

**KERN WATER BANK NATURAL COMMUNITY CONSERVATION PLAN /  
HABITAT CONSERVATION PLAN  
IMPLEMENTATION AGREEMENT**

**By And Among**

**THE UNITED STATES FISH AND WILDLIFE SERVICE  
("Service"),**

**THE CALIFORNIA DEPARTMENT OF FISH AND GAME  
("Department")**

**and**

**KERN WATER BANK AUTHORITY  
("KWBA")**

**October 2, 1997**

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## **List of Exhibits**

- Exhibit A      Map of Kern Water Bank
- Exhibit B      Agreement Regarding Assumption of Mitigation Responsibility  
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- Exhibit C      Kern Water Bank Conservation Bank Agreement
- Exhibit D      Legal Description of DWR Mitigation Parcel
- Exhibit E      Legal Description of KWBA Mitigation Parcel
- Exhibit F      Kern Water Bank Natural Community Conservation Plan / Habitat  
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- Exhibit G      Security Agreement
- Exhibit H      Minimization Of Impacts Management Requirements
- Exhibit I      Substitution of Trustee and Full Reconveyance (640-acre parcel)
- Exhibit J      Form of KWBA Mitigation Parcel Conservation Easement
- Exhibit K      Other Covered Species
- Exhibit L      Viability Fund Disbursement Request
- Exhibit M      Form of DWR Mitigation Parcel Conservation Easement
- Exhibit N      Form of Environmental Indemnity
- Exhibit O      Form of Memorandum of Habitat Conservation Plan
- Exhibit P      List of 2835 Species

**KERN WATER BANK NATURAL COMMUNITY CONSERVATION PLAN /  
HABITAT CONSERVATION PLAN  
IMPLEMENTATION AGREEMENT**

This AGREEMENT REGARDING THE IMPLEMENTATION OF THE KERN WATER BANK NATURAL COMMUNITY CONSERVATION PLAN / HABITAT CONSERVATION PLAN (“Agreement”) is entered into as of the last date subscribed below (the “Effective Date”) by and among the UNITED STATES FISH AND WILDLIFE SERVICE (“Service”), the CALIFORNIA DEPARTMENT OF FISH AND GAME (“Department”), and the KERN WATER BANK AUTHORITY (“KWBA”). These entities may be referred to collectively as “Parties” and each individually as a “Party.” The Department and the Service may be referred to collectively as the “Resource Agencies,” and each as a “Resource Agency.”

**Recitals**

A. KWBA is a joint powers authority formed pursuant to California Government Code section 6500 et seq. that owns approximately 19,900 acres in the County of Kern, California, a map of which is attached hereto as **Exhibit A** (the “Kern Water Bank”).

B. Under the California Endangered Species Act (“CESA”) and other State law, the Department has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. The Department is also the

manager and trustee of fish and wildlife resources and their habitat pursuant to California Fish and Game Code section 1802.

C. The Service has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants, and habitat to the extent set forth in the federal Endangered Species Act of 1973 (“FESA”), the Fish and Wildlife Coordination Act (16 U.S.C. section 661 et seq.), the Fish and Wildlife Act of 1956 (16 U.S.C. section 742a et seq.), and other federal laws.

D. On December 1, 1994, the water contractors of the State of California and others entered into the Monterey Principles, a mediated agreement to change a number of provisions of the contract governing the administration of the State of California water project (“State Water Project”). Pursuant to the Monterey Principles, the California Department of Water Resources (“DWR”) sold the Kern Water Bank to the Kern County Water Agency (“KCWA”) on August 9, 1996, in exchange for 45,000 acre feet of State Water Project entitlement. KCWA subsequently transferred the Kern Water Bank to KWBA.

E. Substantially concurrently with the sale of the Kern Water Bank by DWR to KCWA, KWBA and the Department entered into the Agreement Regarding Assumption of Mitigation Responsibility and Consent To Transfer Of Kern Water Bank Lands (the “Assumption Agreement”; a copy of which is attached as **Exhibit B**). DWR had previously committed itself to engage in certain environmental mitigation and compensation activities on a 530-acre parcel of land within the Kern Water Bank (the “DWR Mitigation Parcel”), and certain other obligations concerning the relocation of blunt-nosed leopard lizards, as more fully set forth in the documents listed in Exhibit “B”



to the Assumption Agreement (the “Mitigation Documents”). Pursuant to the Assumption Agreement, KWBA agreed, and the Department consented, to assume the obligations of DWR set forth in the Mitigation Documents. The Assumption Agreement expires according to its terms upon the execution of this Agreement. KWBA is agreeing, and the Department and the Service are consenting, to continue to perform the obligations and mitigation commitments of DWR transferred to KWBA under the Assumption Agreement in perpetuity or until such time as such obligations and commitments are assumed by an entity approved by the Resource Agencies. In conjunction with the execution of the Assumption Agreement, KWBA provided an executed grant of conservation easement on the DWR Mitigation Parcel to the Department. This grant of conservation easement was never recorded. Concurrently herewith, KWBA will provide to the Department a new grant of conservation easement on the DWR Mitigation Parcel.

F. KWBA is using and intends to use the Kern Water Bank to acquire and bank water when available, to utilize the banked water for agricultural and other purposes, to engage in farming activities and to create a conservation bank (collectively, the “Project”). In order to maximize the usefulness of the Kern Water Bank lands as a water bank, KWBA has constructed and will construct additional water delivery, recharge and extraction facilities, including the rehabilitation and construction of canals, the construction of recharge basins, and the construction and rehabilitation of water wells, pipelines and related infrastructure. KWBA will return some of the Kern Water Bank to its historic intermittent rangeland/wetland habitat, and may conduct agricultural operations on approximately 3,170 acres of the Kern Water Bank as described in greater detail in this Agreement.

G. The Project may result in the Take of Covered Species and/or the modification of the Covered Habitat. However, the Project is anticipated to result in an increase of habitat for the Covered Species compared to the conditions existing prior to the date the Kern Water Bank lands were acquired by the DWR. The Department and the Service agree that the Project, as implemented and described in this Agreement and the natural community conservation plan / habitat conservation plan for the Kern Water Bank, will adequately mitigate the effects of the Project on Covered Species and their habitat.

H. KWBA has prepared a natural community conservation plan / habitat conservation plan for the Kern Water Bank (the "KWB HCP") to permit KWBA to accomplish its water banking, water conservation, agricultural, conservation bank, and environmental objectives. The KWB HCP is based on three principles: (1) the Project is self-mitigating; (2) the areas surrounding the recharge basins will be managed as provided in this Agreement to provide habitat for Covered Species; and (3) adaptive management techniques will be used for operations and habitat management.

