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Joint Powers Authorities: Opportunities & Challenges

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JOINT POWERS AUTHORITIES: OPPORTUNITIES AND CHALLENGES

INTRODUCTION

In this age of regionalism, limited resources available to local governments to carry out their missions, and ever increasing unfunded mandates from the state and federal governments, joint powers authorities have become a cost effective means by which local governments can carry out necessary business. A joint powers authority is established when two or more public agencies by agreement jointly exercise any power common to the contracting agencies. Section 6500 *et seq.* of the California Government Code constitutes the enabling legislation for joint powers authorities.¹ In recent years, there has been a proliferation of joint powers authorities covering a wide range of functions, including fire protection, water, library, criminal justice, recreation, transportation, open space, congestion management, animal control, and others.

The member agencies of a joint powers authority may be of like kind, or may be a combination of different types of agencies, including counties, cities, special districts and state agencies. It is not necessary that each member agency have the authority to exercise the common powers in the geographical area in which the authority will jointly exercise such powers. Indeed, a member agency may even be located out of state. (Section 6502).

CREATION OF A JOINT POWERS AUTHORITY

A joint powers authority is established by contract. The contract may or may not create a separate entity, but many do and some of the more significant issues arise in the context of a newly created entity. Thus, this paper focuses on joint powers authorities that constitute separate entities.

Like all of our clients, a joint powers authority is a political animal. However, the politics associated with a joint powers authority can be quite different because such an authority creates a "blended family" in the governmental context – a new entity that brings together a mix of individual agencies with different agendas, goals, concerns and cultures. Thus, in developing the agreement, care must be taken to focus on the requirements and needs of the new entity to ensure its success. To the extent possible, this process calls for setting aside political differences, jealousies and competition, avoiding the tendency of participating agencies to protect their turf and curbing any desire to dictate the outcome. In drafting the joint powers agreement, the overall goal is to ensure that the newly created entity is given the level of authority required to accomplish its purposes and a strong set of operating rules to enhance stability and survivability during times of turmoil which can easily occur when member agencies are at odds.

Joint Powers Agreements

The enabling legislation at Section 6500 *et seq.* specifies certain fundamental elements for a joint powers agreement. These include the following:

¹ Unless otherwise specified, all code section references shall be to the California Government Code.

- Purpose. The agreement must state the purpose of the authority or the power to be exercised, and must provide the method by which this purpose or power will be accomplished. (Section 6503).
- Financial Accountability. The agreement must provide strict accountability of all funds, receipts, and disbursements. To further this end, an annual audit of the accounts and records of the entity must be performed by an independent certified public accountant or a public officer designated as the treasurer/auditor, unless the financial statements are already audited by the State Controller to satisfy federal audit requirements. The cost of performing this audit must be borne by the entity. The annual special audit may be replaced by a two-year audit. These reports shall be filed within 12 months after the end of the fiscal year or years under audit. (Section 6505).

Practice Tip Unless the income to the new joint powers authority is anticipated to be too small to justify the cost of an audit, it is prudent to call for an audit by an external CPA firm.

- Treasurer. The agreement must designate a treasurer for the entity, who may be the treasurer of one of the contracting parties, the county treasurer of a county in which one of the parties is located, or a certified public accountant. (Section 6505.5). Alternatively, the entity may appoint one of its officers or employees as treasurer or to a joint treasurer/auditor position. (Section 6505.6). The treasurer is the depository and has custody of all of the money of the entity. The treasurer is also responsible for receipt and disbursement of said money, payment of all warrants and obligations of the entity, and financial reporting on at least a quarterly basis to the entity and the member agencies.

Practice Tip This requirement is often overlooked or given short shrift. In cases where the entity created is not large enough to justify its own finance department with a chief financial officer who can serve as the treasurer, the member agencies should think through how to fill the role of treasurer and describe it in the Agreement.

- Administration. The agreement shall specify the entity that will administer and carry out the agreement. This may be (1) one or more of the member agencies to the agreement, (2) a commission or board constituted pursuant to the agreement; (3) an unrelated person, firm or corporation designated in the agreement; or (4) a combination thereof. (Section 6506). Most of this paper assumes that option (2) is pursued and discusses issues associated with the creation of a separate entity.

Practice Tip The manner in which the agreement and new entity will be administered is critical to its success. Will it have the resources to employ its own staff or will it need to rely

upon resources of member agencies? If the latter thought should be given to how this will be determined and achieved. Often the job of staffing the entity rotates between or is shared by the staffs of the member agencies.

- **Manner of Exercising Power.** The agreement must designate the manner in which the entity's powers will be exercised. This is accomplished by identifying one of the member agencies by name whose procedures and policies will serve as the basis for restricting and determining how the entity will exercise its powers.

In making this designation, the parties should carefully consider their choices against the backdrop of the entity's objectives. If a joint powers authority consists of a mix of agencies with varying levels of power (i.e., cities or counties with special districts), the choice of a member agency for determining the *manner* of exercising powers cannot serve to enhance the *substance* of the powers to be jointly exercised beyond those that are shared by all member agencies. A safe approach is to select a member agency whose overall powers represent the lowest common denominator but whose procedures and policies are comprehensive and up-to-date (i.e., identify a general law city rather than a charter city or a special district rather than a city). (Section 6509).

Sometimes there will be advantages in relying on the procedural law of a charter city or a non-city entity, in which case the benefits may overcome the risk of relying on unusual or unfamiliar procedures. For example, a charter city might have more flexible purchasing authority. Since joint powers authorities typically don't meet very often, it can be helpful to have a more flexible manner for issuing checks and awarding contracts than can be used if a general law city is designated.

***Practice Tip** It is a good idea to identify an alternate "parent" agency to fill this role of providing the procedures to follow should the agency named in the agreement withdraw. This will eliminate the need to amend the agreement at that time.*

- **Distribution of Assets.** The agreement must provide for the disposition, division or distribution of any acquired property of the JPA upon its termination. (Section 6511). The agreement must provide that any surplus money retained after the completion of the entity's purpose shall be returned to member agencies in proportion to the contributions made. (Section 6512). This can present interesting issues if the initial members of the entity will be paying substantial sums to construct a facility. If this is the case, the agreement should address what happens if an initial member withdraws prior to dissolution of the entity. (See subsequent bullet on "Withdrawal").

- **Contract Participation Goals.** If a joint powers authority includes a state agency or department, the joint powers authority must comply with certain statutory requirements in the area of contract participation goals for business enterprises owned by minorities, women and disabled veterans. (Section 6522).

In addition to the statutory requirements outlined above, joint powers agreements should address the following subjects.

- **Governance of Entity.** The agreement should set forth the governance structure of the joint powers authority by establishing a governing board of directors, designating the number and composition of the board members and alternates, if appropriate, and how they are selected. If the agreement designates a specified period for terms of directors, the agreement should also specify the power or discretion of the appointing agencies to remove directors; otherwise, removal midterm may be a problem. Further, unless the agreement requires the appointee to be a member of the governing board of the member agency making the appointment, loss of the member entity office does not constitute removal from the authority unless the agreement so provides. In cases where voting power may not be equally spread among member agencies, the agreement must spell out voting rights and quorum rules.

Practice Tips

1. *The decisions as to who will sit on the governing board, act as alternates and assist in liaison roles are very significant. The participation of elected officials or very high level management in those positions is likely to lead to more commitment from the member agencies, a broader level of knowledge and comfort with the entity's decisions and, ultimately, more stability for the entity.*
2. *Be careful when crafting unusual rules regarding voting power, quorums and the like, as these can create interpretative puzzles under the Brown Act and other laws of general application to local governments.*

- **Authority and Functions of the Entity.** As specified in the enabling legislation, joint powers authorities can make and enter into contracts, employ agents and employees, acquire, construct, manage, maintain or operate any building works or improvements, hold or dispose of property, incur debts, liabilities or obligations, and sue and be sued. (Section 6508). The authority that the new entity will require to succeed in carrying out its mission should be outlined in the agreement.

Practice Tip Careful analysis and delineation of the entity's authority are critical to ensure that the authority conveyed covers all of the requisite powers to facilitate achievement of

the entity's stated purpose(s) and is intended to be conveyed. Unless necessary to reach agreement among the parties to the joint powers agreement, it is generally better to provide broad and flexible powers in the agreement and to rely on political controls to keep the entity focused on its mission. Narrow powers or the exclusion of important powers can prove very problematic if they drive a need to amend the joint powers agreement in the middle of the implementation of an important program.

- **Liability of Member Agencies.** The agreement should clarify whether the debts, liabilities, and obligations of the agency shall be the debts, liabilities and obligations of the parties to the agreement. (See subsequent discussion of "Debts, Obligations and Liabilities of Joint Powers Authority" and related Practice Tips.)
- **Authority to Issue Revenue Bonds.** This significant authority to issue revenue bonds, if specified in a joint powers agreement, permits the entity to issue revenue bonds even if one or more of the member agencies does not have this power individually. Thus, if the need for this authority is desired or anticipated, the agreement should provide for the entity's authority to issue revenue bonds, incorporating by reference the applicable requirements outlined in the statutory language in Section 6546, *et seq.*, the Mello-Roos Local-Bond Pooling Act of 1985. The agreement should also state that the revenue bonds and contracts or any obligations entered into to carry out the purpose of the bonds shall not constitute a debt, liability or obligation of any of the member agencies who are parties to the agreement creating such entity. (Sections 6546 and 6551). (See subsequent discussion under "Debt Financing Authority.")

Practice Tip If there is no need for the entity to have authority to issue revenue bonds, the automatic inclusion of this power may present an obstacle to obtaining approval of the agreement from all intended member agencies.

- **Other Debt Financing Authority.** If desired or anticipated by the member agencies, the agreement should address other debt financing authority of the entity. A joint powers authority may issue bonds in order to purchase obligations of local agencies or make loans to local agencies, but the agreement must specify how these obligations are repaid. An entity may also issue bonds in order to purchase or acquire, by sale, assignment, pledge, or other transfer, any or all right, title, and interest of any local agency in and to the enforcement and collection of delinquent and uncollected property taxes, assessments and other receivables placed for collection on property tax rolls. (Section 6516.6(a), (b)).

- Investment of Money. The agreement should acknowledge the entity's entitlement to invest any money in the treasury that is not required for the immediate necessities of the entity. (Section 6509.5).
- Privileges and Immunities. The agreement should provide, as contained in the enabling legislation, that all privileges and immunities from liability, exemptions from laws, ordinances and rules, and benefits that apply to officers, agents or employees of a public agency shall apply to the same extent when performing duties for the entity. (Section 6513).
- Withdrawal of a Member Agency. Multi-member joint powers authorities must map out what happens when a member agency withdraws from the authority. These provisions should guard against (a) encouraging withdrawal by making it easy and painless and (b) jeopardizing the survivability of the entity upon withdrawal of an agency. These objectives are best accomplished by eliminating – to the extent fairness and politics allow – any financial return or reimbursement to withdrawing agencies. On the other hand, if the “marriage” is too permanent, it may not be possible to induce the parties to agree in the first instance. One approach is to make withdrawal nominally easy, but to require the withdrawing party to make acceptable arrangements to address its share of any outstanding obligations at the time of withdrawal. It may also facilitate approval of the joint powers agreement by the intended member agencies if the agreement provides that each member agency will be given notice prior to the entity incurring an obligation over a specified amount and the ability to withdraw before the obligation is incurred.

Practice Tip This section must be drafted with great care, especially in cases where a member agency contributes an asset of significant value, such as when facilities are to be built on property owned by one of the member agencies.

- Approval/Amendment of Agreement. As is true of all contracts, the parties must approve and execute the joint powers agreement and each copy of the agreement needs to be identical. (Section 6502, 6503). Obtaining approval of identical versions of the agreement can sometimes be difficult to accomplish since each member agency and its legal counsel may have its own ideas concerning the contents of the agreement. It is sometimes a good idea to have each legal counsel and legislative body approve the draft agreement in concept before obtaining final approval. It is very frustrating to resubmit what was intended to be a final version of the agreement to a legislative body because one of the member agencies insisted on a change, no matter how insignificant.

Logically, it would seem that if the principal contract requires approval by all member agencies (and, likely, action by the legislative body of each), then amendments to the agreement require such approval as well. The statute provides no basis to delegate the power to amend a joint powers agreement to

less than all of the parties to the agreement or to representatives of the parties other than their legislative bodies. Moreover, the legal limitations on the power of legislative bodies to delegate would also appear to require this.

Yet this requirement may be very nearly impracticable when a joint powers agreement has numerous parties. Many such agreements purport to authorize amendment by some super-majority, but less than all, of the member agencies. Others purport to authorize the governing board of the joint powers authority to do so. One creative solution to this tension between the unanimous action of legislative bodies that the statute and the common law of contracts seem to require and the need to facilitate amendments is reflected in language that provides that an amendment takes effect when approved by 2/3 of the legislative bodies of the member agencies and any member agency which fails to approve an amendment within thirty days of that time is deemed to have withdrawn. While this seems an elegant solution, as discussed above, there are very real problems associated with forced withdrawal, as well.

This may be a problem best solved by legislation. The Department may determine to seek an amendment to the statute to allow very large joint powers authorities, perhaps restricted to those with more than a specified number of members, to include language authorizing amendments of the agreement by something less than unanimous action of the legislative bodies of the member agencies.

Practice Tips

- 1. The cumbersome amendment process underscores the value of developing a comprehensive, carefully crafted joint powers agreement at the outset.*
- 2. It is also necessary to send a notice of any amendment of a joint powers agreement to the Secretary of State within 30 days of the effective date of the amendment. This notice is extremely important if the joint powers authority intends to issue bonds. Failing to file the amendment within the 30-day period is not fatal, however, as the bonds can be issued once the amendment is filed. (Section 6503.5).*

Initial Formation Requirements/Considerations

- Notice to Secretary of State. Most often the contracting parties to a joint powers authority intend to create a new government entity separate from any of its member agencies. If the joint powers agreement creates such a separate entity to administer the agreement, the new entity must file a notice containing the name of each public agency that is a party to the agreement, the effective date of the agreement, a statement of the agreement's purpose or the power to be exercised, and a description of the amendment or amendments made to the

agreement, if any, with the Secretary of State within 30 days after the effective date of the agreement or any amendment thereof. *If a JPA fails to file the required notice that agency may not issue any bonds or incur debt. (Section 6503.5).* As noted above in the practice tips following the discussion on amendments, a similar notice must be filed each time the joint powers agreement is amended.

- **Public Agency Roster.** Although the notices described above are filed with the Secretary of State, they are not to be confused with the Secretary of State's Roster of Public Agency Filing even though much the same information is sought in each case. If the joint powers agreement creates a separate entity, it is prudent also to file for the Roster of Public Agencies to ensure the full benefits of the shorter statute of limitations for the filing of claims under the Government Tort Claims Act. (Section 53051).
- **No Incompatibility of Office Concerns.** If the new governing board of the entity is comprised of members of the legislative boards of the member agencies, such appointments do not present issues of incompatibility of office. The California Attorney General issued an opinion in 1995 that there was no issue of incompatible offices when members of a city council served simultaneously as members of a joint powers authority in which the city participated to operate an airport. (78 Ops.Cal.Atty.Gen. 60 (March 7, 1995)). This opinion contains a good discussion of the concept of incompatible offices and the rationale for determining that the common law rule of incompatible offices is inapplicable to joint powers agencies.
- **Bylaws/Rules.** The board's formulation of bylaws or rules is extremely efficacious at the outset as the new entity struggles for identity and stability. These rules should set forth procedures and expectations governing meetings, board officers, committees and similar subjects.
- **Conflict of Interest Code.** The new entity should approve a conflict of interest code at the earliest possible time and file it with the county if all member agencies are located in the same county, or with the Fair Political Practices Commission if one or more member agencies cross county lines. Effective January 1, 2003, the Political Reform Act now requires that board members of a new entity file disclosure statements even in advance of the entity's adoption of a conflict of interest code. (Section 87302.6; 2 Cal.Code of Regs. §18754).

