

Office of the President

TO MEMBERS OF THE COMMITTEE ON FINANCE:¹

ACTION ITEM

For Meeting of May 16, 2012

AUTHORITY TO INDEMNIFY MERCED IRRIGATION DISTRICT IN CERTAIN LIMITED AGREEMENTS, MERCED CAMPUS

EXECUTIVE SUMMARY

This action would authorize the President to approve the execution of agreements including a third party indemnity provision in favor of the Merced Irrigation District (MID) that would allow the Merced campus to install improvements on Regents' property underlying the existing MID easements for the Fairfield and Le Grand irrigation canals, and the Papazian Powerplant facilities.

MID requires an indemnity provision in its favor that includes liability for acts of third parties in any agreement authorizing construction activity or the installation of improvements within MID's easements, which provision requires approval by the Regents under Standing Order 100.4 (dd) (9).

The construction and encroachment agreements with MID are needed to facilitate development of the Merced campus. Any additional risk is manageable by the University in the construction and operation of the improvements for which the indemnity is provided.

RECOMMENDATION

The President recommends that the Committee on Finance recommend to the Regents that:

- A. The President be authorized to approve the execution of agreements with the Merced Irrigation District (MID) that would allow the Merced campus to install and maintain improvements on Regents' property on and over MID's easements for the Fairfield and Le Grand irrigation canals, and the Papazian Powerplant facilities, that include an agreement to defend, indemnify and hold harmless MID, its officers, agents, and employees for any injury, damages, or claims arising out of the performance of the agreement and the University's use and enjoyment of the University's improvements.

¹ Of interest to the Committee on Grounds and Buildings

- B. The President, or his designee, after consultation with General Counsel, be authorized to approve and execute any documents necessary in connection with the above.

BACKGROUND

The Merced Irrigation District (MID) is a special district operated pursuant to California Water Code Sections 20500 et seq. MID operates a series of irrigation canals throughout the County of Merced to provide water to agricultural users. Two of these canals, the Fairfield Canal and the Le Grand Canal, traverse the Merced campus site, including the portion of the site where the first phase of the campus has been developed (see Attachment A). MID also operates a small hydroelectric facility, the Papazian Powerplant, along with an associated water conveyance facility, on the Merced campus site. The irrigation canals are unlined and bounded by natural banks and earthen berms. Although the water flow through the canals is not constant and the canals are often virtually dry, when MID releases water from its reservoirs for delivery to its users, the flow in the canals can be very heavy, which, along with the water temperature, poses a hazard to anyone entering the canals, either intentionally or as the result of an accident.

The MID facilities on the Merced campus are located within easements held by MID extending 75 feet on either side of the mid-point of the canals and in the immediate vicinity of the Papazian Powerplant facilities. The easements predate the University's acquisition of the Merced campus site. As the easement holder and the owner of the canals and powerplant facilities, MID generally bears the legal liability to third parties for any injury or damage caused by the canals and facilities, regardless of the fact that they are located on the University's property. A Joint Use Agreement executed by the Regents and MID in 2003 provides mutual indemnity to each party limited in proportion to the other party's negligence or intentional acts.

The Merced campus has been designed to avoid any major encroachment into MID's easements; however, in order to continue to build out the campus, it will be necessary to install certain improvements on and over the easements, including roads, bridges, pedestrian paths, handrails, lighting, fencing, landscaping, including associated irrigation infrastructure, utilities, conduits, fire hydrants, and drainage facilities. On occasion, the University needs to conduct minor grading on the easements to accommodate structures on adjacent property of the University or use the easements' land for construction laydown and similar activities. In particular, the constrained size of the Phase 1 campus site has resulted in the need to encroach on the easements in several areas of the existing campus.

Pursuant to the Joint Use Agreement, the University is required to obtain authorization from MID prior to any construction work or the installation of any improvements on the easements. The campus currently is negotiating with MID for authorization to install improvements associated with the Science and Engineering 2 Building and to conduct minor grading in connection with the Recreation Center North project. The campus anticipates that it will need authorization for minor encroachments in connection with additional construction projects in the next year, and will need additional authorizations over time as the campus is built out. Most of the improvements encroaching upon the easements will be limited in scope; however, they are nonetheless essential for the development of the campus and the campus must obtain authorization from MID in order to proceed.

MID proposes to authorize the activities and improvements in the form of construction and encroachment agreements executed pursuant to the overall Joint Use Agreement. Although the Joint Use Agreement contains a mutual indemnification provision for general activities associated with the operation of the campus and the canals and associated facilities (e.g., landscaping, vehicle access, canal maintenance), MID takes the position that any specific authorization to conduct construction activities or install University improvements on MID's easements must include an indemnification provision in favor of MID for any damages or claims arising out of activities authorized under the agreements and the University's use of any improvements within MID's easements.

Accordingly, each construction or encroachment agreement executed by the parties would contain specific provisions related to the proposed University activity or improvement and a standard third party indemnification provision. With the Regents' authorization requested here, to allow the construction or encroachment agreements to include an indemnity to MID, the President will be able to approve and execute the agreements that are otherwise in his authority. If, in the future, the campus expansion proposed construction of a major bridge or some other project exceeding the President's delegated authority, the President would seek the approval of the Regents. For that reason, the campus has requested that the President be authorized to approve agreements otherwise within his authority but containing a standard third party indemnification provision. This would minimize the need to seek the Regents' approval for routine agreements and expedite authorization of construction activities and needed improvements involving MID.

MID and the University have proposed that agreements authorizing the University to conduct construction activities or install improvements on MID's easements include an indemnification provision that would read substantially as follows:

The University agrees to indemnify and hold harmless MID and its officers, agents, and employees from all damages, claims, causes of action, demands, liability, costs and expenses, including any award of attorneys' fees and/or costs, arising out of activities authorized under this Agreement and the University's use and enjoyment of the University's Improvements, and the University further agrees that it shall defend MID at the University's sole expense in any action or proceeding brought against MID on any such claim, demand or cause of action.