I. The KWB HCP also describes a program of KWBA to establish a portion of the Kern Water Bank as a multiple species conservation bank (the "KWB Conservation Bank"), and to permit KWBA to use the conservation credits relating to the KWB Conservation Bank for KWBA's own benefit or to sell the conservation credits to qualified third parties. Concurrently with this Agreement, the Parties are entering into the Kern Water Bank Conservation Bank Agreement (the "Conservation Bank Agreement") which establishes the process whereby qualified third parties may acquire conservation

credits and incidental take authority for the projects of such third parties. This Agreement describes the mechanism for the implementation of the KWB HCP.

J. The policy of the United States Department of Interior on unlisted species and unforeseen circumstances has been articulated by the Office of the Solicitor, as follows:

"The issuance of 'incidental take' permits which allow the taking of species listed under the federal FESA incidental to, and not the purpose of, otherwise lawful activities, is expressly authorized under Section 10(a)(1)(B) of the Act. 16 U.S.C. 1539(a)(1)(B). While the language of Section 10(a)(1)(B) does not explicitly address unlisted species, the legislative history of the section clearly indicates that Congress contemplated that the Service would approve habitat conservation plans that protect unlisted species as if they were listed under the Act and provide Section 10(a)(1)(B) assurances for those unlisted species. The following excerpt from the House Report on the amendment of the Act creating the incidental take permit authority evidences that intent:

'The Secretary [of the Interior] . . . may approve commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be

adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act.' (H.R. Rep. 97-835, 97 Cong., 2nd Sess. 30-31 (1982).)

The Fish and Wildlife Service has routinely approved HCPs that cover both listed and unlisted species."

(Memorandum dated December 8, 1994 from Lynn Cox, Office of the Solicitor, Pacific Southwest Region, U.S. Department of the Interior.)

K. The Service has entered into this Agreement pursuant to FESA, the United States Fish and Wildlife Coordination Act (16 U.S.C. §§ 661-666c), and the Fish and Wildlife Act of 1956 (16 U.S.C. 742a et seq.). In connection with the enactment of section 10(a)(1)(B) of FESA (16 U.S.C. § 1539(a)(1)(B)), the United States Congress expressed its legislative intent that the Service cooperate in the development of conservation plans that protect both listed and unlisted species over the long term, while providing assurances regarding the limits of any mitigation required, stating that:

### Application to Unlisted Species

“Although the conservation plan is keyed to the permit provisions of the Act which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species.”

### Public Private Partnerships

“To the maximum extent possible, the Secretary should utilize this authority under this provision to encourage creative partnerships between the public and private sectors . . . .”

### Long-Term Assurance Provided by and for the Habitat

#### Conservation Plan Proponent

“The Secretary, in determining whether to issue a long-term permit to carry out a conservation plan should consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem.” . . . “Permits of 30 or more years duration may be appropriate in order to provide adequate assurances to the private sector to commit to long-term funding for conservation activities or long-term commitments to restrictions on the use of land.”

Reciprocal Assurances to be Provided by the Service

“The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species . . . .” (H.R. Rep. No. 97-835, 97th Cong., 2d Sess. 30 (1982).)

L. The Department has entered into this Agreement pursuant to CESA and the Natural Community Conservation Planning Act of 1991 (“NCCP Act”), including California Fish & Game Code sections 2081 and 2835.

M. The purpose of natural community conservation efforts under the NCCP Act is to provide for regional protection and perpetuation of natural wildlife diversity while allowing compatible and appropriate land uses. The NCCP Act intends that these goals be achieved through the development and implementation of Natural Community Conservation Plans. These plans are designed to provide an alternative to current single species conservation efforts by formulating regional, natural community based habitat protection programs to protect the numerous species inhabiting the targeted natural communities. The Parties believe that the shift in focus from single species to natural communities will enhance the effectiveness of ongoing species preservation efforts and facilitate economic uses of the Kern Water Bank.

N. The KWB HCP creates a sub-regional planning and management system designed to protect the Covered Habitat and Covered Species. The KWB HCP is intended to avoid, minimize and mitigate for alterations to Covered Habitat, so that the Permitted Uses will not appreciably reduce the likelihood of the survival and recovery of

the Covered Species. The KWB HCP includes preservation and management mitigation measures to further the long-term survival of the Covered Species, and to allow land within the KWB HCP to be used consistently with the requirements of FESA, CESA and the NCCP Act.

### **Agreement**

For good and valuable consideration, the receipt and adequacy of which are acknowledged, the Parties agree as follows:

#### **1. DEFINITIONS**

For the purposes of this Agreement, the following words and phrases shall have the following meanings:

“Adaptive Management” means a flexible approach to the long-term management of the fish, wildlife and habitat resources that is directed over time by the results of ongoing monitoring activities and development of biological and other information.

“Agreement” means this Agreement Regarding the Implementation of the Kern Water Bank Natural Community Conservation Plan / Habitat Conservation Plan, dated the Effective Date, by and among the Service, the Department, and KWBA.

“Annual Management Plan” means the annual management plan prepared by KWBA regarding the Kern Water Bank pursuant to the KWB HCP and section 3.4.5 of this Agreement.

“Annual Report” means the annual report prepared by KWBA regarding the Kern Water Bank pursuant to the KWB HCP and section 3.4.4 of this Agreement.

“Assumption Agreement” shall have the meaning set forth in Recital E of this Agreement.

"CEQA" means the California Environmental Quality Act, California Public Resources Code section 21000 et seq.

"CESA" means the California Endangered Species Act, California Fish and Game Code section 2050 et seq.

“Conservation Bank Agreement” shall have the meaning set forth in Recital I of this Agreement. The form of Conservation Bank Agreement is attached as **Exhibit C**.

“Covered Habitat” means habitat of one or more Covered Species and includes valley sink scrub, saltbush scrub, fallow agricultural land, non-native grassland and those wetlands habitats, including, but not limited to, intermittent wetlands, wetlands, riparian areas, waters of the United States and other waters, that may be established or restored pursuant to the implementation of the Project.