CRITICAL ISSUES IN RELATIONSHIP BETWEEN JOINT POWERS AUTHORITY AND ITS MEMBER AGENCIES

Debt Financing Authority

The enabling legislation confers the power of, and details the requirements for, a joint powers authority to issue revenue bonds exercising the authority described in Article 2 (Section 6540 *et seq.*). The allowable purposes for the issuance of revenue bonds include paying the cost and

expenses of acquiring or constructing a project, or conducting a program for such purposes as: an exhibition, a coliseum, stadium, or sports pavilion, a public building, a regional or local public park, an electrical energy facility, a hazardous waste or toxic substances treatment or disposal facility, local streets, roads, and bridges, facilities for the production, storage, or treatment of water or waste water, mass transit facilities, public works facilities, public health facilities, criminal justice facilities, public libraries, etc. (Section 6546). Thus, if the JPA or its members have the power to acquire, construct, maintain, or operate one or more of the specified projects, revenue bonds may be issued. These bonds may be issued to provide all or part of the needed funding for the acquisition, construction and financing of the project, including incidental expenses such as legal fees and bond interest. However, the bond proceeds may only be used for the project that supported the bond issuance. (Section 6548).

The ability of a joint powers authority to employ debt financing is a significant and attractive tool for three reasons. First, the power of a joint powers authority to issue revenue bonds is *additional to the powers common to the parties to the joint powers agreement*. (Section 6547). A joint powers authority may issue revenue bonds even if one or more of its member agencies does not possess that power individually. As the California Supreme Court articulated in *Rider v. City of San Diego*, (1998)18 Cal. 4th 1035, 1051, this power "does not derive from any power of the contracting parties to issue bonds," but rather from state law.

Second, the *Rider* Court further reasoned that a joint powers authority is "not subject to any of the restrictions that would apply to the contracting parties" when issuing bonds pursuant to the legislation. Thus, in a challenge to the issuance of bonds to construct improvements to a convention center owned by the joint powers authority and operated by a member city, the *Rider* Court held that voter approval requirements "that would apply if the city issued the bonds do not, by their terms, apply to the debts of a joint powers agency." The Court reasoned that because the power to issue bonds is an additional power conferred by legislation, the joint powers authority was not subject to the state constitutional provision requiring cities to obtain a two-thirds vote before incurring indebtedness in excess of annual income and revenue.

Third, the enabling legislation expressly provides that the revenue bonds issued by the entity, as well as contracts or obligations entered into to carry out the purposes for which the bonds are issued, does not constitute a debt, liability or obligation of any of the member agencies to the joint powers agreement. (Section 6551). Thus, the member agencies to a joint powers authority have statutory protection from liability of the entity arising out of a revenue bond issuance.

Prior to a bond issuance, however, each member agency to the joint powers authority which contracts to make payments to be applied to the payment of the bonds or instruments of indebtedness must enact an authorization ordinance, pursuant to Section 6547. This ordinance must describe "in general terms the project, or projects, to be funded by the revenue bonds, the maximum amount of the bonds proposed to be issued, and the anticipated sources of revenue to redeem the bonds." A separate authorization is required for each proposed bond issue. Specific rules attach to different types of projects. If a member agency does not have the statutory power to enact an ordinance (as is true of school districts and some other special districts), Section 6547.2 empowers the governing body of the agency to enact the ordinance by a majority vote of its members. Notice of enactment of the ordinance must be published within 15 days of adoption to facilitate a referendum process.

Debts, Obligations and Liabilities of Joint Powers Authorities

In contrast to the manner in which the enabling legislation expressly insulates member agencies from obligations of a joint powers authority related to the issuance of revenue bonds, the legislation specifies that member agencies are jointly and individually liable for all other obligations and liabilities unless the joint powers agreement provides differently. Section 6508.1 states:

[T]he debts, liabilities, and obligations of the agency shall be debts, liabilities, and obligations of the parties to the agreement, *unless the agreement specifies otherwise*. A party to the agreement may separately contract for, or assume responsibility for, specific debts, liabilities, or obligations of the agency. (Emphasis added).

Section 6508.1, enacted in 1968, arguably conflicts with Sections 895.2 and 895.4 in the Government Tort Claims Act, which sections were enacted in 1963. The relevant portions of Section 895.2 states that:

Whenever any public entities enter into an agreement, they are *jointly and severally liable* upon any liability which is imposed by any law other than this chapter upon any one of the entities or upon any entity created by the agreement for *injury caused by a negligent or wrongful act or omission occurring in the performance of such agreement*. (Emphasis added).

The Law Revision Commission Comments observe that this section makes member agencies to a joint powers authority jointly and severally liable to the injured party for any torts that may occur in the performance of the agreement for which any one of the entities, or an entity created by the agreement, is otherwise made liable by law. (4 Cal.L.Rev.Committee.Reports 801 (1963)).

Section 895.4 then clarifies that as part of a joint powers agreement, member agencies "may provide for contribution or indemnification by any or all of the public entities that are parties to the agreement upon any liability arising out of the performance of the agreement." The Law Revision Commission Comments point out that Section 895.4 allows public entities in a joint powers authority to allocate financial responsibility among themselves "in whatever manner seems most desirable to them." (4 Cal.L.Rev.Comm. Reports 801 (1963)). They further state that Section 895.4 "does not affect the right of the injured person to recover the full amount of his damages from any one of the public entities under Section 895.2." (Emphasis added). (*Id.*)

When Section 895 *et seq.* was enacted, it seems clear that the Legislature intended for member agencies to be liable for torts of a joint powers authority. According to accepted principles of statutory construction, a later statute should "trump" an earlier one on the same subject. This would lead to the conclusion that, despite Section 895 *et seq.*, member agencies can shield themselves from tort liability by the language of a joint powers agreement so specifying because Section 6508.1 was enacted subsequent to Section 895 *et seq.* However, recent case law offers the first glimpse of how the courts may address this statutory inconsistency, drawing the

distinction that clear language in a joint powers agreement can protect member agencies from contractual liability, but not from tort liability.

In *Tucker Land Co. v. State of California*, (2001)114 Cal. App. 4th 1191, review denied March 13, 2002, the Second District Court of Appeal affirmed that the constituents of Mountains Recreation and Conservation Authority ("MRCA"), a Los Angeles-area open space joint powers agency, were not jointly and individually liable for the contractual obligations of that joint powers authority pursuant to the language and intent of the joint powers agreement.

Tucker Land Co. ("Tucker") entered into a contract in 1992 to sell to the MRCA land that was then the subject of pending litigation. Tucker tendered the note and deed of trust to MRCA after prevailing in the litigation over the parcel of land. However, the MRCA in the interim had purchased the property from the bankruptcy trustee for a much lower price and subsequently filed a rescission action against Tucker claiming failure to resolve the litigation in a timely manner. Tucker cross-complained for anticipatory breach and the court held in favor of Tucker, which was affirmed on appeal. Since MRCA refused to pay, Tucker sought a writ of mandate ordering payment of the judgment. In addition to the writ of mandate, Tucker also filed an action seeking a declaration that the constituent members of the MRCA are jointly and individually liable for the obligations of the MRCA. Tucker did not prevail in the lower court proceedings. In appeal, Tucker contended that the Legislature intended that governmental entities forming a JPA be separately liable for the obligations of the JPA, or alternately liable under the "alter ego" theory. (*Id.* at 1196). The court affirmed the lower court's decision in favor of the member agencies.

Section 15 of the MRCA Agreement stated that "no debt, liability, contract, obligation, employee, or agent of the Authority or the Governing Board shall be or constitute thereby a debt, liability, contract, obligation, employee, or agent of the parties or any of them" and "[n]o action or omission of the parties or any of them shall be attributable to the Conservancy or the Districts, i.e., the member agencies, except as expressly provided in Section 13 of this Agreement [relating to tort liability]." (*Id.* at 1194). Thus, the agreement expressly protected constituent members from liability that may otherwise flow from MRCA's liability pursuant to Section 5608.1.

Tucker argued legislative intent to hold member agencies responsible for the liability of a joint powers authority based upon Sections 895 and 895.2 in the Government Tort Claims Act, and Section 970.8, which requires local public entities to have sufficient funds with which to pay judgments. The court reasoned that Sections 895.2 and 895.4 make clear that the Legislature intended that member entities of a joint powers authority be liable for the torts of the authority, but was not convinced that these sections necessarily reflect legislative intent that member entities are also liable for contractual obligations of the joint powers authority. As the court noted, the "primary issue presented in this appeal is whether the constituent members of a Joint Powers Agency . . . are liable for the contractual obligations of the JPA, where the joint powers agreement specifies that they are not and does not provide for liability other than that of the JPA." (*Id.* at 1193). The court based its holding on a plain meaning interpretation of Section 6805.1, reasoning that because "the agreement specified otherwise," the member agencies were not liable for the contractual obligations of the joint powers authority.

The *Tucker* case is the only judicial statement thus far as to the liability relationship between joint powers authorities and their member agencies. This decision offers comfort that member agencies can protect against the contractual debts, liabilities and obligations of a joint powers authority through clear language in the agreement to that effect. The question remains whether the same holds true for tort related liabilities and obligations.

Practice Tips

1. *Include broad language in the joint powers agreement to Section 6508.1 to cover insulation of member agencies from the debts, liabilities and obligations whether they sound in tort, contract or otherwise.*
2. *Consider the inclusion of an indemnification running from the joint powers authority to the member agencies, but draft the provision carefully and narrowly to ensure that the joint powers authority's obligation is limited to claims and suits arising from its performance of activities and its exercise of powers only. The indemnity obligation should not extend to cover the actions of member agencies.*
3. *Consider naming the member agencies as additional insureds for the commercial general and automobile liability policies of the joint powers authority.*

Delegation of Land Use Authority

When drafting a joint powers agreement, particular care must be taken regarding the language delegating land use authority to the joint powers authority. If member agencies wish, they may delegate such authority to the joint powers authority, but in doing so, they must understand that they have ceded control to the newly created separate entity. This delegation extends to "any power common to the member agencies"² including the power of eminent domain. *Burbank, Glendale, Pasadena Airport Authority v. Robert R. Hensler*, (2000) 83 Cal.App.4th 556, 99 Cal.Rptr.2d 729.

In *Hensler*, the City Councils of Burbank, Glendale and Pasadena formed an airport authority to acquire and operate the Burbank Airport (Airport Authority). Mr. Hensler owned a construction company located adjacent to the airport's western boundary. The airport authority began condemnation proceedings and Mr. Hensler objected, arguing that the airport authority had no power to exercise eminent domain. The Court of Appeals ruled that a joint powers authority may, given the correct language in the joint powers agreement, exercise eminent domain authority delegated to it by the member agencies.

² Section 6502

Section 37350.5 grants broad eminent domain power to a city to acquire by eminent domain any property necessary to carry out its powers or functions.³ Section 6502 authorizes cities, acting together, to exercise eminent domain powers jointly. It provides “if authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties.” It is not necessary that any power common to the contracting parties be exercised by each contracting party with respect to the geographical area in which such power is to be jointly exercised. Because Section 6500 defines cities as public agencies and Section 6508 authorizes separate public entities to acquire property and to sue and be sued in their own names, the court reasoned that cities could create a joint powers agency and delegate eminent domain authority to it, provided the appropriate delegation language is included in the joint powers agreement.

In *Hensler*, the joint powers agreement indicated that the individual member cities were entering into the Airport Authority joint powers agreement for the purpose of “acquiring, operating, repairing, maintaining, improving, and administering the Burbank Airport.” The joint powers agreement recited that it was made pursuant to the provisions of Article I, Chapter 5, Division 7, Title 1 of the Government Code (Government Code Section 6500 et seq.) and declared that the parties had created a public entity, the airport authority, that was separate and apart from the parties. The agreement further stated that “each of the [p]arties has the powers necessary to accomplish the purposes of this Agreement. The foregoing purposes shall be accomplished and the common powers exercised in the manner hereinafter set forth.”

The Powers and Duties section of the Airport Authority joint powers agreement provided: “[T]he Authority is authorized to do all acts necessary or convenient to the exercise of the aforementioned powers, including, but not limited to, the following ... to acquire real or personal property including, without limitation, by purchase, lease, gift, bequest, devise, or the exercise of the power of eminent domain pursuant to California Government Code Sections 6502, 37350.5 and 50470 (other than by the purchase of fee title to condemned real property zoned for residential uses ...)” (Emphasis added.)

The Airport Authority joint powers agreement further stated, “It is intended that the Authority will proceed to do all acts necessary or desirable to accomplish the purposes of this Agreement. Such acts may, but need not necessarily include, all or part of the following ... (g) Conducting any necessary or desirable studies to determine whether any development, repair, improvement, renovation or reconfiguration of the Airport Facility should be undertaken and causing any such development, repair, improvement, renovation or reconfiguration and any acquisition of property by purchase, lease, gift, bequest, devise or exercise of the power of eminent domain pursuant to California Government Code Section 6502, 37350.5 and 50470...” (Emphasis added.)

³ Because *Hensler* involved acquisition for an airport, the court analyzed Government Code Section 50470 which specifically grants a city the power to acquire property by condemnation for use as an airport and Code of Civil Procedure Section 1240.125 which specifically authorizes a local public entity to “acquire property by eminent domain outside its territorial limits for ... airports ... if it is authorized to acquire property by eminent domain for the purposes for which the property is to be acquired.” (83 Cal.App.4th at 562)

Practice Tip It is important in drafting the joint powers authority agreement to think carefully about the extent of authority each of the members intends to delegate. The joint powers authority may not, in all instances, exercise its land use powers in a manner that pleases each member agency. Because land use decisions can be controversial, it is important that the member agencies be advised, at the time of adopting the joint powers agreement, that these provisions may affect local zoning regulations and limit options of member agencies to complain if the land use decisions of the joint powers authority are objectionable to individual member agencies.

ADVISING THE JOINT POWERS AUTHORITY

Once created, the joint powers authority is a separate legal entity. Counsel for the joint powers authority will be required to advise its board and staff on all legal issues which arise during the authority's life. This position presents unique challenges for counsel because of the potential for miscommunication and conflicts between the member agencies, between each member agency and its representative to the board and between counsel for the joint powers authority and counsel for the member agencies.

Two of the most challenging issues faced by attorneys for the joint powers authority are those presented by the Brown Act, Section 54950, et seq., and potential conflicts of interest. Especially problematic are potential Section 1090 violations. Effective communication on these issues, both with the member agencies' representatives and the member agencies' legal counsels, is important to avoid situations in which someone is left out of the information loop, inadequately prepared to act on issues before the agency or receives conflicting legal advice from the joint powers authority's counsel and member agency's counsel.