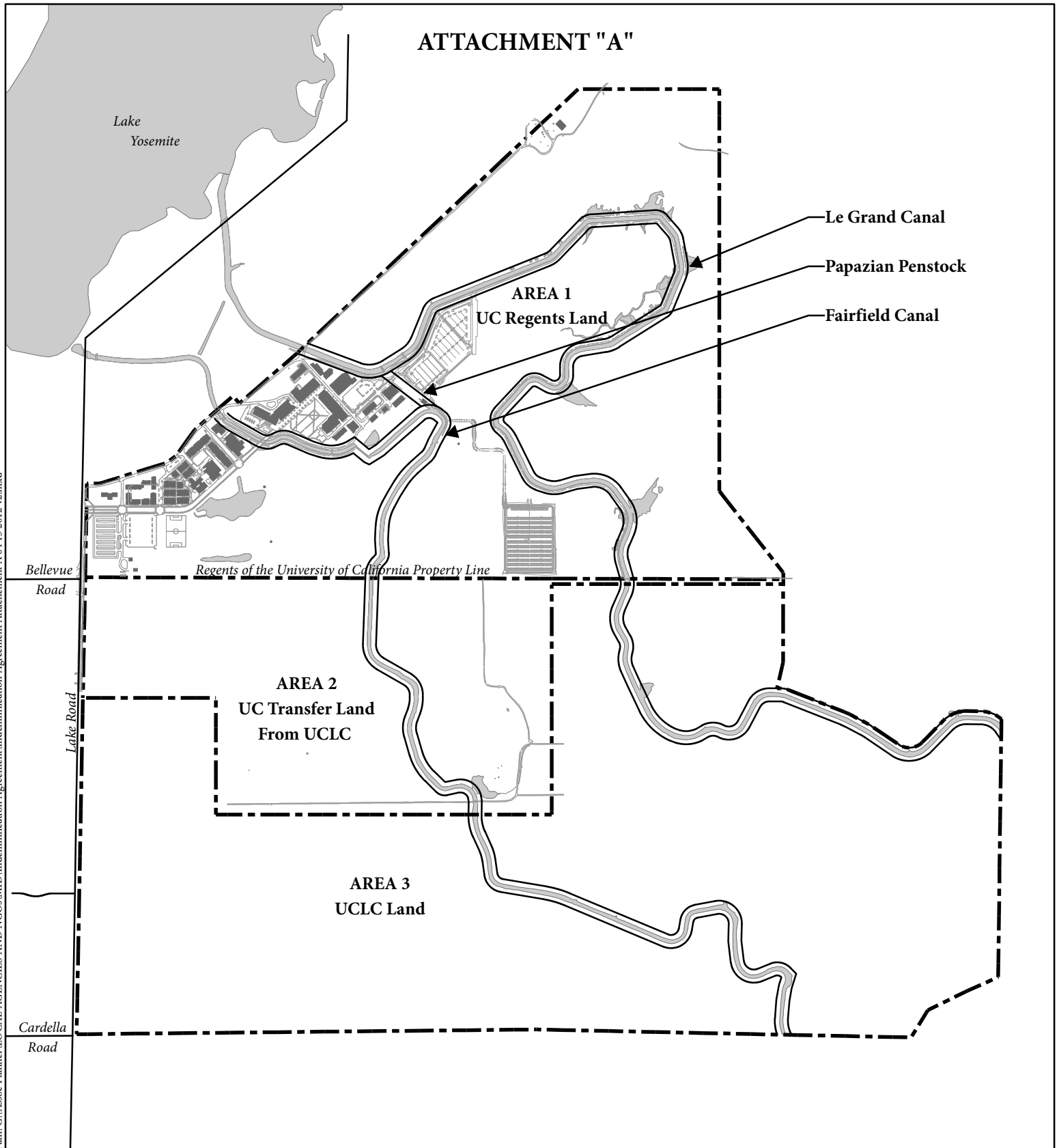
Although the proposed indemnification could expose the University to some increased liability and defense costs, given the limited nature of most of the improvements and the finite duration of these construction activities, the level of risk is manageable. Most of the anticipated improvements (for example, utilities and drainage facilities) will not result in any increase in the number of individuals, other than construction and facilities personnel, entering the easement areas. Any risks associated with construction activities will be largely mitigated by the general contractor's indemnification of the University and good project oversight by the campus. With respect to larger improvements, such as a bridge or pedestrian path, it will be incumbent on the campus to design and maintain the improvements to minimize any risk to the individuals using them. Such measures could include handrails, protective landscaping and signage. Every

improvement project will be reviewed by the University to ensure that adequate risk reduction measures have been incorporated into project design.

Moreover, in May 2007, the Regents authorized the President to execute agreements with similar indemnification language in land access agreements in furtherance of research, training or public service (*Approval of Indemnification Terms in Certain Limited Agreements in Support of Research*). The nature of the proposed agreements with MID is more permanent than the transitory nature of the land access agreements contemplated in the 2007 item.

(Attachment)

ATTACHMENT "A"



Merced Irrigation District Canal Easement Location Map

UNIVERSITY OF CALIFORNIA, MERCED OFFICE OF PHYSICAL PLANNING DESIGN & CONSTRUCTION

Date: 4/13/2012

Source: University of California, Physical Planning Design & Construction, Digitized Planning Area Boundary, and GIS Program, April, 2012; General Purpose Approximation Map; For illustration only; User to verify all information; Not to be used as a substitute for a legal land survey



SCALE 1" = 1,500'

0 375 750 1,500 Feet