"Covered Species " means (1) the following taxa that are known or expected to occur within the Kern Water Bank:

**Mammals Listed under FESA and/or CESA**

Giant kangaroo rat (*Dipodomys ingens*)

San Joaquin antelope squirrel (*Ammospermophilus nelsoni*)

San Joaquin kit fox (*Vulpes macrotis mutica*)

Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*)

**Reptiles Listed under FESA and/or CESA**

Blunt-nosed leopard lizard (*Gambelia (= Crotaphytus) silus*)



Giant garter snake (*Thamnophis gigas*)

**Birds Listed under FESA and/or CESA**

Aleutian Canada goose (*Branta canadensis leucopareia*)

American peregrine falcon (*Falco peregrinus anatum*)

Greater sandhill crane (*Grus canadensis tubida*)

Swainson's hawk (*Buteo swainsoni*)

White-tailed kite (*Elanus caeruleus*)

Southwestern willow flycatcher (*Empidonax traillii extimus*)

California condor (*Cymnogyphus californicus*)

Least Bell's vireo (*vireo bellii pusillum*)

Bald eagle (*Haliaeetus leucocephalus*)

**Invertebrates Listed under FESA and/or CESA**

Conservancy fairy shrimp (*Branchinecta conservatio*)

Longhorn fairy shrimp (*Branchinecta longiantenna*)

Valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*)

Vernal pool fairy shrimp (*Branchinecta lynchi*)

Vernal pool tadpole shrimp (*Lepidurus packardii*)

**Amphibians Listed under FESA and/or CESA**

California red-legged frog (*Rana aurora draytonii*)

**Plants Listed under FESA and/or CESA**

Bakersfield cactus (*Opuntia basilaris* var. *treleasei*)

Bakersfield saltbush (*Atriplex tularensis*)

California jewelflower (*Caulanthus californicus*)

Hoover's woolly-star (*Eriastrum hooveri*)

Kern mallow (*Eremalche kernensis* (= *E. parryi* ssp. *k.*))

San Joaquin woolly-threads (*Lembertia congdonii*)

**Other Mammal Species of Concern**

American badger (*Taxidea tasus*)

Buena Vista Lake shrew (*Sorex ornatus relictus*)

Greater western mastiff bat (*Eumops perotis californicus*)

Pacific western big-eared bat (*Plecotus townsendii*)

**Other Reptile Species of Concern**

Western pond turtle (*Clemmys marmorata marmorata* (= *C. m. pallida*))

**Other Bird Species of Concern**

Burrowing owl (*Athene cunicularia*)

Ferruginous hawk (*Buteo regalis*)

Le Conte's thrasher (*Toxostoma lecontei*)

Loggerhead shrike (*Lanius ludovicianus*)

Mountain plover (*Charadrius montanus*)

Tricolored blackbird (*Agelaius tricolor*)

White-faced ibis (*Plegadis chihi*)

Western snowy plover (*Charadrius alexandrinus nivosus*)

**Other Amphibian Species of Concern**

Western spadefoot toad (*Scaphiopus hammondi*)

**Other Plant Species of Concern**

Alkali mariposa lily (*Calochortus striatus*)

Comanche Point layia (*Layia leucopappa*)

Heart-leaved saltbush (*Atriplex cordulata*)

Hispid bird's-beak (*Cordylanthus mollis* ssp. *hispidus*)

Kern tarplant (*Hemizonia pallidus*)

Lesser saltbush (*Atriplex miniscula*)

Lost Hills saltbush (*Atriplex vallicola*)

Recurved larkspur (*Delphinium recurvatum*)

Slough thistle (*Cirsium crassicaule*)

Striped adobe lily (*Fritallaria striata*); and

(2) other taxa listed on **Exhibit K** hereto which are known or expected to occur in the Kern Water Bank in the intermittent wetlands, wetlands, riparian areas, waters of the United States, and other waters on the Kern Water Bank, or uplands, which may be created or become established as a result of the Project.

“Critical Habitat” shall have the meaning given to that term pursuant to Section 3 of FESA, 16 U.S.C. § 1532(5).

“Department” means the California Department of Fish and Game.

“DWR” means the California Department of Water Resources.

“DWR Mitigation Parcel” shall have the meaning set forth in recital E of this Agreement.

“DWR Mitigation Parcel Conservation Easement” shall have the meaning set forth in section 3.4.3 of this Agreement.

“Effective Date” shall have the meaning set forth in the Introductory Paragraph of this Agreement.

"Environmental Laws" includes all federal and state laws governing or regulating the impact of development activities on land, water or biological resources as they relate to Covered Species or Covered Habitat, including but not limited to CESA, FESA, CEQA, NEPA, the Fish and Wildlife Coordination Act, 16 U.S.C. section 661 et seq., the Fish and Wildlife Act of 1956, 16 U.S.C. section 742a et seq., California Fish and Game Code section 1802, and the Natural Community Conservation Planning Act, California Fish and Game Code section 2800 et seq., and includes any regulations promulgated pursuant to such Environmental Laws.

“Environmental Indemnity” shall mean the Environmental Indemnity Agreement, the form of which is attached as **Exhibit N**.

“Extraordinary Circumstances” shall have the meaning set forth in Section 5.1.6(b) of this Agreement.

“Federal Listed Species” means, at any time, those Covered Species listed as a threatened species or endangered species pursuant to FESA.

"FESA" means the federal Endangered Species Act of 1973, 16 U.S.C. section 1531 et seq.

“Fully-Protected Species” means (a) the following species:

Blunt-nosed leopard lizard (*Gambelia* (= *Crotaphytus*) *silus*)

American peregrine falcon (*Falco peregrinus anatum*)

Greater sandhill crane (*Grus canadensis tabida*)

White-tailed kite (*Elanus leucurus*)

and (b) any taxa added to the lists of species found at California Fish & Game Code sections 3511, 4700, 5050 and 5515, or any successor statutes, which are Covered Species.

“Incidental Take” means the Take of a taxa which is incidental to an otherwise lawful activity.

“Included Party” means a qualified third party which has obtained the authority to engage in the Incidental Take of Covered Species pursuant to the Conservation Bank Agreement, the Section 10(a) Permit and the Section 2081/2835 Management Authorization.

“KCWA” means the Kern County Water Agency.

“KCWA CESA MOU” shall have the meaning set forth in section 3.3.4 of this Agreement.

“Kern Water Bank” shall have the meaning set forth in Recital A of this Agreement.

“KWBA” means Kern Water Bank Authority, a California joint powers authority.

“KWBA Mitigation Parcel” shall have the meaning set forth in section 3.4.3 of this Agreement.