Practice Tip In addition to the questions and concerns regarding miscommunication and conflicts between member agencies, their representative to the joint powers authority board and member agencies' counsel, the joint powers authority's attorney must take care to avoid creating his/her own problematic issues regarding Section 1090 and incompatible offices. To avoid the problem of an incompatible office, it is important to include in the joint powers agreement, authorization for counsel to one or more of the member agencies to serve as counsel to the joint powers authority. This will not, of course, obviate the need to comply with joint representation conflicts provisions of the Rules of Professional Conduct, or the conflict of interest statutes. (See discussion of Section 1090 Considerations.)

Brown Act Considerations

As a separate legal entity, the joint powers authority will be required to comply with the Brown Act, Section 54950, et seq. As such, it is required to conduct its business in public unless a situation arises which would justify meeting in closed session. If closed sessions are contemplated, great care should be taken to ensure that the matter to be discussed qualifies for closed session.

During the life of a joint powers authority, there may be times when individual member agencies will be at odds with one another. While the joint powers agreement must contain provisions for dispute resolution, withdrawal of individual members and/or termination of the joint powers authority, the joint powers authority's attorney may be called on to advise when and how the board can discuss these options, who can be present for those discussions and whether they may occur in closed session.

If the dispute between member agencies poses a threat of litigation, a closed session may be called. When this occurs, there may be a need to exclude representatives from the member agency involved in the dispute with the joint powers authority. While there is no specific reported case on point which allows for exclusion of a member representative of the joint powers authority board, there is authority to exclude a council member from a closed session when that council member has taken a position which is adverse to her city and to deny access to closed session notes by a council member who is excluded from the closed session due to a financial conflict of interest. These cases may be relied upon as authority to exclude a joint powers authority representative from a closed session, *DeGrassi v. City of Glendora*, (1999) 207 F.3d 636 and to deny excluded members access to closed session material and records. *Hamilton v. Los Gatos*, (1989) 213 Cal.App.3d 1050.

In *DeGrassi*, a member of the Glendora City Council sought indemnity for attorneys' fees and damages from city officials and private parties for alleged civil rights violations. The 9th Circuit Court of Appeals held that exclusion from a closed session called to discuss her request for a defense was appropriate although it did infringe upon Ms. DeGrassi's First Amendment speech rights. In authorizing exclusion of an elected representative, the court balanced the need for a public entity to engage in frank and open communication with its legal counsel versus a public official's right to free speech pursuant to the First Amendment. The court held that Ms. DeGrassi was properly excluded from the closed session because of her status as a potential litigant, not because of her viewpoint. In so holding, the court cited to *Pickering v. Board of Education*, (1968) 391 U.S. 563, 570, 88 Sup. Ct. 1731, 20 L.Ed.2d 811, finding a sufficiently great interest in confidentiality overrides a public employee's First Amendment Rights. The court determined that the exclusion of a public official from a closed session presented only a "minor intrusion" on the right to speak because the public official still retains a right to speak out in public or directly with other members of the council.

DeGrassi also asserted that as a public official, she possessed First Amendment rights that were independent of those as a citizen. The court acknowledged that restrictions on a council member's attendance at meetings or limitations on the opportunity to address matters of public concern might infringe upon a public official's First Amendment right to "uninhibited, robust and wide open debate on public issues" but *DeGrassi's* issues were "essentially self interested

with no public import," and therefore not a matter of public concern. See *Roe v. City and County of San Francisco* (9th Cir. 1997) 109 F.3d 578, 584-85, and *Connick v. Meyer* (1983) 461 U.S. 138, 103 Sup. Ct. 1684, 75 L.Ed.2d 708. Because DeGrassi's speech did not relate to issues of policy or to any matter of political, social or other concern to the community, exclusion from the closed session was appropriate.

While *DeGrassi* involved First Amendment questions, the issue of access per the Brown Act was discussed in *Hamilton*. Robert Hamilton excused himself from a closed session at which the Town Council discussed pending and anticipated litigation regarding a downtown parking assessment district. Councilmember Hamilton owned property within the district and so recused himself from the closed session. After the closed session, he requested copies of the closed session tape. The Town refused and he filed a writ. The trial court held that Hamilton had, due to his conflict and recusal, no greater right to closed session material than any member of the public. The Court of Appeal agreed. In denying access to the material, the court reasoned:

"To permit a financially interested council member to be privy, unnecessarily, to confidential information which might affect his business interests gives the appearance of impropriety. In our society, information is power. The council member might use the confidential information to his advantage personally, or he might disclose the information improperly to others interested in the decision. Furthermore, the disqualified member's mere presence, or knowledge thereafter, might also subtly influence the decisions of other council members who must maintain an ongoing relationship with him." (213 Cal.App.3d. at 1058.)

Practice Tip While these cases involve a city council member excluded from a closed session and denied access to related materials, they stand for the proposition that a member of a governing board who has taken a legal position which is adverse to the authority on behalf of his/her member agency, may be excluded from a closed session and denied access to material when discussion of the dispute with the member agency is undertaken. Exclusion of representatives from these member agencies is essential to allow for an open and frank discussion of the issues and potential exposure of the joint powers authority to litigation.

Joint Powers Authority Board Members Fiduciary Duty to the Authority

During the life of a joint powers authority, its board will be called on to discuss and adopt programs that may not be advantageous to all member agencies, but which are necessary for the operation of the joint powers authority. The joint powers authority's attorney may be called on to remind the member agency representatives, especially during these times, that they have a fiduciary duty to the joint powers authority. In this circumstance, if a representative heeds this

advice and votes his/her conscience, will that vote be valid and binding when it does not comport with the direction given to the representative by his/her member agency? The answer is "yes."

Board members of a joint powers authority may cast votes which are inconsistent with positions taken by the agencies they represent on the joint powers authority board. This precise situation arose and was addressed by the California Attorney General in Opinion No. 00-708, issued December 8, 2002. In that instance, the County of Ventura and the cities of Ojai, Oxnard, Port Hueneme and San Buenaventura formed a joint powers authority known as the South Coast Area Transit (SCAT). One of the city representatives on the SCAT board voted to approve expenditure of funds despite the fact that this expenditure was inconsistent with the position taken by that member's city council. In concluding that the vote was valid, the Attorney General indicated that Section 6500-6599 authorizes establishment of a joint powers agreement to create a separate entity responsible for the administration of the joint powers agreement. The joint powers authority board sits as a separate and distinct public agency governing body. While the SCAT board member's own city council had taken a different position on the proposed expenditure, that decision did not, in any way, limit the ability/discretion of the joint powers authority board member to cast his vote because the Joint Exercise of Powers Act does not contain provisions which require appointed members to vote as directed by their city councils. In reaching this conclusion, the Attorney General cited *Harbach v. El Pueblo de Los Angeles, etc. Com.* (1971) 14 Cal.App.3d 828, 834 in which the court held that a joint powers agency board member was entitled to exercise discretion in voting in a manner similar to that of his or her city council.

The opinion noted that generally, a director of a joint powers authority will vote in accordance with the position taken by his or her appointing agency, but in the instance where a board member fails to do so, it is left up to the appointing power to "ensure compliance with its wishes." While a contrary vote may result in removal of the joint powers authority board member by the original appointing authority, it will not affect the validity of the vote itself.

Practice Tip This Attorney General opinion has implications which should be considered in drafting the joint powers agreement. In the SCAT agreement, appointments to the joint powers authority board of directors were "at the pleasure" of the member's city council. The member agencies' city councils were therefore left with complete control over timing of the appointment and removal of each of their representatives to the joint powers authority board of directors. While this type of appointment/removal provision is common in joint powers agreements, a provision that allows for removal at only specific times or for specific reasons may provide more stability for the authority board and ability of individual board members to appropriately exercise their fiduciary duties when voting on joint powers authority programs.

Section 1090 Considerations

Some of the most intellectually challenging issues faced by joint powers authority attorneys arise when conflict of interest concerns are expressed. Caution must be exercised to adequately assess all potential statutory and common law conflicts when these questions are posed to counsel. While this paper does not contain an exhaustive discussion of conflict of interest issues, a general discussion of Section 1090 is included because a joint powers authority presents fertile ground for these conflicts for board members and counsel.

Section 1090 is the common law conflict of interest standard which prohibits self dealing by public officials. Section 1090 prohibits public officials or employees from having financial interests in contracts made by them or any governing board on which they sit. See *Berca v. Woodland* (1899) 125 Cal.App. 19, 57 P. 777. Section 1090 covers board members, officers, employees and consultants of a public entity and applies to conduct of a public official in the making of a contract, including preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids. *Millbrae Association for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 69 Cal.Rptr. 251.

Section 1090 applies to a joint powers authority in two situations. First, if a joint powers authority board member is financially interested in a proposed contract, the joint powers authority may not enter into the contract regardless of whether or not the member representative participates in or abstains from the actual decision. *Thompson v. Call* (1985) 38 Cal.3d 666, 649, 214 Cal.Rptr. 139, cert. denied (1986) 474 U.S. 1057, 106 S.Ct. 796. Second, if a joint powers authority employee has a financial interest in a proposed contract with the joint powers authority, the authority may not enter into the contract if that employee's responsibilities are germane to the formation of the contract. *Frasier-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 137 Cal.Rptr. 82. Cal. Opinions of the Attorney General 126, 129 (1999). If the joint powers authority enters into a contract in which a member representative or employee with relevant responsibilities has a financial interest, the contract is void. Per Section 1092, the joint powers authority employee and board representative may be prosecuted both civilly and criminally for violation of Section 1090.

Section 1090 applies whether the financial interest of the member representative or employee is direct or indirect. *People v. Deysher* (1934) 2 Cal.2d 141, 146, 40 P.2d 259. But remote interests in a contract do not create a conflict if the member representative or employee discloses his or her financial interests, abstains from influencing or attempting to influence members of the authority body in the making of the contract and the authority board authorizes the contract in good faith by a sufficient vote gathered without counting the vote of the party with the remote interest. Section 1091. Further, the act provides that there are certain non-interests as enumerated in Government Code Section 1091.1.

When Section 1090 has been violated, serious penalties may be imposed. The maximum fine for a willful violation is a felony conviction and a fine of \$1,000 or imprisonment in state prison. Additionally, the official is forever disqualified from holding any office in the state. See Section 1097. A violation of Section 1090 is subject to a three-year statute of limitations, which is tolled until the violation is discovered. California Penal Code Section 801, 803(c).

The analysis required by counsel when a potential Section 1090 issue arises is critical and often brought to the attorney's attention at the last minute. When representing a joint powers authority, Section 1090 questions present complicated fact patterns to be puzzled through, since the joint powers authority board members and employees may also sit on the legislative body or be employed by one of the member entities. The California Attorney General has issued two opinions in the last three years regarding potential Section 1090 violations by members of governing boards of joint powers authorities. These opinions are instructive for authority counsel in providing Section 1090 advice.

In an opinion issued on March 3, 2002, the Attorney General opined that a city council could lawfully enter into a development agreement with a joint powers authority where one of the city's planning commissioners advised the city council with respect to the terms of the development agreement and that commissioner's spouse served as the city's representative on the joint powers authority. (85 Ops.Cal.Atty.Gen. 34 (March 6, 2002)).

The city council in that instance intended to enter into a development agreement with a joint powers authority pursuant to Section 65864-65869.5 to expand its airport. The Attorney General opined that the city council could execute the agreement under these circumstances without concern for Section 1090 even though development agreements would fall within the terms of Section 1090 and the planning commissioner's advice would fall within the definition of "making of the contract." No Section 1090 problem existed because there was no "requisite financial interest" on the part of the city's planning commissioner who received no compensation for serving on the planning commission. The Attorney General additionally noted that the commissioner's spouse was compensated as the city's representative on the governing board of the joint powers authority, but there was "simply no financial interest" in the underlying development agreement by either spouse. The only compensation received by the spouse was for representing the city's interests on the joint powers board. Because both spouses had been appointed by the city to "further the best interests of the city," there was no "private gain" to be realized by either that would cause the planning commissioner to have "divided loyalties" in rendering advice to the city council.

● On May 3, 2002, the California Attorney General issued a second opinion regarding joint powers authorities and 1090 issues (85 Ops.Cal.Atty.Gen. 87 (May 3, 2002)). The cities of Burbank, Glendale and La Canada-Flintridge entered into a joint powers agreement creating the Verdugo Workforce Investment Board (hereinafter WIB). The purpose of the WIB was to administer a federal program providing job training services in the member cities. The joint powers agreement provided that Glendale's employees would manage the service provided by the WIB. The city manager for Glendale was authorized to execute all WIB contracts with private vendors. A newly elected member of the Glendale city council had, prior to his election, contracted with and provided services to the WIB. The question asked of the Attorney General was whether or not the WIB could continue to contract with this newly elected city council member, given his official relationship with the Burbank City Manager. The Attorney General concluded that it could. In so finding, the Attorney General opined that the purpose of 1090 was to "remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct." In this instance, the new contract would not be "made" by the city council member in his official capacity but rather only in his private capacity because the city

council did not review, consider, approve, administer or monitor the performance of any WIB contract. The city council would not be involved in attempting to influence the WIB in any way concerning the development, negotiation, execution or performance of the contract. In light of this, the Attorney General found that the proposed contract would not be "made" by the city council for the purposes of Government Code Section 1090. The result, of course, would not be the same if this councilmember were selected by the Burbank City Council to represent that city on the WIB.

The Attorney General rejected the argument that the joint powers authority contracts were made by the city council because the Glendale city manager executed them. The joint powers agreement gave the city manager the power and ability to execute the WIB's contracts. The WIB Board approved those contracts and therefore the city manager's execution of the contracts was a ministerial act on behalf of the WIB, not the city council. The Attorney General found support for this determination in reviewing two prior opinions. In 57 Ops.Cal.Atty.Gen. 458 (September 17, 1974), the Attorney General had earlier concluded that a county purchasing agent with independent authority to enter into contracts could execute a contract with a county supervisor for goods or services without violating 1090 since the board of supervisors would not be participating in the making of the contract. In 21 Ops.Cal.Atty.Gen. 90 (March 4, 1953), the Attorney General concluded that a city treasurer could deposit funds in a bank in which the city council member was a stockholder and director. The Attorney General indicated that the significant fact in each of these situations was the independent status of the party contracting on behalf of the governmental agency.

As these opinions demonstrate, a careful review of the specific facts presented to the joint powers authority attorney is absolutely essential when Section 1090 issues arise.

As indicated earlier, potential problems regarding Section 1090 are not limited to joint powers authority board members. Caution should also be exercised in this area by joint powers authority employees, including counsel.

In September 2002, the Fifth District Court of Appeal issued the opinion in *People v. Gnass* (2002) 101 Cal.App.4th 1271 regarding a Section 1090 violation by an attorney for a joint powers authority. This case should be reviewed carefully by attorneys representing joint powers authorities, especially if counsel also represents one of the member agencies.

Gnass involved a grand jury indictment of a city attorney for alleged violations of Section 1090 arising from his participation as counsel for a joint powers authority. Gnass was a contract city attorney. In 1990, his city entered into a joint powers agreement with its own redevelopment agency to create a Public Financing Authority with power to issue bonds to fund capital improvement projects within the city. Several years later, the city was approached with an offer to participate in the formation of a new joint powers authority to issue Mello-Roos pooled bonds under the Government Code provisions cited above. The city's Public Financing Authority eventually participated in six new joint powers authorities formed to issue Mello-Roos pooled bonds. City Attorney Gnass served as counsel for the city's Public Financing Authority and as disclosure counsel for each of the Mello-Roos joint powers authorities. These were so-called "roving" Mello-Roos bond pools which funded programs unrelated to the agencies which had formed the JPA and, in some cases involved questionable real estate ventures hundreds of miles

from the member agencies. The member agencies formed the joint powers authorities solely for the administrative fees paid to them in conjunction with the issuance of debt. In his role as Mello-Roos disclosure counsel, Gnass received \$185,000 and his law firm received an additional \$58,750. The city's Public Financing Authority received between \$500-800,000 for its participation in the Mello-Roos joint powers authorities.

A ten-count indictment was issued alleging that Gnass violated Section 1090 because he had a financial interest in a contract made in his official capacity. The district attorney argued that Gnass used his position as city attorney to convince the city's Public Financing Authority to enter into the agreements for the Mello-Roos joint powers authorities, and then to hire him to act as disclosure counsel on the bond issues.

While the appellate court ultimately upheld the dismissal of the indictments because improper instructions were given, the case contains a detailed discussion of the analysis to be employed when determining whether or not a public official has violated Section 1090. This analysis is instructive for counsel who may be called on to advise joint powers authority board members or staff whether a Section 1090 problem exists.

The first question asked by the court was whether or not the city attorney was acting in his official capacity when he advised the city's Public Financing Authority with regard to the Mello-Roos joint powers agreements. The court concluded that he was acting in his official capacity when rendering this advice.

The second question asked by the court was whether or not Gnass had "made" the joint powers agreements. The court noted that preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation of bids are all part of the making of a contract for purposes of Section 1090. Having made this determination, the court concluded that Gnass was in a position to exert "considerable influence" over the decisions of the city's Public Financing Authority to join the Mello-Roos joint powers authorities and that he probably did exert his influence. The court further concluded that this would have been consistent with his role as the city's Public Financing Authority attorney and did not in and of itself necessarily "import an improper motive on his part."

The third question asked by the court was whether or not Gnass was financially interested in the joint powers agreements. In analyzing the evidence in this regard, the court noted that the certainty of a financial gain is not necessary to create a conflict of interest. The purpose of Section 1090 is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on the official's decision. Forbidden interests extend to "expectations of benefit by express or implied agreement and may be inferred from the circumstances." (*Id.* at. 326) Applying this reasoning, the court found that it was reasonable to conclude that Gnass had a financial interest in the joint powers agreements. The court found that even if there was no understanding, that he would eventually be hired as disclosure counsel for the Mello-Roos joint powers authorities, or could be if he wanted the job, he might have been "tempted to foster that possibility by ingratiating himself with whomever would be making the decision."

Having concluded that the city attorney had a financial interest in being appointed as disclosure counsel for the Mello-Roos joint powers authority, the court then asked whether or not that interest became a "non-interest" pursuant to Section 1091.5 by virtue of Gnass' disclosure of this situation to the city's Public Financing Authority.⁴ The trial court had concluded that in his dual role as attorney for the city's Public Financing Authority and as disclosure counsel for the Mello-Roos joint powers authorities, Gnass did not have a prohibited conflict so long as he disclosed to the city's Public Financing Authority that he was also working as disclosure counsel to the Mello-Roos joint powers authority. The Court of Appeal disagreed with this interpretation of Section 1091.5(a)(9), both as a matter of logic and statutory construction. The Court of Appeal concluded that Gnass' conflict of interest, if any, existed before the Mello-Roos joint powers authority was created because if created, he might be hired as disclosure counsel. The court found that it was the employment contract as city attorney that created the requisite financial interest, not the conflict. Section 1091.5(a)(9) allows for a financial interest to be deemed a "non-interest" if the contracts under consideration are between two public agencies.⁵ Since the conflicts in question did not arise in connection with a contract or proposed contract between the city's Public Financing Authority and a Mello-Roos joint powers authorities, Section 1091.5(a)(9) did not apply.

While the court held that the evidence was sufficient to establish probable cause to believe the city attorney had been acting in his official capacity when he advised the city's Public Financing Authority regarding the Mello-Roos joint powers agreements under which he was hired as disclosure counsel, that the evidence demonstrated that he had a financial interest in the Mello-Roos joint powers authorities, that he became the disclosure counsel and was paid in that capacity, the appellate court upheld the trial court's granting of a motion to set aside the indictments due to a failure to properly instruct the jury on the issue of whether or not he acted "knowingly and willfully."⁶

This case is an important one for joint powers authority attorneys due to its discussion of Section 1090 violations which may arise if an attorney serves in a dual capacity when advising joint powers authorities.

⁴ Section 1091.5(a)(9) provides: (a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following: [¶] ... [¶] (9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record."

⁵ As an example, an employee of public agency A is a board member of public agency B. A conflict might arise if agency B considered a contract with agency A. See *Gnass* at page 1303.

⁶ To impose criminal liability for violation of Section 1090, it must be proved that a public official or employee acting in his official capacity knowingly and willingly made, or caused to be made, a contract in which he or she had a financial interest. "Willfully" has been defined as purposefully making a contract in which an official is financially interested. "Knowingly" means that there is a reasonable likelihood that the contract may result in a personal financial benefit. See *Gnass* 101 Cal.App.4th at 1305.

Practice Tip *While the facts in Gnass were egregious, they do raise the issue of whether a city attorney should represent a joint powers authority in which her or his city is a member. Many city attorneys do act in this dual capacity and there is no direct authority on the point. If the city attorney of a potential member agency is reviewing a joint powers agreement and there is a possibility or even likelihood that the city attorney will become legal counsel for the joint powers authority, thought should be given to retaining independent counsel to review and advise the city council on the joint powers agreement. Once the joint powers authority is established, the attorney should employ independent counsel to draft agreements between his or her member entity client and the joint powers authority in order to insure that no Section 1090 violations occur.*

JOINT POWERS AGREEMENT

THE STATE WATER CONTRACTORS OPERATING AUTHORITY

This Agreement is made and entered into by and between the California public agencies that have contracts with the State of California, Department of Water Resources, for water supplies made available by the State Water Project which are parties signatory to this Agreement. These public agencies are sometimes referred to herein as "Parties" and/or "Members."

RECITALS

WHEREAS, California Government Code Sections 6500, *et seq.*, provide that two or more public agencies may by agreement jointly exercise any power common to the contracting parties; and

WHEREAS, the Parties to this Agreement each have and possess the power to acquire, construct, operate and maintain works and facilities for the development, transmission and use of water resources and water rights including, without limitation, works and facilities to divert, store, pump, treat, transport and deliver water and to operate power facilities incidental to such pumping and deliver of water and to contract with the United States, the State of California, municipalities, districts and public and private corporations in the construction and operation of works and the provision of services for the purpose of conserving, providing and transporting water for beneficial uses; and

WHEREAS, the Parties to this Agreement desire to join together for the purpose of contracting with the State of California, Department of Water Resources, for the

provision of services to and the operation and maintenance of various portions of the State Water Project by this Authority:

NOW, THEREFORE, it is agreed by and between the Parties hereto as follows:

Article I

Definitions

Section 1.1 Definitions: As used in this Agreement, unless the context requires otherwise, the meaning of the terms set forth below shall be as follows:

(a) "Authority" shall mean the State Water Contractors Operating Authority created by this Agreement.

(b) "Board of Directors" or "Board" shall mean the governing body of the Authority as established by Article 6 (Board of Directors) of this Agreement.

(c) "Contractor" or "State Water Contractor" shall mean any public agency contracting with the State of California for a Water Supply Contract, or any public agency assignee of rights under such a contract.

(d) "Department" or "DWR" shall mean the Department of Water Resources of the State of California.

(e) "Law" or "the Law" shall mean the Joint Exercise of Powers Act, being Articles 1 and 2 of Chapter 5 of Division 7 of Title 1 of the California Government Code (Sections 6500, *et seq.*).

(f) "Maximum Annual Entitlement" shall mean the maximum annual entitlement specified in the Contractor's Water Supply Contract.

(g) "Member" shall mean any Contractor that becomes a signatory to this Agreement.

(h) "Project Agreement" is an agreement of the type specified in Section 4.3 (Specific Projects).

(i) "Specific Project" has the meaning set forth in Section 4.3 (Specific Projects).

(j) "State" shall mean the State of California.

(k) "State Water Contractors" shall mean the nonprofit mutual benefit corporation of State Water Contractors.

(l) "State Water Project," "Project" or "SWP" shall mean those project facilities defined in the respective Water Supply Contracts of Contractors.

(m) "Treasurer/Controller" shall mean that person, designated by the Board of Directors, who is to perform the duties of the Treasurer and Auditor-Controller of the Authority as required by law and as directed by the Board of Directors.

(n) "Water Supply Contract" or "Contract" shall mean the respective Contract for a water supply between each Contractor and the State, made pursuant to the California Water Resources Development Bond Act, as amended (Water Code Sections 12930, *et seq.*), and any amendments to such Contracts.

Article 2

Creation of the State Water Contractors Operating Authority

Section 2.1 Creation: There is hereby created pursuant to the Law, a public entity to be known as the "State Water Contractors Operating Authority," which shall be an agency or entity which is separate from the Parties to this Agreement.

Article 3

Term of Agreement

Section 3.1 Term: This Agreement shall become effective on the date on which the General Manager of the State Water Contractors certifies that it has been executed by ten or more Contractors that have a combined total of seventy-five percent (75%) of the Maximum Annual Table A Amount of all Contractors.

Article 4

Purposes and Powers

Section 4.1 Purpose: The purpose of this Agreement is to provide for the joint exercise, through the Authority, of powers common to each of the Parties, as described in the Recitals above, to provide services to and to operate and maintain, through contracts with the State, portions of the State Water Project and to acquire, construct, own, operate, maintain and replace other facilities appurtenant thereto, to acquire water and water rights and to do all acts related or incidental thereto, either by the Authority alone or in cooperation with the State, the United States or other entities, in order to provide for the development and delivery of water from the State Water Project to Contractors.

Section 4.2 Powers: The Authority shall have the power to exercise any power common to all of the Parties as authorized by the Law and is hereby authorized to do all acts necessary for the exercise of these common powers, including, but not limited to, any of the following:

- (a) To make and enter into contracts;
- (b) To incur debts, liabilities or obligations;

(c) To acquire, by eminent domain or otherwise, and to hold and dispose of property necessary to the full exercise of its powers;

(d) To contract for the services of engineers, attorneys, technical specialists, financial consultants, and separate and apart therefrom, to employ such other persons as it deems necessary;

(e) To issue bonds, notes and other indebtednesses, and to enter into leases, installment sale and installment purchase contracts, all as provided for in Section 11.8 (Issuance of Bonds, Notes and Other Indebtedness).

(f) To apply for, accept and receive state, federal or local licenses, permits, grants, loans or other aid from any agency of the United States of America, the State or other public or private entities necessary for the Authority's full exercise of its powers;

(g) To perform all acts necessary or proper to carry out fully the purposes of this Agreement; and

(h) To the extent not hereinafter specifically provided for, to exercise any powers in the manner and according to the methods provided under the laws applicable to the Coachella Valley Water District.

Section 4.3 Specific Projects: Except for investigations, studies and matters of general administration, the Authority shall function through agreements with the State Department of Water Resources. Members and others providing for the Authority to undertake Specific Projects, including but not limited to, the operation and maintenance of portions of the State Water Project and acts related or incidental thereto to implement Specific Projects. A Specific Project may involve all or less than the Members of the Authority, provided that no Member shall be required to be involved in a Specific

Project, as a Member of the Authority, involving less than all of the Members of the Authority without its approval. The details of each Specific Project involving less than all the Members shall be set forth in a Project Agreement executed by the participating Members. The Board of Directors of the Authority shall have the authority to disapprove Specific Project Agreements upon determination that the Project Agreement has specific, substantial adverse financial impacts upon Members not executing the Specific Project Agreement. If a Specific Project is to be undertaken for less than all of the Members of the Authority, the Members intending to participate in that Specific Project shall each appoint a representative to a project committee to develop the Project Agreement for that project. The Project Agreement shall set forth the duties, obligations and voting rights of the Members participating in the project.

Article 5

Members

Section 5.1 Membership: Each Contractor that possesses the powers described in the Recitals and in Section 4.2 (Powers) of this Agreement that executes this Agreement and any addenda, amendments or supplements thereto, and which has not, pursuant to the provisions hereof, withdrawn from this Agreement shall be a Member of the Authority. Any Contractor that executes this Agreement that does not possess such powers or who ceases to have such powers or who is subsequently determined not to have such powers shall be ineligible for Membership in the Authority.

Section 5.2 Classification of Members: The Authority shall have eight classes of Members, as follows, with no Contractor holding a membership in more than one class:

(a) Class 1

Those Feather River and North Bay Aqueduct Contractors, entitled to delivery of SWP water north of the Delta, or along the North Bay Aqueduct which are signatories to this Agreement.

(b) Class 2

Those South Bay Aqueduct Contractors entitled to deliver of SWP water along the South Bay Aqueduct which are signatories to this Agreement.

(c) Class 3

Those San Joaquin Valley Contractors entitled to delivery of SWP water within the San Joaquin Valley, except the Kern County Water Agency, which are signatories to this Agreement.

(d) Class 4

The Kern County Water Agency, if it is a signatory to this Agreement.

(e) Class 5

Those Coastal Aqueduct Contractors entitled to deliver of SWP water along the Coastal Aqueduct downstream of the Devil's Den Pumping Plant which are signatories to this Agreement.

(f) Class 6

The Metropolitan Water District of Southern California, if it is a signatory to this Agreement.

(g) Class 7

Those Southern California West Branch Contractors entitled to delivery of SWP water along the West Branch of the California Aqueduct, except The Metropolitan Water District of Southern California, which are signatories to this Agreement.

(h) Class 8

Those Southern California East Branch Contractors entitled to delivery of SWP water along the East Branch of the California Aqueduct, except The Metropolitan Water District of Southern California, which are signatories to this Agreement.

Section 5.3 Admission to Membership: Any Contractor that has not executed this Agreement on or before its effective date shall be admitted to membership upon the approval of the Board of Directors, the payment of any applicable fees and charges and upon becoming a signatory to this Agreement.

Section 5.4 Meetings of Members: Meetings of Members shall be held at such locations in the State of California as may be designated from time to time by the Board of Directors. Each Member shall appoint a representative and an alternate to represent and vote for the Member at all meetings of Members and meetings of classes of Members. Each representative (or alternate) shall have the voting rights provided for in Section 5.12 (Voting).

Section 5.5 Regular Annual Meeting: The Members shall meet annually during the first quarter of each year, at a time and place set by the Board, or at such other times as may be determined by the Board, for the purpose of transacting such proper business as may come before the meeting, including the meeting of classes required pursuant to Section 5.7 (Meetings of Classes) for the purpose of holding the election of Directors. If

the election of Directors does not occur at any such meeting of the Members, the Board shall cause the election of Directors to be held at a special meeting of the classes called and held as soon as it is reasonably possible after the adjournment of the regular meeting of the Members. If the date fixed for the regular meeting of Members falls on a legal holiday specified in Section 6700 of the Government Code, such meeting shall be held at the same hour and place on the next succeeding full business day.

Section 5.6 Special Meetings of Members: Special meetings of the Members shall be called by the Board of Directors and held at such times and places within the State of California as may be ordered by action of the Directors. Five percent or more of the Members may also call special meetings for any purpose.