“KWB Conservation Bank” means the Kern Water Bank Conservation Bank, established pursuant to the Conservation Bank Agreement attached hereto as **Exhibit C**.

“KWB HCP” means the Kern Water Bank Natural Community Conservation Plan / Habitat Conservation Plan attached hereto as **Exhibit F**.

“Memorandum of Habitat Conservation Plan” shall mean that certain Memorandum of Habitat Conservation Plan, the form of which is attached hereto as **Exhibit O**.

“Mitigation Documents” shall have the meaning set forth in Recital E of this Agreement.

“NCCP Act” means the Natural Community Conservation Planning Act of 1991, California Fish and Game Code section 2800 et seq.

“NEPA” means the National Environmental Policy Act, 42 U.S.C. section 4321 et seq.

“Ongoing Management Deed of Trust” shall have the meaning set forth in Section 3.4.1 of this Agreement.

“Ongoing Management Note” shall have the meaning set forth in Section 3.4.1 of this Agreement.

“Party” shall have the meaning set forth in the Introductory Paragraph of this Agreement.

“Permanent Management Deed of Trust” shall have the meaning set forth in Section 3.4.1 of this Agreement.

“Permanent Management Note” shall have the meaning set forth in Section 3.4.1 of this Agreement.

“Permanent Management Plan” shall have the meaning set forth in Section 3.4.3 of this Agreement.

“Permitted Uses” means those activities specifically authorized by the KWB HCP and this Agreement to take place on the Kern Water Bank lands.

“Project” shall have the meaning set forth in Recital F of this Agreement.

“Recovery Plan” shall have the meaning given to that term pursuant to Section 4 of FESA, 16 U.S.C. § 1533(f).

“Required Management” shall have the meaning set forth in Section 4.1 of this Agreement.

“Resource Agency” and “Resource Agencies” shall have the meaning set forth in the Introductory Paragraph of this Agreement.

“Section 10(a) Permit” means, collectively, (a) the permit issued by the Service pursuant to section 10(a) of FESA (16 U.S.C. § 1539(a)) to permit Incidental Take of Covered Species which may occur as a result of the Permitted Uses on the Kern Water Bank and (b) the permit issued by the Service pursuant to section 10(a) of FESA (16 U.S.C. § 1539(a)) to permit Incidental Take of Covered Species by Included Parties in accordance with the Conservation Bank Agreement.

“Section 2081/2835 Management Authorization” means, collectively, (a) the management authorization issued by the Department to KWBA pursuant to sections 2081 and 2835 of the California Fish and Game Code, or any successor section, to permit Incidental Take of Covered Species which may occur as a result of Permitted Uses on the Kern Water Bank and (b) the management authorization issued by the Department to KWBA pursuant to sections 2081 and 2835 of the California Fish and Game Code, or any successor section, to permit Incidental Take of Covered Species by Included Parties in accordance with the Conservation Bank Agreement.

“Security Agreement” shall have the meaning set forth in Section 3.4.1 of this Agreement. The form of Security Agreement is attached as **Exhibit G**.

“Service” means the United States Fish and Wildlife Service.

“State Listed Species” means, at any time, those Covered Species which are listed as an endangered species, threatened species or a candidate species pursuant to CESA.

“State Water Project” shall have the meaning set forth in Recital D of this Agreement.

“Take” and “Taking” have the same meaning as provided in FESA with regard to activities subject to FESA, and have the same meaning as provided in California state law with regard to activities subject to CESA.

“Unforeseen Circumstances” shall have the meaning set forth in section 5.1.6 of this Agreement.

“Vegetation Management Plan” shall have the meaning set forth in Section 4.2.1(b) of this Agreement.

“Viability Fund” shall have the meaning set forth in Section 3.4.2 of this Agreement.

“2835 Species” shall mean those species listed on **Exhibit P** hereto.

## 2. **FINDINGS**

### 2.1. **Findings Made by the Service.**

Following an opportunity for public comment, the Service has found that:

(a) The Taking of Covered Species by KWBA in accordance with the KWB HCP, in connection with the Permitted Uses, will be incidental to the carrying out of an otherwise lawful activity. The Taking of Covered Species by Included Parties, in accordance with the Conservation Bank Agreement and the agreements to be entered into



by the Service and the Included Parties pursuant to the Conservation Bank Agreement, will be incidental to the carrying out of an otherwise lawful activity.

(b) The KWB HCP and this Agreement, to the maximum extent practicable, minimize and mitigate the impacts of the Incidental Taking of Covered Species contemplated by the KWB HCP and this Agreement.

(c) The funding sources identified and provided by KWBA and to be provided by Included Parties, if any, will ensure that adequate funding for the KWB HCP will be provided.

(d) This Agreement and the KWB HCP provide adequate procedures for addressing Unforeseen Circumstances.

(e) The Taking of Covered Species as contemplated by the KWB HCP and as provided for in this Agreement will not appreciably reduce the likelihood of the survival and/or recovery of Covered Species in the wild.

(f) All measures required by the Service as necessary or appropriate for purposes of the KWB HCP have been provided for in the KWB HCP as implemented by this Agreement.

(g) The Service has received such other assurances as it has deemed necessary to ensure that the KWB HCP and this Agreement will be implemented by KWBA and the Included Parties, if any.

(h) Although certain affirmative management obligations of KWBA with respect to the Kern Water Bank are limited to the term of this Agreement, the Service acknowledges that the permanent loss of up to 481 acres of land within the Kern Water Bank may occur as a result of the Permitted Uses.

(i) The Service has found that no further approvals and/or mitigation measures directed at impacts to Covered Species, except as expressly provided in this Agreement and the Conservation Bank Agreement, will be required for the protection of Covered Species pursuant to FESA or NEPA.

(j) The Service has considered the anticipated duration and geographic scope of the Permitted Uses as described in the KWB HCP and of the projects of Included Parties, and have considered the assurances to be provided by KWBA and Included Parties, if any, under this Agreement, and have determined that the foregoing findings and determinations are in accordance with FESA, and that the KWB HCP meets the standards set forth in 50 C.F.R. sections 17.22(b)(2) and 17.32(b)(2).

## **2.2. Findings Made by the Department.**

The Department has found and determined that the KWB HCP, as implemented by this Agreement, meets the requirements for a management authorization for the purposes of CESA and a NCCP Plan for purposes of the NCCP Act, and, in this regard, the Department finds and determines the following:

(a) The Taking of Covered Species and Covered Habitat as contemplated and addressed in the KWB HCP will not result in jeopardy to the continued existence of the Covered Species.