Section 5.7 Meetings of Classes: Meetings of a class of Members may be called by any Member of that class and held at such times and places within the State of California as selected by such Member for any purpose, including the purpose of voting on the removal of a Director selected by that class pursuant to Section 6.7(h) (Removal of Directors without Cause) of this Agreement. The remaining provisions of this Agreement shall apply to the extent practicable, to such special meetings of classes of Members.

Section 5.8 Notice of Meetings: Except in the case of emergencies, written notice of every meeting of Members and of every meeting of classes of Members shall be either personally delivered or mailed by First Class United States mail, postage prepaid, to each Member, at least seven (7) days before the date of the meeting. The notice shall state the place, date and time of the meeting. In the case of annual meetings, the notice shall state those matters which the Board of Directors, at the time that notice was given, intends to present for action by the Members. In the case of special meetings, the notice shall

include the subject or subjects of the meeting. The notice of any meeting at which Directors are to be elected shall include the names of all those who are nominees at the time the notice is given to the Members.

Section 5.9 Quorum: A quorum of any meeting of Members or of any meeting of a class of Members shall consist of a majority of the Members or the Members of that class on the date the meeting is held. Except as otherwise provided in this Agreement, every act or decision made by a majority of the Members present at a meeting duly held at which a quorum is present is the act of the Members. The Members present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment notwithstanding the withdrawal of enough Members to leave less than a quorum, if any action taken, other than adjournment, is approved by at least a majority of the Members required to constitute a quorum. In the absence of a quorum, any meeting of the Members may be adjourned from time to time by a vote of the majority present, but not other business may be transacted except as provided for in this section.

Section 5.10 Conduct of Meetings: The President of the Authority or, in the President's absence, the Vice President, shall be the Chair of and shall preside over meetings of the Members. The Secretary of the Authority shall act as the secretary of all meetings of Members, provided that in the Secretary's absence, the Chair shall appoint another person to act as secretary for the meeting.

Section 5.11 Rules of Order: A majority of the Members may adopt rules governing meetings if not inconsistent or in conflict with this Agreement. In the absence of rules adopted by the Members, Roberts' Rules of Order, as they may be amended from

time to time, shall govern the meetings of Members in so far as they are not inconsistent or in conflict with this Agreement or any Authority bylaws.

Section 5.12 Voting: Except as otherwise provided by this Agreement, each Member shall have one vote.

Section 5.13 Review of Actions by the Board of Directors: On demand of any Member, any action of the Board shall be subject to a referendum by the Members. Such action shall be nullified if either:

- (a) a majority of the Members vote against it, or
- (b) Members who cumulatively have a majority of the Maximum Annual Table A Amounts of all of the Members vote against it.

Each such demand for referendum shall be received by the General Manager within fourteen (14) calendar days of the date of the Board's action. Each such demand may be made by telephone, facsimile, e-mail, hand delivery or mail. Any Member making such demand shall communicate that fact to all of the Members within the fourteen-day period. If such a demand is made, the contested action shall be suspended until the vote of the Members has occurred. The votes of the Members shall be communicated to the General Manager in writing within thirty (30) days of the date of the referral to them by the General Manager. The General Manager shall promptly communicate the results of the voting to the Members.

Article 6

Board of Directors

Section 6.1 Board of Directors: The Authority shall have a minimum of three (3) and no more than nine (9) Directors selected pursuant to Section 6.3 (Selection of

Directors). Collectively, the Directors shall be known as the "Board of Directors" or the "Board."

Section 6.2 Qualifications: The Directors of the Authority shall be officers or employees of the Members or other designated representatives of the Members.

Section 6.3 Selection of Directors: Each class of membership as defined in Section 5.2 (Classification of Members) of this Agreement, is entitled to select one (1) Director, except Class 8, which is entitled to select two (2) Directors, if two or more Southern California East Branch Contractors are Members of the Authority. Each class may select one or more alternates for its Director to act in the absence of the Director. The Directors shall be selected as follows:

(a) The Directors selected by Classes 4 and 6 shall be appointed by the Kern County Water Agency and The Metropolitan Water District of Southern California, respectively. The names of such Directors shall be announced by the representatives of these Members at the annual meeting of the Members.

(b) The Directors selected by Classes 1, 2, 3, 5, 7 and 8 shall be elected at the annual meeting. A majority vote of Members of the class shall be required for election of a Director of that class. Each Member of each class shall be entitled to one (1) vote for each Director to be elected by that class.

(c) If no eligible Contractor in the class is a Member of the Authority, no Director shall be selected for that class and the total number of Directors of the Board shall be reduced accordingly.

Section 6.4 Terms of Office: The terms of office for Directors shall be three years, with the terms of the Directors first elected beginning on the January 1 following

the effective date of this Agreement. Each Director shall hold office until such Director's successor is elected or appointed and qualifies for such office. If a Director is removed at a special meeting of the appropriate class as provided for in Section 6.7(h) (Removal of Directors without Cause) of this Agreement, such Director shall hold office until his or her successor is elected or appointed and qualifies as a Director.

Section 6.5 Nomination and Election of Directors: Any person qualified to be a Director selected by a class may be nominated by any Member of that class by any method selected by Members of that class. The candidate in each class receiving the highest number of votes is elected. The Directors shall be eligible for re-election, provided they continue to meet the qualifications required by this Agreement.

Section 6.6 Compensation: The Directors shall serve without compensation from the Authority.

Section 6.7 Board Meetings:

(a) **Place of Meetings.** All regular meetings of the Board shall be held in the State of California at the principal office of the Authority or such other places in the State as determined by the Board.

(b) **Time of Regular Meetings.** Regular meetings of the Board shall be held without call or notice at _____ a.m. on the _____ (____) day of each month, or at such other time, with notice, as may be directed by the Board.

(c) **Special Meetings.** Special meetings of the Board may be called by the President, the Vice President or the Secretary or any two (2) Directors. Except in the case of emergencies, special meetings shall be held on a minimum of four (4) days' notice by First Class Mail, postage prepaid, or on forty-eight (48) hours' notice delivered

personally or by telephone or facsimile. Notices of special meetings need not be given to any Director who signs a waiver of notice or a written consent to the holding of the meeting or any approval of the minutes thereof, whether before or after the meeting, or attends the meeting without protesting, prior thereto or at its commencement, the lack of such notice to such Director. All such waivers, consents and approvals shall be filed with the Authority records or made a part of the minutes of the meeting.

(d) Quorum. A majority of the Directors then in office, or their respective alternates in the absence of a Director, constitutes a quorum of the Board for the transaction of business, except as hereinafter provided.

(e) Acts or Decisions of the Board. Except as otherwise provided in this Agreement, every act or decision made by a majority of the Directors or their alternates in the absence of a Director present at a meeting duly held at which a quorum is present is the act of the Board, provided, however, that any meeting at which a quorum was initially present may continue to transact business notwithstanding the withdrawal of Directors if any action taken is approved by at least a majority of the required quorum for such meeting. A written summary of all Board actions shall be mailed by First Class Mail to all Members within three (3) working days after such action was taken.

(f) Conduct of Meetings. The President or, in the President's absence the Vice President, shall preside at all meetings of the Board of Directors, the Secretary of the Authority or, in the Secretary's absence, any person appointed by the presiding officer shall act as Secretary of the Board.

(g) Adjournment. A majority of the Directors or their alternates present, whether or not a quorum is present, may adjourn any meeting to another time and place.

If the meeting is adjourned more than twenty-four (24) hours, notice of the adjournment to another time or place must be given prior to the time of the adjourned meeting to the Directors who were not present at the time of the adjournment.

(h) Removal of Directors without Cause. At a special meeting of the appropriate class Members, a Director or alternate may be removed without cause if such removal is approved by two-thirds (2/3) of the Members of the class.

(i) Resignation of a Director. Any Director may resign effective on giving written notice to the Board of Directors, unless the notice specifies a later time for the effectiveness of such resignation. A successor shall be elected as provided for in this Agreement.

(j) Vacancies on the Board. A vacancy on the Board of Directors shall exist on the death, resignation or removal of any Director, whenever the number of Directors is increased, or on the failure of the Members at any election to elect or appoint the full number of Directors authorized. Vacancies on the Board of Directors may not be filled by the Directors. A vacancy shall be filled only by the Members of the appropriate class of Members.

Article 7

Conduct of Meetings

Section 7.1 Compliance with Brown Act: All meetings of the Members, of classes of Members, of the Board of Directors, and the directors of any Specific Project, including, without limitation, regular, adjourned regular and special meetings, shall be called, noticed, held and conducted in accordance with applicable provisions of the Ralph M. Brown Act, California Government Code Sections 54950, *et seq.*

Section 7.2 Teleconferencing: The Members, the Board of Directors, and the Members of a class with regard to meetings of that class, and the directors of any Specific Project, may use teleconferencing in connection with any meeting in conformance with, and to the extent authorized by, the Ralph M. Brown Act.

Article 8

Officers

Section 8.1 Numbers and Titles: The officers of the Authority shall be a President, a Vice President, a Secretary, a General Manager, a Treasurer/Controller, and such other officers with such titles and duties as shall be determined by the Board. Any number of offices may be held by the same person, provided that the President shall not also serve as the Treasurer. The Board may authorize the Treasurer of one of the Members to serve as the Treasurer; provided that the funds of the Authority are kept in accounts separate from those of that Member. The Vice President or, in the Vice President's absence, the Secretary shall exercise all powers of the President in the President's absence or inability to act. The President and the Vice President shall be members of the Board of Directors.

Section 8.2 Appointment and Resignation: The officers shall be chosen annually by, and serve at the pleasure of, the Board. Any officer may resign at any time on written notice to the Board.

Section 8.3 Chief Executive Officer: The General Manager appointed by the Board of Directors shall serve as the Chief Executive Officer of the Authority.

Article 9

Employees

Section 9.1 General Manager and Staff: The Board of Directors shall employ a General Manager. To fill positions approved by the Board, the General Manager shall employ such additional full-time and/or part-time employees and assistants and independent contractors as may be necessary from time to time to accomplish the purposes of the Authority.

Article 10

Committees

Section 10.1 Committees: The Board may, by the action of a majority of a number of the Directors then in office create from time to time various committees to carry on the business of the Authority.

Article 11

Financial Provisions

Section 11.1 Fiscal Year: The fiscal year of the Authority shall be from July 1 of each year to the succeeding June 30.

Section 11.2 Depositary: The Treasurer/Controller shall be the depositary and have custody of all money of the Authority from whatever source and shall perform the duties specified in Government Code Section 6506.5. All funds of the Authority shall be strictly and separately accounted for, and regular reports shall be rendered to the Board and the Members of all receipts and disbursements at least quarterly during the fiscal year. The books and records of the Authority shall be open to inspection by a Member or Director at all reasonable times upon reasonable notice. The Treasurer/Controller shall

either make or contract with a certified public accountant to make an annual audit of the accounts and records of the Authority, which shall be conducted, at a minimum, in accordance with the requirements of the State Controller under Section 26909 of the California Government Code, and shall conform to generally accepted auditing standards.

Section 11.3 Property Bonds: The Board shall from time to time designate the officers and persons, in addition to the Treasurer/Controller, who shall have charge of, handle, or have access to any property of the Authority. Each such officer and person, including the Treasurer/Controller, shall file a bond in an amount designated by the Board. When fixing the amount of such bonds, the Board shall be deemed to be acting for and on behalf of the Members who appointed them in compliance with Government Code Section 6505.1.

Section 11.4 Budget: As soon as practicable after the effective date of this Agreement, and thereafter at least thirty (30) days prior to the commencement of each fiscal year, the General Manager shall present a proposed budget to the Board for the forthcoming fiscal year. Prior to the commencement of the fiscal year, the Board shall present a budget to the Members for the Members' adoption.

Section 11.5 Contributions to Working Capital Account: A Working Capital Account, which is to be used for the purpose of funding general overhead and administrative expenses for the ongoing operations of the Authority, shall be established by the Board and approved in connection with the annual budget process. Contributions to the Working Capital Account shall be allocated among the Members in proportion to their respective Maximum Annual Table A Amounts. Contributions shall be established by the Board for each fiscal year no later than ninety (90) days prior to the beginning of

the fiscal year. Any Member that does not make its contribution to the Working Capital Account within sixty (60) days after the beginning of the fiscal year shall be deemed to have withdrawn as a Member and ceased to be a Party to this Agreement.

Section 11.6 Other Contributions: Contributions or advances of other funds and of personnel, equipment or property may be made to the Authority by any Member for any purposes of this Agreement, and credited to the Member's obligations, with the consent of the Board. Any such advances may be made subject to repayment, and in such case shall be repaid in the manner agreed upon by the Member making the advance and the Authority.

Section 11.7 Return of Contributions and Revenue: In accordance with Government Code Section 6512.1, repayment or return to the Members of all or any part of any contributions made by Members and any revenues received by the Authority may be directed by the Board at such time and upon such terms as the Board may decide. The Board shall hold title to all funds, and property acquired by the Authority during the term of this Agreement.

Section 11.8 Issuance of Bonds, Notes and Other Indebtedness: The Authority may issue bonds, notes or other forms of indebtedness if such issuance is approved at a meeting of the Members by two-thirds of all of the members and by Members who cumulatively have seventy-five percent (75%) of the Maximum Annual Entitlements of all of the Members. Bonds, notes or other forms of indebtedness to be issued for Specific Projects must also be approved by the Members who are parties to the Project Agreement by the vote required for such indebtedness set forth in the Project Agreement. The Secretary shall notify all of the Members by registered mail, return receipt requested, of

the approval for incurring of such indebtedness within ten (10) days after its approval. Any Member may within thirty (30) days of the receipt of such notice withdraw from this Agreement by giving written notice to the General Manager, provided that such withdrawal does not in any way impair any contracts, or other indebtedness of the Authority then in effect. This right to withdraw is in addition to the Member's right to withdraw set forth in Section 13.1 (Withdrawal of Membership). No such bonds, notes or indebtedness shall be issued before the expiration of the time given in this Section to Members to withdraw from this Agreement.

Article 12

Relationship of the Authority and Its Members

Section 12.1 Separate Entity: The Authority shall be a public entity separate from the Parties to this Agreement. Unless, and to the extent otherwise agreed herein, the debts, liabilities and obligations of the Authority shall not be the debts, liabilities or obligations of the Parties. All property, equipment, supplies, funds and records of the Authority shall be owned by the Authority, except as otherwise provided in this Agreement.

Article 13

Withdrawal of Membership

Section 13.1 Withdrawal of Membership: Any Member may withdraw from this Agreement by giving sixty (60) days written notice of its election to do so, which notice shall be given to the General Manager and to each of the Directors; provided, that such withdrawal does not in any way impair any contracts, resolutions, indentures or other obligations of the Authority, including obligations for Specific Projects, then in

effect. No refund or repayment of any portion of the Authority's assets shall be made to the Member ceasing to be a Party to this Agreement.

Section 13.2 Disposition of Property Upon Termination: Upon termination of this Agreement, any surplus money on hand shall be returned to the Members in proportion to their contributions made. The Board of Directors shall first offer any property, works, rights and interest of the Authority for sale to the Members on terms and conditions determined by the Board. If no such sale to Members is consummated, the Board shall offer the property, works, rights and interest of the Authority for sale to any governmental agency, private party or persons for good and adequate consideration. The net proceeds from any sale shall be distributed among the Members in proportion to their contributions made. If no such sale is consummated, then all property, works, rights and interests of the Authority shall be given to the State Water Contractors.