(b) All measures required by the Department as necessary or appropriate for purposes of the KWB HCP have been provided for in the KWB HCP as implemented by this Agreement.

(c) Although the affirmative management obligations of KWBA with respect to the Kern Water Bank are limited to the term of this Agreement, the Department acknowledges that the loss of up to 481 acres of land within the Kern Water Bank authorized in accordance with the KWB HCP and this Agreement may be permanent.

(d) No further approvals and/or mitigation measures directed at impacts to Covered Species and/or Covered Habitat caused by Permitted Uses or by the projects of Included Parties will be required by the Department pursuant to CESA, CEQA, the NCCP Act, or the Native Plant Protection Act, except as expressly provided in this Agreement and the Conservation Bank Agreement.

(e) Based on the avoidance and minimization efforts set forth in the KWB HCP and the procedures set forth herein, the Project will not cause the Take of any Fully-Protected Species.

### **3. OBLIGATIONS OF THE PARTIES**

#### **3.1. Obligations of All Parties For Closing.**

##### **3.1.1. KWBA.**

To effectuate the closing of the transaction documented by this Agreement (the “Closing”), KWBA shall execute the following documents:

- (a) this Agreement;
- (b) the Conservation Bank Agreement;
- (c) the KWBA Mitigation Parcel Conservation Easement;
- (d) the DWR Mitigation Parcel Conservation Easement;
- (e) the Security Agreement;

- (f) the Ongoing Management Note;
- (g) the Ongoing Management Deed of Trust;
- (h) the Permanent Management Note;
- (i) the Permanent Management Deed of Trust;
- (j) the Substitution of Trustee and Full Reconveyance;
- (k) the Environmental Indemnity;
- (l) the Memorandum of Habitat Conservation Plan, and
- (m) the side letter agreement re damages.

KWBA has, prior to Closing:

- (a) provided appraisals for the land securing the Ongoing Management Note and the Permanent Management Note;
- (b) provided a preliminary title report and a hazardous material survey, in form satisfactory to the Department, for the DWR Mitigation Parcel and KWBA Mitigation Parcel; and
- (c) provided to the Department a report regarding the compliance of the Conservation Bank with the State of California's Official Policy on Conservation Banking, published in 1995.

Following Closing, KWBA shall:

- (a) establish the Viability Fund, and deposit \$50,000 therein; and
- (b) record the Memorandum of Habitat Conservation Plan with the Kern County Recorder's Office.

### **3.1.2. The Service.**

To effectuate the Closing, the Service shall execute the following documents:

- (a) this Agreement;
- (b) the Conservation Bank Agreement;
- (c) the KWBA Mitigation Parcel Conservation Easement;
- (d) the DWR Mitigation Parcel Conservation Easement;
- (e) the Security Agreement;
- (f) the side letter agreement re damages, and
- (g) the Section 10(a) Permit.

### **3.1.3. The Department.**

To effectuate the Closing, the Department shall execute the following documents:

- (a) this Agreement;
- (b) the Conservation Bank Agreement;
- (c) the KWBA Mitigation Parcel Conservation Easement;
- (d) the DWR Mitigation Parcel Conservation Easement;
- (e) the Security Agreement;
- (f) the Ongoing Management Deed of Trust;
- (g) the Permanent Management Deed of Trust;
- (h) the Substitution of Trustee and Full Reconveyance;
- (i) the Environmental Indemnity; and
- (j) the Section 2081/2835 Management Authorization.

### **3.2. The Service.**

#### **3.2.1. Permits.**

Upon the Closing, the Service will issue to KWBA the Section 10(a) Permit. The Section 10(a) Permit is: (a) a permit issued pursuant to section 10(a) of FESA which will allow KWBA to engage in the Incidental Take of Covered Species which may occur as a result of the Permitted Uses on the Kern Water Bank; and (b) a permit issued pursuant to section 10(a) of FESA which will allow Included Parties, and in certain circumstances KWBA, to engage in the Incidental Take of Covered Species upon compliance with the Conservation Bank Agreement and the agreements between the Resource Agencies and the Included Parties, or KWBA as applicable, executed pursuant to the Conservation Bank Agreement. Due to the comprehensive list of Covered Species, the Section 10(a) Permit does not address the Take of Covered Habitat.

Incidental take of all Covered Species will be authorized pursuant to Fish and Game Code Section 2081. The take of 2835 Species will also be authorized pursuant to Fish and Game Code Section 2835. The 2835 Species are known to exist in and around the Kern Water Bank and local populations of the 2835 Species are expected to benefit directly from habitat preservation and enhancement activities under the KWB HCP. Management of the 2835 Species on the Kern Water Bank is expected to contribute to the regional conservation of the 2835 Species.

Other Covered Species may become a 2835 Species if sufficient species-specific information is developed that shows that such Covered Species will be conserved and managed within the Kern Water Bank. Additional 2835 Species may be proposed by any Party and may be included as a 2835 Species upon the Department's review and

approval. The determination that a Covered Species is a 2835 Species shall be considered a Minor Amendment to the KWB HCP.

**3.2.2. Monitoring and Oversight.**

Upon issuance of the Section 10(a) Permit, the Service shall monitor the implementation of the Section 10(a) Permit, this Agreement, the KWB HCP and KWBA's actions thereunder in order to insure compliance with this Agreement. Authorized agents and/or employees of the Service may conduct inspections at the Kern Water Bank at a reasonable hour upon reasonable notice to KWBA, in accordance with 50 C.F.R. section 13.21(e)(2).

**3.2.3. Review of Annual Reports and Annual Management Plans.**

The Service shall review each Annual Report and each Annual Management Plan. Within sixty (60) days of receipt by the Service of any Annual Report or Annual Management Plan, the Service shall either (1) give notice to KWBA that it has comments on the Annual Report or disputes with the Annual Management Plan; or (2) request a thirty (30) day extension to conclude its review of the Annual Report or Annual Management Plan. Failure by the Service to give notice of comment or dispute within the 60-day or 90-day period, as applicable, shall be deemed to constitute the approval by the Service of the related Annual Report or Annual Management Plan. Notice of the above-described deadlines shall be provided in the Annual Report and Annual Management Plan.

Disputes involving the Annual Management Plan shall be resolved pursuant to Section 3.5.