Article 14

Provision for Bvlaws

Section 14.1: As soon as practicable after the first meeting of the Board of Directors, the Board shall cause to be developed Authority bylaws to govern the day-to-day operation of the Authority.

Article 15

Miscellaneous Provisions

Section 15.1 Notices: Notices to Members hereunder shall be sufficient if delivered to the principal office of the respective Member.

Section 15.2 Amendments: This Agreement may be amended or terminated at any time at any duly constituted meeting of Members by a two-thirds (2/3) vote of the

Members representing seventy-five percent (75%) of the Maximum Annual Table A Amounts of all of the Members.

Section 15.3 Prohibition Against Assignment: No Member may assign any right, claim or interest it may have under this Agreement, and no creditor, assignee, or third-party beneficiary of any Member shall have any right, claim or title to any part, share interest, fund, or asset of the Authority. This Agreement shall be binding upon, and shall inure to, the benefit of the successors of any Party.

Section 15.4 Agreement Complete: The foregoing constitutes the full and complete Agreement of the Parties. There are no oral understandings or agreements not set forth in writing herein.

Section 15.5 Severability: Should any part, term or provision of this Agreement be decided by a court of competent jurisdiction to be illegal or in conflict with any applicable Federal law or any law of the State of California, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms or provisions hereof shall not be affected thereby.

Section 15.6 Withdrawal by Operation of Law: Should the participation of any Party to this Agreement be decided by the courts to be illegal or in excess of that Party's authority or in conflict with any law, the validity of the Agreement as to the remaining Parties shall not be affected thereby, and each Party hereby agrees that it would have entered into this Agreement upon the same terms as provided herein if that withdrawing party had not been a participant in this Agreement.

Section 15.7 Multiple Originals: This Agreement may be executed in counterparts, each of which shall be deemed an original.

Section 15.8 Limitations on Liability: The Authority shall be authorized to defend, indemnify and hold harmless any Director, officer, agent or employee for actions taken or not taken within the scope of the authority given or granted by the Authority and from and against any claim or suit arising out of any act or omission of the Authority, the Board or any Director, officer, agent and employee in connection with this Agreement and may purchase insurance as the Board may deem appropriate for this purpose. In contemplation of Section 895.2 of the Government Code, and pursuant to the authority contained in Sections 895.4 and 895.6 of that Code, each of the Members assumes that portion of the liability imposed upon the Authority or any of its Members, officers, agents or employees by law for injury caused by any negligent or wrongful act or omission occurring during the performance of any Project Agreement entered into by that Member pursuant to Section 4.3 that is not covered by insurance, that is in proportion to its respective Maximum Annual Table A Amount to the total Maximum Annual Table A Amounts of all of the Members that are parties to such Project Agreement. As to any other injury caused by any negligent or wrongful act or omission occurring during the performance of this Agreement, each Member assumes that portion of the liability imposed upon the Authority or any of its Members, officers, agents or employees by law that is not covered by insurance, that is in proportion to its representative Maximum Annual Entitlement to the total Maximum Annual Entitlements of all of the Members. To achieve such purposes, each Member shall to the extent provided herein indemnify and hold harmless the other Members for any loss, costs or expenses that may be imposed on such other Members solely by virtue of Section 895.2. The provisions of Section 2778 of

the Civil Code are made a part of this Agreement as though fully set forth in this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement by authorized officials thereof on the dates indicated below, which Agreement may be executed in counterparts.

Date: _____

MEMBER

By: _____
Authorized Representative

Summary of Proposed Joint Powers Agreement for the State Water Contractors Operating Authority

The proposed joint powers agreement (JPA), which creates a new separate governmental entity, is based upon requirements of the Joint Powers Law (Government Code Sections 6500, *et seq.*). In many respects it is modeled upon the State Water Contractors (SWC) bylaws. This is a summary of the agreement.

1. Purposes and Powers of the JPA

The purposes of the JPA Agreement are to establish a framework for possible future provision of various services to the State. These services would be provided pursuant to agreements the entire JPA, or groups of its members, would enter into with the State. They could include operation and maintenance of portions of the SWP and the acquisition and operation of related facilities such as water and water rights. These latter activities could be either by the Authority alone or in cooperation with the State, the United States or other entities. The Authority will have all of the powers necessary to accomplish these purposes, including the power to enter into contracts, incur debts and liabilities, to hire staff and consultants, to issue bonds, notes and other indebtedness.

2. Specific Projects

The Authority can undertake specific projects that may involve all or less than all the Members of the Authority, provided that no Member shall be required to be involved in a specific project without its approval. The details of each specific project involving less than all Members must be set forth in a Project Agreement executed by the participating Members and approved by the Board of Directors as to nonfinancial impact upon nonparticipating Members.

3. Membership in the JPA

The JPA creates an Authority consisting of those SWC's that elect to become parties to the JPA. In order to become effective, the JPA must be executed by ten or more SWC's having a combined total of 75% of the Maximum Annual Table A Amounts of all SWCs. Members may withdraw from the Authority by giving 30 days written notice, provided that such withdrawal does not in any way impair any contracts or other indebtedness of the Authority then in effect.

The Members of the Authority are divided into eight classes in the same manner as now provided for in the SWC bylaws. The full membership shall meet at least once annually and more often as needed. A quorum for meetings of the Members consists of a majority of the Members. The voting in the membership meetings will be one vote for each Member.

4. Governance of the Authority

Board of Directors: The Authority is to be governed by a Board of not less than three nor more than nine directors. Each class of Members shall elect one director and alternate(s), except Class 8 (Southern California East Branch Contractors) shall elect two directors and alternates. This is the same procedure that is provided for in the SWC bylaws. If no contractors from a class elect to join the Authority, there will be no director from that class on the Board of Directors. The term of office for directors is three years. Nominations for directors are to be made by the Members in each class for the director for that class. Vacancies on the Board are to be filled by the Members of the appropriate class.

Board Meetings: Since the JPA is a public agency, membership and Board meetings will be subject to applicable requirements of the Brown Act. A quorum for Board meetings shall consist of a majority of the directors. All acts of the Board must be made by a majority of the directors present at a meeting where there is a quorum.

Review of Actions of the Board: On the demand of any Member, any action of the Board shall be subject to a referendum by the Members. The Board's action will be nullified if either a majority of the Members or Members who have a majority of the Maximum Annual Table A Amounts of all of the Members vote against it. This is similar to the provisions in the SWC's bylaws.

Officers: The officers of the Authority will be a president, a vice-president, a secretary, a general manager and a treasurer/controller. Any of the offices may be held by the same person, provided that the president may not also serve as the treasurer. The Authority shall have a general manager appointed by the Board who shall serve as the chief executive officer of the Authority. The Board may employ such other persons as required to carry out the functions of the Authority.

5. Financial Provisions

Funds and Budget: All funds of the Authority will be deposited with the treasurer/controller, who shall be bonded. The general manager will submit a proposed budget each year to the Board, and the Board will present it to the Members for final approval.

Working Capital Account: The JPA authorizes the Board to establish a working capital account with the contributions to that account to be allocated among the Members in proportion to their respective Maximum Annual Table A Amounts. Any Member that

does not make its contribution to the working capital account within sixty days after the beginning of the fiscal year shall be deemed to have withdrawn from the Authority.

Bonds and Indebtedness: The Authority may issue bonds, notes and other forms of indebtedness, if such issuance is approved at a meeting of the Members by two-thirds of all the Members and by the Members who cumulatively have 75% of the Maximum Annual Table A Amounts of all Members. Any bonds or indebtedness to be issued for a specific project must be approved by the Members who are parties to the Project Agreement by whatever vote is required as set forth in that Project Agreement.

Refunds: No refund or repayment of any portion of the Authority's assets will be made when a Member ceases to be a party to the Agreement.

6. Liabilities of Members

The liabilities of the Authority are not intended to become the liability of any of the Members, but if pursuant to applicable Government Code sections, any liabilities of the Authority are placed upon the Members, they shall be allocated in proportion to each Member's respective Maximum Annual Table A Amount.

7. Amendments and Termination

Amendments can be made to the Agreement by a vote of two-thirds of the Members representing 75% of the Maximum Annual Table A Amounts of all Members. The Agreement can be terminated in the same manner.

JOINT POWERS AGREEMENT CREATING THE SALTON SEA MANAGEMENT AUTHORITY

THIS JOINT POWERS AGREEMENT ("Agreement") is made and entered into by and between the following public agencies:

- a. County of Imperial
- b. County of Riverside
- c. Imperial Irrigation District
- d. Coachella Valley Water District.

(The above are individually and collectively referred to herein as the "PART" or "PARTIES," "MEMBER" or "MEMBERS," "MEMBER AGENCY" or "MEMBER AGENCIES.")

RECITALS

- A. Each of the PARTIES herein is a public agency and each is authorized and empowered to contract with all the other parties for the joint exercise of powers under Articles I and II, Chapter 5, Division 7, Title (commencing with Section 6500) of the California Government Code (the "ACT").
- B. Each of the PARTIES to this Agreement has the authority and power to manage and operate water bodies for the public benefit and to create a separate public agency to carry out such power.
- C. The PARTIES recognize the immediate necessity for coordinated planning, and in the future for construction, operation, and maintenance of works and facilities for water quality improvement and elevation stabilization of the Salton Sea.

COVENANTS

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND PROMISES OF THE PARTIES HERETO, AND THE PROVISIONS, CONDITIONS AND TERMS PROVIDED FOR HEREIN, THE PARTIES AGREE AS FOLLOWS:

ARTICLE I

CREATION AND PURPOSES

1.1 Creation of Public Agency

There is hereby created a public agency known as the "Salton Sea Management Authority" (hereinafter referred to as the "Authority"). The Authority is formed by this Agreement pursuant to the provisions of Articles I and II, Chapters 5, Division 7, Title I (commencing with Sections 6500) of the government code of the State of California. It is the intent of the PARTIES that the Authority shall be a public agency separate from the PARTIES.

1.2 Purpose

The purpose of the Agreement is to create a public agency to exercise the common power of managing and operating Salton sea in Imperial and Riverside Counties, California for the improvement of water quality and stabilization of water elevation and to enhance recreational and economic development potential.

The purpose of this Agreement shall be accomplished and said power exercised in a manner hereinafter set forth, subject, however, to such restrictions as are applicable to the PARTIES to this Agreement in the manner of exercising such powers, as required by Government Code Section 6509.

ARTICLE II POWERS OF THE AUTHORITY

2.1 The Authority shall have the power common to the PARTIES to do any and all of the following:

- (a) To make and enter into contracts, leases and other agreements;
- (b) To employ agents, employees, consultants, advisors, independent contractors and other staff;
- (c) To incur debt, liabilities or obligations;
- (d) To acquire, hold or dispose of property by eminent domain, lease, lease purchase or sale.
- (e) To acquire, construct, manage, maintain and operate any buildings, works or improvements;
- (f) To sue and be sued in its own name, provided that the Authority shall not commence or intervene in any lawsuit without the approval of all of its members;
- (g) To raise revenue, to levy and collect rates, fees and charges, and to issue bonds, notes, warrants and other evidences of indebtedness to finance costs and expenses incidental to the purpose of the Authority;
- (h) To contract with the Federal Government and other agencies;
- (i) To designate committees of the Board of Directors of the Authority to serve at the pleasure of the Board of Directors, and to prescribe the manner in which proceedings of such committees shall be conducted; such committees may include, without limitation, maintenance, operations, finance, land use, recreation, public safety, water quality and capital improvement committees;
- (j) To exercise jointly the common power of the parties to manage and operate water bodies;

ARTICLE III
EFFECTIVE DATE

- 3.1 This Agreement shall become effective and the Authority shall be created as of the date on which the second of at least two of the governing bodies of the PARTIES to this Agreement have approved and executed this Agreement.
- 3.2 In the event any additional public agency becomes a member of the Authority after its formation, all of the existing members and the prospective member shall execute a memorandum specifying the obligations of the prospective member for contributions towards past or present Authority expenditures.

ARTICLE IV
GOVERNING BODY

- 4.1 This Agreement and the Authority created hereby shall be administered by the governing body of the Authority which shall be known as the "Board of Directors" of the Authority. All of the power and authority of the Authority shall be exercised by the Board of Directors, subject, however, to the reserved right of MEMBER AGENCIES with regard to approval of proposed budgets and assumption of financial obligations.
- 4.2 Each PARTY hereto shall designate and appoint one member of its governing body or a senior administrative official to act as its representative on the Board of Directors. Each member of the Board of Directors shall have one vote.
- 4.3 In order to assist in coordinating the duties and the activities of the Authority with other governmental entities, the following shall be ex-officio members of the Authority:
1. IMPERIAL VALLEY ASSOCIATION OF GOVERNMENTS (IVAG)
 2. COACHELLA VALLEY ASSOCIATION OF GOVERNMENTS (CVAG)
 3. SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS (SCAG)
- 4.4 Each members of the Board of Directors shall hold office from the first meeting of each odd-numbered year for a period of two years or until his/her successor is selected. Directors may be replaced for successive terms. Each member of the Board of Directors shall, however, serve at the pleasure of the appointing MEMBER AGENCY and may be removed at any time, with or without cause, in the sole discretion of the appointing MEMBER AGENCY.
- 4.5 The vote, assent or approval of MEMBER AGENCIES in any matter requiring such vote, assent or approval hereunder shall be evidenced by a certified copy of a resolution, minute order or similar writing of the governing body of such MEMBER AGENCY, filed with the Authority.

ARTICLE V
CONDUCT OF MEETINGS

- 5.1 Regular meeting of the Board of Directors of the Authority shall be held monthly. At its first meeting, the Board shall provide for the time and place of holding its regular meeting, which place shall be within Imperial or Riverside Counties. From time-to-time, special meetings may be called at the request of the President of the Board or of a majority of the Board of Directors. Notice of all meetings shall be furnished in writing to each member of the Board of Directors and to each PARTY to this Agreement at least 48 hours prior to the time appointed for the meeting.
- 5.2 The meetings of the Board of Directors shall be open to the public and shall be held and conducted in accordance with the provisions of the Ralph M. Brown Act as set forth in the California Government Code Sections 54950, et seq.
- 5.3 The Secretary of the Authority shall cause to be kept the minutes of all Board meetings and shall cause a copy of these minutes, along with copies of all ordinances and resolutions enacted to be forwarded to each of the PARTIES hereto.
- 5.4 A majority of the Board of Directors shall constitute a quorum for the transaction of business.
- 5.5 Except as otherwise provide herein, all actions of the Board shall be passed upon the affirmative vote of a majority of a quorum of the Board of Directors.
- 5.6 The Board of Directors may adopt, from time-to-time, such rules and regulations for the conduct of its affairs as may be required.
- 5.7 If authorized by law, Board members may be compensated for attendance at all regular and special meetings of the Board or of any committee of the Authority.

ARTICLE VI
OFFICERS

- 6.1 The Board of Directors shall select from its membership its own officers, including a President, Vice-President, and Secretary. The Treasurer of _____ (one of the MEMBER AGENCIES) _____ shall be the Treasurer of the Authority, to be the depository and have custody of all money of the Authority from whatever source, provided that the Board of Directors may at any time select another treasurer. Said Board shall also select a Controller, who shall be of the same public agency as Treasurer, and who shall draw all warrants to pay demands against the Authority approved by the Board.
- 6.2 The public officer, officers or persons who have charge of, handle or have access to any property of the Authority shall file an official bond in an amount to be fixed by

the Board of Directors.

- 6.3 Any officer may be removed, either with or without cause, by the Board of Directors, at any regular or special meeting thereof.
- 6.4 The Board of Directors shall have the power to appoint such additional officers as may be appropriate.
- 6.5 Each and all of the said officers shall serve at the pleasure of the Board and shall perform such duties and shall have such powers as the Board may, from time-to-time determine.
- 6.6 The term of each office shall be a maximum of two years. It shall be a policy of the Board to encourage the rotation of the offices among the Board members.
- 6.7 All of the privileges and immunities from liability, exemption from laws, ordinances and rules, all pension, relief, disability, workers compensation, and other benefits which apply to the activity of officers, agents, or employees of any of the members when performing their respective functions shall apply to them to the same degree and extent while engaged in the performance of any of the functions and other duties under this Agreement. None of the officers, agents, or employees appointed by the Board of Directors shall be deemed, by reason of their employment by the Board of Director, to be employed by any of the members or, by reason of their employment by the Board of Directors to be subject to any of the requirements of such members.

BUSINESS OFFICE AND STAFF

- 7.1 Subject to the provisions of Paragraph 7.2 below, the Authority's business office shall initially be located at the offices of the (one of the Member Agencies) _____ (city) _____ California. (Agency) shall make its personnel available as necessary to perform the secretarial, clerical and administrative duties of the Authority. The Authority shall reimburse _____ (Agency) _____ for any personnel time expended on behalf of the Authority at _____ Agency's) _____ rate of salary, plus benefits, along with any materials used, upon presentation of periodic billings.
- 7.2 The Board of Directors may, from time-to-time, change the location of the Authority's business office and/or utilize the secretarial, clerical and administrative services or other MEMBER AGENCIES in place of, or in addition to, those of _____ (Agency) _____, with the appropriate reimbursement for the same, or employ its own personnel to provide such services.
- 7.3 Notwithstanding the provisions of Paragraphs 7.1 and 7.2, the Authority's business office shall be relocated to within the territorial boundaries of the Salton Sea management Authority within three (3) years of the effective date of this Agreement unless the PARTIES agree otherwise.
- 8.1 As soon as possible after the formation of the Authority, the first meeting of the Board

of Directors and annually in the month of October, a general administrative budget shall be adopted by the Board of Directors. The budget shall be prepared in sufficient detail to constitute an operating outline for contributions to be made by the PARTIES and expenditures to be made during the ensuing year for operation, administration, projects, programs, planning, study, debt service (if any) and reserves. The budget shall be adopted by the Board of Directors, subject to ratification by the MEMBER AGENCIES pursuant to Paragraph 4.3 above. Until such time as the ratification process has been completed, the budget shall constitute a proposed budget.

8.2 If a participating MEMBER AGENCY fails or refuses to approve any general budget of the Authority, said budget shall be returned to the Authority for restudy and/or revision. In the event a budget acceptable to all of the MEMBERS financially liable thereunder is not approved prior to the start of a fiscal year, the Authority shall continue to operate at the level of expenditure authorized by the last approved budget and the PARTIES thereto shall be obligated to promptly contribute their pro-rata portion thereof to the Authority.

8.3 Each annual budget shall provide for pro-rata contributions by each participating MEMBER AGENCY to be established by the Board of Directors of the Authority; provided, however, that the minimum annual contribution by each MEMBER AGENCY shall be \$50,000 in the first year and adjusted thereafter as needs and inflationary pressure may require.

8.4 The contribution from each MEMBER of the AUTHORITY specified in any budget shall be due, payable and delivered to the Authority within 30 days after receipt of a billing from the Authority or as soon thereafter as a warrant can issue in the normal course of a MEMBER's business. To the extent permitted by State law, unpaid, past due contributions shall bear interest at the legal rate of interest from the date due to the date paid.

8.5 Each MEMBER AGENCY of the Authority expressly possesses and reserves to itself final and absolute discretion to approve or disapprove, prior to commitment, any and all expenditures or other financial obligations of the Authority, other than approved budgeted items, insofar as such expenditures or obligations are, or shall be chargeable against such MEMBER AGENCY. All General Administrative Budgets and Specific Project budgets (Article IX, below) shall be subject to prior approval by each MEMBER Agency to the extent that such budgets impose any financial liability on such MEMBER AGENCY.

ARTICLE IX SPECIFIC PROJECTS

9.1 For matters not deemed to be of general benefit to all PARTIES (Article VIII above), the Authority shall function through the identification and implementation of "specific projects." A specific project may involve less than all of the MEMBERS of the Authority, provided that no MEMBER shall be involved without its approval. A

separate project budget and written project agreement of the PARTIES who consent to participation in a specific project shall be established for each specific project, which budget and agreement shall determine the respective obligations, functions and rights of the MEMBERS involved, and of the Authority. The members of the Board of Directors representing the MEMBER AGENCIES who will be involved in financing and implementing the specific project shall be and constitute a "Project Committee" of the Authority for purposes of administration and implementation of the specific project.

ARTICLE X ACCOUNTING

- 10.1 The fiscal years of the Authority shall be from January 1 to December 31, following.
- 10.2 Full books and accounts shall be maintained for and by the Authority in accordance with practices established by or consistent with those utilized by the Controller of the State of California for like public agencies. In particular, the Treasurer of the Authority shall comply strictly with the requirements of the statutes governing joint powers agencies, Chapter 5, Division 7, Title 1 of the Government Code, commencing with Section 6500, including verifying and reporting, in writing, on the first day of January, April, July, and October of each year to the Authority and to the contracting parties to the agreement the amount of money the Treasurer holds for the Authority, the amount of receipt since the Treasurer's last report, and the amount paid out since the Treasurer's last report.
- 10.3 The records and accounts of the Authority shall be audited annually by an independent certified public accountant and copies of each such audit report shall be filed with the Auditor-Controller of the County of Imperial, County of Riverside, state Controller and each MEMBER of the authority no later than 15 days after receipt of the audit by the Board of Directors.
- 10.4 Each MEMBER AGENCY shall have the right to audit the records and accounts of the Authority, the cost and expense of which shall be borne by the MEMBER Agency seeking such audit.

ARTICLE XI REVENUE BONDS

- 11.1 The authority shall have the power and authority to issue Revenue Bonds in accordance with State Law.

ARTICLE XII PROPERTY RIGHTS

- 12.1 To the extent that any funds received by the Authority from any MEMBER are used

for the acquisition or construction of assets, the same shall be allocated annually on the books of the Authority to the credit of the said contributing MEMBER.

ARTICLE XIII

ADMISSION AND WITHDRAWAL OR DISSOLUTION

13.1 It is recognized that public entities, other than the original parties, may wish to participate in the Salton sea Authority. Additional public entities may be come parties to this Agreement such terms and conditions as provided by the Board of Directors and the consent of two-thirds (2/3) of the existing parties to the Agreement. evidenced by the execution of a written addendum to this Agreement, and signed by all of the parties including the additional party.

13.2 Withdrawal from the Authority

It is fully anticipated that each party hereto shall participate in the Authority until purposes set forth in this Agreement are accomplished, the withdrawal of any party, either voluntary or involuntary shall be conditioned as follows:

- a. In the case of a voluntary withdrawal following a properly noticed public hearing, written notice shall be given to the Authority, one year and ninety days prior to the effective date of withdrawal;
- b. Withdrawal shall not relieve the party of its proportionate share of any debts or other liabilities incurred by the Authority prior to the effective date of the parties' notice of withdrawal;
- c. Withdrawal shall result in the forfeiture of that party's rights and claims relating to distribution of property any funds upon termination of the Authority as set forth in section 13.3 and 13.4 below.

13.3 Upon dissolution of the Authority, there shall be a partial or complete distribution of assets and discharge of liabilities as follows:

- a. Upon withdrawal of any MEMBER of the Authority prior to dissolution, the withdrawing MEMBER shall forfeit its proportionate share of the assets of the Authority and shall contribute its proportionate or otherwise defined share towards the discharge of any enforceable liabilities incurred by the Authority as the same appear on the books of the Authority.
- b. Upon dissolution of the Authority, each MEMBER shall receive its proportionate or otherwise defined share of the assets of the Authority within a reasonable amount of time after dissolution, and each MEMBER shall contribute its proportionate or otherwise defined share toward the discharge of any enforceable liabilities incurred by the Authority as the same appear on the books of the Authority.

- 13.4 The distribution of assets may be made in kind or assets may be sold and the proceeds thereof distributed to the MEMBERS at the time of dissolution after the discharge of all enforceable liabilities.

ARTICLE XIV

14.1 Hold Harmless and Indemnity

Each party hereto agrees to indemnify and hold the other parties harmless from all liability for damage, actual or alleged, to persons or property arising out of or resulting from negligent acts or omissions of the indemnifying party or its employees. Where the Board of Directors itself or its agents or employees are held liable for injuries to persons or property, each party's liability for contribution or indemnity for such injuries shall be apportioned proportionately upon the contributions (less voluntary contributions) of each member. In the event of liability imposed upon any of the parties to the Agreement, or upon the Board of Directors created by this Agreement, for injury which is caused by the negligent or wrongful act or omission of any of the parties in the performance of this Agreement, the contribution of the party or parties not directly responsible for the negligent or wrongful act or omission shall be limited to One Hundred Dollars (\$100.00). The party or parties directly responsible for the negligent or wrongful acts or omissions shall indemnify, defend, and hold all other parties harmless from any liability for personal injury or property damage arising out of the performance of this Agreement.

ARTICLE XI

TERM: RESCISSION OR TERMINATION

- 15.1 This Agreement shall remain in effect and the Authority shall continue to manage and operate Salton sea for a period of 40 years from the Effective Date of this Agreement or until this Agreement is extended or terminated as provided for herein.
- 15.2 This Agreement may be extended or terminated by written consent of a majority of the MEMBER AGENCIES evidenced by certified copies of resolutions of their governing bodies; provided, however, that no such termination shall be effective until all revenue bonds and other forms of indebtedness issued pursuant hereto, and the interest thereon, shall have been paid or adequate provision for such payment shall have been made in accordance with the resolution of the authority authorizing the issuance thereof.

ARTICLE XVI

ARBITRATION

- 16.1 Any controversy or claim between any two or more parties to this Agreement, or between any such party or parties and the Authority with respect to disputes,

demands, differences, controversies, or misunderstandings arising in relation to interpretation of this contract, or any breach thereof, shall be submitted to and determined by arbitration. The party desiring to initiate arbitration shall give notice of its intention to arbitrate to every other party to this Agreement and the Authority. Such notice shall designate as "respondents" such other parties as the initiating party intends to have bound by any award made therein. Any party not so designated but which desires to join in the arbitration may, within 10 (10) days of the service upon it of such notice, file a response indicating its intention to join in and to be bound by the results of the arbitration, and further designate any other parties it wishes to name as a respondent. Within twenty (20) days of the service of the initial demand for arbitration, the initiating party and the respondent shall each designate a person to act as an arbitrator. The two designated arbitrators shall mutually designate a third person to serve as arbitrator. The three arbitrators shall proceed to arbitrate the matter accordance with the provisions of Title 9 of Part 3 of the Code of Civil Procedure, section 1280 et seq. The parties to this Agreement agree that the decision of the arbitrators will be binding.

ARTICLE XVII

NOTICES

- 17.1 Notices under this Agreement shall be sufficient if addressed to the principal office of each of the PARTIES hereto and shall be deemed given upon deposit in the U.S. Mail, First-Class, Postage Prepaid.
- 17.2 All notices, statements, demands, requests, consents, approvals, authorizations, agreements, appointments or designations hereunder shall be given in writing and addressed to the principal office of each member of the Authority.

ARTICLE XVIII

MISCELLANEOUS

- 18.1 The section headings herein are for convenience only and are not be construed as modifying or governing language in the section.
- 18.2 This Agreement is made in the State of California and under the Constitution and laws of this State and is to be so construed.
- 18.3 This Agreement may be amended from time-to-time in writing by unanimous action of the PARTIES; provided, however, that any such amendment shall take into consideration the holders of any revenue bonds or other forms of indebtedness which are outstanding in accordance with any resolution of the authority authorizing the issuance thereof.
- 18.4 This Agreement shall be binding upon and shall inure to the benefit of the successors of the PARTIES.

18.5 If any one or more of the terms, provisions, promises, covenants or conditions of this Agreement shall to any extent be adjudged invalid, unenforceable, void or voidable, for any reason whatsoever by a court of competent jurisdiction, each and all of the remaining terms, provisions, promises, covenants, and conditions of this Agreement shall not be affected thereby and shall be valid and enforceable to the fullest extent permitted by law.

18.6 The PARTIES shall not assign any rights or obligations under this Agreement without the written consent of all other PARTIES.

IN WITNESS WHEREOF, the **PARTIES** have executed this Agreement on the day and year hereinafter indicated.

The document is signed and dated by the following persons:

Riverside County, **Patricia Larson**, Chair, Board Supervisors, August 4, 1993

Imperial County, **Wayne J. Van De Graaff**, Chair, Board of Supervisors, September 7, 1993

Imperial Irrigation District, **Lloyd Allen**, President, Board of Directors, August 16, 1993

Coachella Valley Water District, **Tellis Codekas**, President, Board of Directors, August 12, 1993

[The JPA the agreement became effective as of the date on which all of the parties to this agreement approved and executed this agreement.]

**Joint Exercise of Powers Agreement Between the City of Oxnard and the United
Water Conservation District Creating the RiverPark Reclamation and Recharge
Authority**

This Joint Exercise of Powers Agreement (the "Agreement"), dated for reference September 17, 2002, is entered by and among the City of Oxnard, a general law city, ("Oxnard") and the United Water Conservation District, a special district ("UWCD") with respect to the development of land in and adjacent to Oxnard identified as "RiverPark" and more precisely defined in that certain development agreement between Oxnard and RiverPark A, LLC and RiverPark B, LLC, approved by the Oxnard City Council on September 17, 2002. Oxnard and UWCD shall be collectively known as the "Parties" and individually as "Party". This Agreement is made pursuant to the Joint Exercise of Powers Law (Articles 1 through 4 [commencing with Section 6500] of Chapter 5, Division 7, Title 1 of the California Government Code, as now or hereafter amended, hereinafter the "Act").

PREAMBLE

WHEREAS, each of the Parties has determined that there is a need to develop a process to secure grant funding and other public and private funding to implement the Oxnard Plain Groundwater Recharge Program ("Recharge Program") previously adopted by the Board of Directors of UWCD, and as thereafter amended, a copy of which is on file with the Executive Director of UWCD and the RiverPark Reclamation Plan ("Reclamation Plan") submitted to Oxnard for approval by RiverPark B, LLC on June 4, 2002, and as thereafter amended, a copy of which is on file with the City Clerk of Oxnard; and

WHEREAS, each of the Parties has determined that the creation and use by the Parties of a single entity to secure grant funding and other public and private funding to implement the Recharge Program and Reclamation Plan is in the public interest; and

WHEREAS, Oxnard and UWCD are each authorized by law to secure public funding to implement programs that are of benefit to the public, including, but not limited to, the Recharge Program and Reclamation Plan; and

WHEREAS, Oxnard and UWCD are each authorized by law to purchase, acquire, own, lease, and use real and personal property necessary or convenient for the conduct of its governmental business; and

WHEREAS, the Parties have determined that the creation of a single entity for such purposes will be a great benefit to Oxnard, UWCD and those individuals, businesses and agricultural users that receive water either directly or indirectly from one or both of those entities.