### **3.3. The Department.**

#### **3.3.1. Permits.**

Upon the Closing, the Department will issue to KWBA the Section 2081/2835 Management Authorization. The Section 2081/2835 Management Authorization is made up of two authorizations issued pursuant to CESA and the NCCP Act: (a) an authorization which will allow KWBA to engage in the Incidental Take of Covered Species and Covered Habitat which may occur as a result of the Permitted Uses on the Kern Water Bank; and (b) an authorization which will allow Included Parties to engage in the Incidental Take of Covered Species and Covered Habitat upon compliance with the Conservation Bank Agreement and the agreements between the Resource Agencies and the Included Parties executed pursuant to the Conservation Bank Agreement.

#### **3.3.2. Monitoring and Oversight.**

Upon issuance of the Section 2081/2835 Management Authorization, the Department shall monitor the implementation of the Section 2081/2835 Management Authorization, this Agreement, the KWB HCP and KWBA's actions thereunder in order to insure compliance with this Agreement. The Department may conduct inspections at the Kern Water Bank at a reasonable hour upon reasonable notice to KWBA.

#### **3.3.3. Review of Annual Reports and Annual Management Plans.**

The Department shall review each Annual Report and Annual Management Plan. Within sixty (60) days of receipt by the Department of any Annual Report or Annual Management Plan, the Department shall either (1) give notice to KWBA that it has comments on the Annual Report or disputes with the Annual Management Plan; or (2)



request a thirty (30) day extension to conclude its review of the Annual Report or Annual Management Plan. Failure by the Department to give notice of comment or dispute within the 60-day or 90-day period, as applicable, shall be deemed to constitute the approval by the Department of the related Annual Report or Annual Management Plan. Notices of the above-described deadlines shall be provided in each Annual Report and Annual Management Plan.

Disputes involving the Annual Management Plan shall be resolved pursuant to Section 3.5.

**3.3.4. 640-Acre parcel deed of trust.**

The Department acknowledges that KWBA, as successor-in-interest to Kern County Water Agency (“KCWA”), has complied with the terms and conditions of the CESA Memorandum of Understanding Between KCWA and the Department Regarding Kern Water Bank, 1995 Interim Operation (Tracking No. 2881-1995-027-4) (“KCWA CESA MOU”). On that basis, concurrent with the execution of this Agreement, the Department shall execute a Substitution of Trustee and Full Reconveyance substantially in the form of **Exhibit I** for that certain approximately 640-acre parcel on which the Department was granted a deed of trust by Paramount Farming Company as security for KCWA’s obligations under the KCWA CESA MOU.

**3.4. KWBA.**

**3.4.1. Funding of the Management of the Kern Water Bank;**

**Security.**

During the term of this Agreement, KWBA shall be solely responsible for funding the Permitted Uses and the management of the Kern Water Bank Lands in accordance with this Agreement. KWBA has, and shall have, sufficient financial resources to, and hereby commits to, fund its obligations under the KWBA HCP.

KWBA shall, concurrently with its execution of this Agreement, (a) enter into that certain Security Agreement (the form of which is attached as Exhibit G) (the "Security Agreement") whereby KWBA shall issue to the Department (i) a note (the "Ongoing Management Note"), substantially in the form of Exhibit "1" to the Security Agreement, in the amount of \$200,000, secured by a deed of trust (the "Ongoing Management Deed of Trust"), substantially in the form of Exhibit "2" to the Security Agreement, as security for KWBA's performance of its obligations under this Agreement and (ii) a note (the "Permanent Management Note"), substantially in the form of Exhibit "3" to the Security Agreement, in the amount of \$300,000, secured by a deed of trust (the "Permanent Management Deed of Trust"), substantially in the form of Exhibit "4" to the Security Agreement, as security for the performance of KWBA's obligations in perpetuity pursuant to the Permanent Management Plan following the termination of the Section 10(a) Permit and the Section 2081/2835 Management Authorization, and (b) establish and fund the Kern Water Bank Authority Covered Species Viability Fund, pursuant to Section 3.3.2 of this Agreement.

The sole purpose of the Ongoing Management Note and Ongoing Management Deed of Trust is to create a mechanism whereby the Resource Agencies can obtain funds for Adaptive Management activities under the Annual Management Plans that KWBA will not perform. The existence of the Ongoing Management Note and Ongoing Management Deed of Trust does not in any way limit the authority of the Resource Agencies to revoke or suspend the Section 10(a) Permit and/or the Section 2081/2835 Management Authorization. However, the intent of the Parties is that the Resource Agencies may look to that security as a method of funding an Adaptive Management activity which KWBA will not agree to engage in, so that the Resource Agencies are not faced with the choice of either foregoing the desired activity or revoking and/or suspending the Section 10(a) Permit and the Section 2081/2835 Management Authorization.

Should the security mechanisms described in this section 3.4.1 become void such that the Resource Agencies cannot foreclose upon the Deeds of Trust, the Parties shall meet to discuss implementing equivalent security mechanisms and concurrently restoring KWBA's title to the Deed of Trust lands.

**3.4.2. Kern Water Bank Authority Covered Species Viability Fund.**

(a) Establishment of Kern Water Bank Authority Covered Species Viability Fund; Funding. Concurrently with the execution of this Agreement, KWBA shall establish an account, named the "Kern Water Bank Authority Covered Species Viability Fund" (the "Viability Fund"), with the Treasurer of the County of Kern. KWBA shall deposit the original principal amount of \$50,000 into the Viability Fund. On an annual

basis, KWBA shall deposit an amount into the Viability Fund such that on January 1, or the next succeeding business day, of any year the principal amount of the Fund shall be at least \$50,000; provided, however, that KWBA shall not be obligated to make any further deposits into the Viability Fund once KWBA has made deposits into the Viability Fund totaling \$75,000.

Any accrued interest in the Viability Fund shall be the property of KWBA. KWBA shall be entitled to withdraw the interest from the Viability Fund on a semi-annual basis.

Any amounts remaining in the Viability Fund upon the termination of this Agreement shall be the property of KWBA.

(b) Withdrawals from the Viability Fund. Within ten business days of receipt by KWBA of a complete Viability Fund Disbursement Request (a form of which is attached as **Exhibit L**) signed by an authorized representative of each Resource Agency, KWBA shall deliver funds in the amount requested to the person authorized by that Viability Fund Disbursement Request to receive such funds. Notwithstanding the foregoing, if the amount requested, together with all amounts previously disbursed from the Viability Fund pursuant to Viability Fund Disbursement Requests in that calendar year, will exceed \$10,000, then KWBA will deliver funds such that the total principal amount disbursed from the Viability Fund in that calendar year will equal \$10,000. In no event shall KWBA be obligated to disburse more than \$10,000 principal amount from the Viability Fund in any calendar year.