NOW, THEREFORE and in consideration of the foregoing and of the mutual covenants and promises herein set forth, the Parties agree as follows:

ARTICLE I

PURPOSE AND ADMINISTRATION

A. Purpose. The purpose of this Agreement is to create a public entity to secure grant funding and other public and private funding to reclaim mining pits for water recharge purposes, to implement the Recharge Program and Reclamation Plan, and to undertake other groundwater recharge, groundwater quality, and water supply programs as the Board of Directors ("Board") may find to be within the public interest.

B. Creation of Authority. Pursuant to the Act, there is hereby created a public entity to be known as the "Oxnard Plain / RiverPark Reclamation and Groundwater Recharge Joint Powers Authority" (the "Authority"). The Authority shall be a public entity separate and apart from the Parties.

C. Board of Directors.

(1) Created. The Authority shall be administered by a Board. The Board shall be called the "Board of Directors of the Oxnard Plain / RiverPark Reclamation and Groundwater Recharge Joint Powers Authority." All voting power of the Authority shall reside in the Board.

(2) Directors. Each of the Parties shall appoint two Directors and their alternates to the Board of the Authority.

(3) Terms; Vacancies. (a) Each Director and alternate shall serve a three-year term commencing on the later of his or her appointment or the effective date of this Agreement and ending on June 30th of the third year following his or her appointment and each Director and the alternates shall serve at the pleasure of the party making the appointment.

(b) Directors and alternates shall continue to serve until their successors are appointed.

(c) Vacancies shall be filled in the same manner as the original appointments.

(d) Nothing in this Agreement shall bar the reappointment of a Director or an alternate.

(4) Compensation; Expenses. Directors and alternates may be entitled to compensation from the Authority for service on the Board as may be provided by Board resolution. Each Director and alternate may be reimbursed for his or her

necessary expenses including travel incurred in connection with his or her services as Director, pursuant to resolution of the Board.

D. Meetings of the Board.

(1) Regular Meetings. Regular meetings of the Board shall be held at such times and places as the Board may fix by resolution from time to time, and if any day so fixed shall fall upon a legal holiday, then, upon the next succeeding business day at the same hour. No notice of any regular meeting of the Board need be given to the Directors.

(2) Special Meetings. Special meetings of the Board may be called in accordance with the provisions of Section 54956 of the California Government Code.

(3) Call, Notice and Conduct of Meetings. All meetings of the Board, including without limitation, regular, adjourned regular and special meetings, shall be called, noticed, held and conducted in accordance with the provisions of Sections 54950 et seq. of the California Government Code.

E. Minutes. The Secretary shall cause minutes to be kept of the meetings of the Board, and shall, as soon as possible after each meeting, cause a copy of the minutes to be forwarded to each Director and to each of the Parties.

F. Voting. Each Director and each alternate shall have one vote. A vote may only be exercised by the Director or alternate in attendance at the meeting and no alternate may vote if the Director for whom that alternate was appointed is in attendance at the time the vote is cast. In no event shall either Party have more than two votes.

G. Quorum; Required Votes; Approvals. Three of four Directors or alternates shall constitute a quorum of the Board, provided that an alternate may not be counted toward a quorum if the Director for whom he or she serves is also to be counted toward a quorum. A minimum of three votes shall be necessary for the Board to take any action, provided that less than a quorum may adjourn meetings of the Board.

H. By-laws. The Board may adopt by-laws and rules and regulations for the conduct of its meetings or as are necessary for the purposes hereof.

I. Fiscal Year. The fiscal year of the Authority shall be from July 1 of one year to June 30 of the following year, or any other twelve-month period hereafter designated by the Board by resolution.

J. Personnel. The Board shall be responsible for the regulation of all personnel activities, including but not limited to the selection, recruitment, discipline, and discharge of any Authority staff. The Board may designate a person or persons to

perform any or all of the duties of this paragraph J. and to take such action as is necessary and appropriate with regard to those duties.

ARTICLE II

OFFICERS AND EMPLOYEES

A. Chair. The Authority shall have a Chair who shall be a Director and who shall be selected as Chair by the Board and who shall perform the duties customary to said office. The Chair may sign contracts on behalf of the Authority, and shall perform such other duties as may be imposed by the Board.

B. Vice-Chair. The Authority shall have a Vice Chair who shall be a Director and who shall be selected by the Board. In the absence of the Chair, the Vice-Chair shall perform the duties of the Chair and shall perform all duties customary to such office.

C. Secretary. The Authority shall have a Secretary who need not be a Director and who shall be selected by the Board and shall perform all duties customary to such office.

D. Treasurer and Auditor. Pursuant to Sections 6505.5 and 6505.6 of the Act, the Finance Director of Oxnard is designated as the Treasurer/Auditor of the Authority. The Treasurer/Auditor shall be the depository, shall have custody of all of the accounts, funds and money of the Authority from whatever source, shall have the duties and obligations set forth in Sections 6505 and 6505.5 of the Act and shall assure strict accountability of all funds and reporting of all receipts and disbursements of the Authority. As provided in Section 6505 and Section 6505.6 of the Act, the Treasurer/Auditor shall make arrangements with a certified public accountant or firm of certified public accountants for an annual independent audit of accounts and records of the Authority.

E. Executive Director. The Board may appoint an Executive Director and may delegate authority to the Executive Director to execute contracts approved by the Board and to perform any duties necessary and appropriate for the day-to-day management and operation of the Authority.

F. Officers in Charge of Records, Funds and Accounts. Pursuant to Section 6505.1 of the Act, the Treasurer/Auditor shall have charge of, handle and have access to all accounts, funds and money of the Authority and all records of the Authority relating thereto. The Secretary shall have charge of, handle and have access to all other records of the Authority.

G. General Counsel. The Board may appoint a General Counsel of the Authority who shall provide legal advice and perform such other duties as may be prescribed by the Board.

H. Other Employees. The Board shall have the power to appoint and employ such other employees, consultants and independent contractors as may be necessary to accomplish the purposes of this Agreement.

I. Assistant Officers. The Board may appoint such assistants to act in the place of the Secretary or other officers of the Authority, other than any Director, as the Board shall from time to time deem appropriate.

J. Removal and Reappointment. Unless otherwise expressly stated, all officers of the Authority shall serve at the pleasure of the Board. However, nothing in this paragraph J. shall authorize the Board to appoint or dismiss a Director or the Treasurer/Auditor.

ARTICLE III

POWERS

A. General Powers. The Authority shall exercise in the manner herein provided the powers common to the Parties necessary or appropriate to the accomplishment of the purposes of this Agreement.

B. Specific Powers. The Authority is authorized, in its own name, to do all acts necessary for the exercise of the foregoing powers, including but not limited to, any or all of the following:

- (1) to develop, plan and implement the Recharge Program and Reclamation Plan, to reclaim mining pits within the Oxnard Plain for groundwater recharge purposes, and to undertake such other related programs as the Board may authorize;
- (2) to make and enter into contracts;
- (3) to employ agents or employees;
- (4) to acquire, construct, own, manage, maintain, dispose of, or any property or improvements necessary to implement and/or maintain the Recharge Program and Reclamation Plan;
- (5) the right of eminent domain to take any property reasonably necessary to implement the Recharge Program and Reclamation Plan or to otherwise fulfill the purposes of the Authority;
- (6) to sue and be sued in its own name;

- (7) to incur debts, liabilities or obligations, provided that no such debt, liability or obligation shall constitute a debt, liability or obligation of any or all of the Parties to this Agreement;
- (8) to apply for, accept, receive and disburse grants, loans and other aid from any agency of the United States of America, the State of California, or of the County of Ventura or any private source;
- (9) to invest any money in the treasury pursuant to Section 6505.5 of the Act that is not required for the immediate necessities of the Authority, as the Authority determines is advisable, in the same manner and upon the same conditions as local agencies, pursuant to Section 53601 of the California Government Code;
- (10) to contract with Oxnard, UWCD, the County of Ventura, or any other appropriate entity, to administer funds, including grant funds, received by the Authority;
- (11) to disburse funds to Oxnard, UWCD, RiverPark or any third party, provided that such disbursement is reasonably necessary to develop, plan, implement and/or maintain the Recharge Program and Reclamation Plan or otherwise to attain the purposes of this Agreement;
- (12) to implement the Recharge Program and Reclamation Plan consistent with the grant covenants and any applicable rules and regulations relating to such Recharge Program and Reclamation Plan; and
- (13) to carry out and enforce all the provisions of this Agreement.

C. **No Effect on Powers of Other Agencies.** Notwithstanding anything contained in this Agreement to the contrary, no provision of this Agreement shall be construed as denying to Oxnard, the UWCD or the Fox Canyon Ground Water Management Agency any rights or powers they already have or which they may hereafter be granted.

D. **Obligations of Authority.** The debts, liabilities and obligations of the Authority shall not be the debts, liabilities and obligations of any or all of the Parties to this Agreement.

ARTICLE IV

CONTRIBUTION; ACCOUNTS AND REPORTS; FUNDS

A. Contributions. Each of the Parties may in the appropriate circumstance when required hereunder: (1) make contributions from their treasuries for the purposes set forth herein, (2) make payments of public funds or private funds to defray the cost of such purposes, (3) make advances of public funds for such purposes, such advances to be repaid as provided herein, or (4) use its personnel, equipment or property in lieu of other contributions or advances. The provisions of Section 6513 of the California Government Code are hereby incorporated into this Agreement.

B. Accounts and Reports. The Treasurer/Auditor shall establish and maintain such funds and accounts as may be required by any applicable laws or regulations, good accounting practice, or by any provision of any trust agreement entered into with respect to the proceeds of any bonds issued by the Authority. The books and records of the Authority in the hands of the Treasurer/Auditor shall be open to inspection at all reasonable times by representatives of the Parties. The Treasurer/Auditor, within 120 days after the close of each fiscal year, shall give a complete written report of all financial activities for such fiscal year to the Parties. The trustee appointed under any trust agreement shall establish suitable funds, furnish financial reports and provide suitable accounting procedures to carry out the provisions of said trust agreement. Said trustee may be given such duties in said trust agreement as may be desirable to carry out this Agreement.

C. Funds. Subject to the applicable provisions of any instrument or agreement into which the Authority may enter, which may provide for a trustee to receive, have custody of and disburse Authority funds, the Treasurer/Auditor of the Authority shall receive, have the custody of and disburse Authority funds in accordance with generally accepted accounting practices, shall approve demands against the Authority pursuant to Government Code Section 6505.5(e), and shall make the disbursements required by this Agreement or necessary to carry out any of the provisions or purposes of this Agreement.

D. Annual Budget and Administrative Expenses. The Board shall adopt a budget for administrative expenses, which shall include all expenses not included in any financing issue of the Authority, prior to the commencement of each fiscal year. At such time that the Authority receives public grant funding, Oxnard and UWCD each shall be entitled to be reimbursed for its reasonable administrative expenses relating to the Authority, in particular and without limitation Oxnard shall be reimbursed for the reasonable cost of services provided by the Treasurer/Auditor.

ARTICLE V

TERM, DISPOSITION OF ASSETS

A. Term. This Agreement shall continue in full force and effect until terminated by a unanimous vote of the Board or until such time as the Parties to this Agreement are reduced to one.

B. Disposition of Assets. Upon the winding up and dissolution of the Authority, after paying or adequately providing for the debts and obligations of the Authority, the remaining assets of the Authority shall be distributed to the Parties. If, for any reason, the Parties are unable or unwilling to accept the assets of the Authority, said assets will be distributed to the United States government or to the State of California or any local government for public purposes.

C. Terminations. Any Party may withdraw from its status as a Party to this Agreement on sixty (60) days notice, provided that that Party's withdrawal shall not become effective until that Party has either discharged, or arranged for, to the satisfaction of the remaining members of the Board, the discharge of any pending obligation the Party has assumed hereunder.

D. Continuation. The inclusion of additional parties to this Agreement or the withdrawal of some, but not all, of the Parties to this Agreement shall not be deemed dissolution of the Authority or a termination of this Agreement. The Authority shall continue to exist and this Agreement shall continue in full force and effect so long as there shall be at least two Parties to this Agreement.

ARTICLE VI DISPUTE RESOLUTION

If at any time the Parties are unable to agree on any matter, they shall meet and confer in an attempt to resolve their differences. If the Parties are unable to do so they shall jointly appoint a third person to mediate a resolution of their differences. In the event the Parties are unable to agree on a mediator, then each Party shall name three retired judges or other attorneys experienced in mediation, each Party may eliminate as many as two of the names provided by the other and, if the Parties cannot agree upon a mediator from the names remaining, the mediator shall be selected by lot from between them.

ARTICLE VII

GENERAL PROVISIONS

A. Notices. Any notices required by or given pursuant to this Agreement shall be in writing and shall be delivered to the each of the Parties at the

address of their principal business offices listed below or at such other address as any Party may specify in writing to the Authority:

City of Oxnard
300 West Third Street
Oxnard, CA 93030
Attn: City Manager
Facsimile: (805) 385-7806

City of Oxnard
300 West Third Street
Oxnard, CA 93030
Attn.: City Attorney
Facsimile: (805) 385-7423

United Water Conservation District
106 North Eighth Street
Santa Paula, California 93060
Attn.: General Manager
Facsimile: (805) 525-2661

Phil Drescher, General Counsel
United Water Conservation District
P.O. Box 9100
Oxnard, CA 93031-9100
Facsimile: (805) 988-8387

B. Governing Law. This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of California.

C. Headings. The article and paragraph headings contained in this Agreement are for the convenience of reference only and are not intended to define, limit or describe the scope of any provision of this Agreement.

D. Consent. Whenever any consent or approval is required by this Agreement, such consent or approval shall not be unreasonably withheld.

E. Amendments. This Agreement may be amended at any time, or from time to time, or by applicable regulations or laws of any jurisdiction having authority, by one or more supplemental agreements executed by all of the Parties to this Agreement either as required to carry out any of the provisions of this Agreement or for any other purpose.

F. Enforcement by Authority. The Authority is hereby authorized to take or seek any or all legal or equitable actions or remedies, including but not limited to injunction and specific performance, necessary or permitted by law to enforce this Agreement.

G. Severability. Should any part, term or provision of this Agreement be decided by any court of competent jurisdiction to be illegal or in conflict with any applicable law, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, or provisions of this Agreement shall not be affected thereby and to that end the parts, terms and provisions of this Agreement are severable.

H. Successors. This Agreement shall be binding upon and shall inure to the benefit of the successors of the Parties. The Parties may not assign any right or obligation hereunder without the written consent of the other Parties to this Agreement.

I. New Parties. Upon unanimous approval by the Board and by their governing bodies, additional public agencies may become parties to this Agreement.

J. Execution in Counterparts. This Agreement may be executed on behalf of the respective Parties in one or more counterparts, all of which collectively shall constitute one document and agreement.

K. Effective Date. This Agreement shall take effect upon its execution on behalf of the later of the Parties to do so.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed and attested by their proper officers thereunto duly authorized, on the day and year set opposite the name of each of the Parties.

CITY OF OXNARD

By: _____
Dr. Manuel M. Lopez
Mayor

Dated: _____, 2002

ATTEST:

Daniel Martinez
City Clerk

APPROVED AS TO FORM:

Gary Gillig
City Attorney

UNITED WATER CONSERVATION DISTRICT

By: _____
President

Dated: _____, 2002

ATTEST:

Secretary