If the amount requested exceeds the existing principal amount in the Viability Fund, then KWBA shall disburse the remaining principal amount as requested, pay itself any accrued interest in the Viability Fund, and close the Viability Fund.

(c) Contents of the Viability Fund Disbursement Request. The purpose of the Viability Fund is to fund specific actions for the benefit of Covered Species located on the Kern Water Bank and to relieve KWBA of any responsibility, except as expressly provided in this Agreement and the Annual Management Plans, to sustain, promote and/or assure the long-term viability of the populations of Covered Species located on the Kern Water Bank. In order to request a disbursement from the Viability Fund, the Resource Agencies collectively must set forth in the Viability Fund Disbursement Request provided to KWBA the following:

(1) The best available scientific data which establishes that a concern exists regarding the viability of a population of a Covered Species located on the Kern Water Bank; and

(2) The plan of action and methodology of the Resource Agencies, supported by the best available scientific data, to address that concern.

Since the purpose of the Viability Fund is to protect the Covered Species found on the Kern Water Bank, the plan of action proposed by the Resource Agencies may not, without the express written consent of KWBA, include the introduction and/or re-establishment of individuals of the relevant Covered Species onto the Kern Water Bank from anywhere outside the Kern Water Bank.

(d) Audits. Each Resource Agency shall have the right, during normal business hours and following 10 business days' written notice to KWBA, to review and audit all books and records of KWBA pertaining to the Viability Fund.

**3.4.3. DWR Mitigation and KWBA Mitigation Parcels; Funding in Perpetuity; Management in Perpetuity.**

KWBA previously granted to the Department a conservation easement on a certain approximately 530-acre parcel more particularly described on **Exhibit D** hereto (the "DWR Mitigation Parcel"). This grant of conservation easement was never recorded. Concurrently herewith, KWBA shall provide (i) an executed grant of conservation easement (the "KWBA Mitigation Parcel Conservation Easement", the form of which is attached hereto as **Exhibit J**) to the Department on a certain approximately 635-acre parcel more particularly described on **Exhibit E** hereto (the "KWBA Mitigation Parcel"), (ii) an executed grant of conservation easement (the "DWR Mitigation Parcel Conservation Easement", the form of which is attached hereto as **Exhibit M**) to the Department on the DWR Mitigation Parcel, (iii) an Environmental Indemnity (in the form attached as **Exhibit N**) and (iv) a preliminary title report and hazardous material survey for the KWBA Mitigation Parcel and DWR Mitigation Parcel in a form satisfactory to the Department. KWBA is hereby assuming the obligation to fund the management of the DWR Mitigation Parcel and the KWBA Mitigation Parcel in perpetuity.

Commencing five years prior to the expiration of the Section 10(a) Permit and the Section 2081/2835 Management Authorization, KWBA shall prepare a management plan (the "Permanent Management Plan") outlining the manner in which KWBA shall manage

the land in the Kern Water Bank on which KWBA has granted a conservation easement to the Department, including but not limited to the DWR Mitigation Parcel, the KWBA Mitigation Parcel and that portion of the Conservation Bank that is protected by conservation easements. The Permanent Management Plan shall be prepared in light of the planned uses of the Kern Water Bank at that time but shall address KWBA's management obligations in perpetuity for the land in the Kern Water Bank covered by conservation easements. The Permanent Management Plan also shall govern the ability of KWBA to use the proceeds from the "Endowment Fund" (as such term is defined in the Conservation Bank Agreement) and the ability of the Resource Agencies to make demand on the Permanent Management Note and foreclose upon the Permanent Management Deed of Trust as described in the Security Agreement. The Resource Agencies shall approve the Permanent Management Plan, which approval shall not be unreasonably withheld, after having the opportunity for review and comment thereon.

#### **3.4.4. Annual Report.**

KWBA shall prepare an Annual Report by March 1 of each year that this Agreement is in effect for the preceding calendar year ending December 31, and submit the Annual Report to the Service and the Department. The Annual Report shall include the following:

- (a) a summary of all activities that have taken place on the Kern Water Bank in the previous year, including construction, operation and maintenance of water recharge and water extraction facilities;

- (b) a summary of all Take that has occurred within the previous year, including Take of Covered Species and Take of Covered Habitat;
- (c) a summary of all mitigation measures implemented in the previous year;
- (d) results of completed studies;
- (e) the status of ongoing studies;
- (f) results from the implementation of monitoring programs;
- (g) results from the implementation of avoidance and minimization measures;
- (h) a report regarding the status of the Viability Fund;
- (i) a copy of KWBA's annual financial report, or such other reasonably available financial information as mutually agreeable among the Parties evidencing KWBA's continued ability to fund its affirmative obligations under the KWB HCP and this Agreement; and
- (j) a certification from a responsible officer of KWBA which states: "Under penalty of law, I certify that, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, the information submitted is true, accurate and complete."

In an attachment to the first Annual Report, KWBA shall analyze the types of habitat, the approximate acreages of each type of habitat and the approximate distribution of each type of habitat within the Master Permit Credit Area. KWBA shall rely only on maps prepared by the California Energy Commission and maps and information to be provided by the Service in preparing the attachment.

The Parties may, upon mutual consent, agree to a different date for the submission of any Annual Report to the Resource Agencies.



### **3.4.5. Annual Management Plan.**

KWBA shall send to the Resource Agencies by May 1 of each year an Annual Management Plan for the Kern Water Bank for the operational year commencing the following July 1. The Annual Management Plan shall describe in detail the operational activities contemplated for the Kern Water Bank during the year, including construction, maintenance and repair of the infrastructure on the Kern Water Bank, and a detailed description of the Adaptive Management activities to be carried out.

The Parties may, upon mutual consent, agree to a different date for the submission of any Annual Management Plan to the Resource Agencies.

Unless the Parties agree otherwise, in April of each year, the Parties shall enter into informal consultation and briefing regarding the contents of that year's proposed Annual Management Plan. The Resource Agencies shall notify KWBA of any proposed recovery plan for any Covered Species which may impact the Kern Water Bank. KWBA shall consider in good faith all changes proposed by the Resource Agencies. For the first five years following the Effective Date, the Parties shall confer informally at least four times per year on the implementation of the applicable Annual Management Plan, and at least two times per year for the next five years thereafter.

KWBA shall provide updates of aerial photographs of the Kern Water Bank every five years, but only to the extent that photographs are reasonably and otherwise commercially available and that the available photographs have not been previously provided to the Resource Agencies.

### **3.4.6. Delta Water.**

KWBA will not seek changes to the operation of the State Water Project or the Central Valley Project which would necessitate a change in any biological opinion issued by the Service for such projects.

### **3.5. Dispute Resolution.**

The Parties recognize that disputes concerning the implementation of and compliance with the KWB HCP, the Section 10(a) Permit, the Section 2081/2835 Management Authorization, this Agreement and the Conservation Bank Agreement may arise from time to time. It is the intention of the Parties to use the alternative dispute resolution procedures set forth in this Section 3.5 and to work together in good faith to resolve all such issues. However, if at any time any Party determines that circumstances warrant, the Party may utilize any remedy provided in Section 7 of this Agreement without waiting to complete the dispute resolution process set forth in this Section 3.5. The Resource Agencies specifically reserve the right to use whatever enforcement powers and remedies that are available by law and regulation, including but not limited to suspension or revocation of the Section 10(a) Permit and the Section 2081/2835 Management Authorization.

#### **3.5.1. Mandatory Meet and Confer.**

Any Party (the "Notifying Party") having reason to believe that any other Party (the "Violating Party") has failed to meet its obligations under the Section 10(a) Permit, the Section 2081/2835 Management Authorization, the KWB HCP, this Agreement or the Conservation Bank Agreement must notify the Violating Party of the specific provisions

which may have been violated, the reasons why a violation has occurred, and any remedies the Notifying Party proposes to correct the alleged violation.

The Violating Party will then have sixty (60) days, or such other amount of time as may be mutually agreeable, to respond in writing to the issues raised by the Notifying Party.

**3.5.2. Dispute Resolution.**

If the issues raised by the Notifying Party are not resolved to the satisfaction of the Notifying Party within 30 days after the response of the Violating Party was due, the Parties will consider in good faith to engage in non-binding mediation or other alternative dispute resolution process.

**3.5.3. All Rights to Pursue Other Remedies Preserved.**

In the event that the Parties choose not to engage in a dispute resolution process or that the Parties are not satisfied with the results of the mediation, or that the Resource Agencies elect not to pursue the security created by the Security Agreement, the Parties may seek their remedies pursuant to Section 7 of this Agreement.

**3.5.4. Ongoing Management Note; Ongoing Management Deed of Trust.**

The Resource Agencies may, pursuant to the Security Agreement, make demand on the Ongoing Management Note, and may seek foreclosure on the Ongoing Deed of Trust, and following foreclosure may draw on the Excess Funds Management Account

(as such term is defined in the Security Agreement) only to fund an Adaptive Management activity that KWBA will not conduct, in the following manner:

Following receipt of a proposed Annual Management Plan, if either Resource Agency believes that an Adaptive Management activity needs to be added to that Annual Management Plan, the Resource Agency shall notify KWBA and the other Resource Agency within the time period set forth in Sections 3.2.3 and 3.3.3 of this Agreement of the existence of a dispute with the Annual Management Plan. KWBA shall thereafter meet and confer with the Resource Agencies collectively. If the Parties cannot agree on the Adaptive Management activities for the Annual Management Plan, the Resource Agencies may collectively invoke the procedures set forth in the Security Agreement to make demand on the Ongoing Management Note, and, if KWBA refuses to pay on demand, to foreclose on the Ongoing Management Deed of Trust. If the Ongoing Management Note has already been foreclosed, then the Resource Agencies may look only to the funds available in the Excess Funds Management Account or to its remedies under Article 7 of this Agreement; KWBA shall have no obligation to make further funds available once the Resource Agencies have foreclosed on the Ongoing Management Deed of Trust. Notwithstanding the foregoing, KWBA will remain obligated to fund the Permitted Uses and the management of the Kern Water Bank in accordance with Section 3.4.1 of this Agreement.

The Resource Agencies must act collectively; neither Resource Agency shall have the unilateral right to seek to make demand on the Ongoing Management Note, to seek to foreclose on the Ongoing Management Deed of Trust, or to withdraw funds from the Excess Funds Management Account.

#### **4. MANAGEMENT AND CONSERVATION OF THE KERN WATER BANK**

##### **4.1. Required and Adaptive Management.**

KWBA shall manage the Kern Water Bank primarily using Adaptive Management techniques as set forth on an annual basis in the Annual Management Plan, as more particularly described in the KWB HCP. Notwithstanding the foregoing, KWBA will minimize impacts to Covered Species and Covered Habitats during the term of this Agreement by requiring that its employees, agents, contractors and representatives comply with the Minimization Of Impacts Management Requirements set forth on **Exhibit H** (the "Required Management"). With the consent of all Parties, the Parties may re-examine the Required Management every five years. If all Parties mutually agree, the Parties may agree to modify the Required Management in light of the best scientific evidence available for the benefit of Covered Species.

##### **4.2. Permitted Uses.**

The Kern Water Bank is divided pursuant to the KWB HCP into six Sectors:

(1) Recharge Basins and Other Water Banking Facilities; (2) Compatible Habitat; (3) Sensitive Habitat; (4) Permanent Mitigation Land; (5) Farming; and (6) Conservation Bank Land. (See Map of Kern Water Bank attached as **Exhibit A.**) In each Sector, KWBA may engage in the Permitted Uses for that Sector as set forth in this Section 4.2 and/or the KWB HCP.

#### **4.2.1. Recharge Basins and Other Water Banking Facilities.**

The Recharge Basins and Other Water Banking Facilities Sector constitutes approximately 6,381 acres, as shown on **Exhibit A**. The Permitted Uses thereon are as follows:

(a) **Water Related Operations.** KWBA may install, construct, repair, maintain, and operate water recharge, water recovery, and water conveyance facilities, including, but not limited to, recharge basins, levees, water wells, pipelines, recharge canals, recovery canals, pumps, and appurtenant facilities such as storage buildings, fences and access roads. KWBA may line the recovery canals with concrete. KWBA may install, build, operate, repair and maintain a concrete-lined supply/recovery canal or canals within the area delineated for the supply/recovery canal project in the KWB HCP and shown on **Exhibit A**. KWBA will ensure that the access road system is adequate for emergency response and fire protection needs. KWBA may install, build, operate, repair and maintain a Kern River Reverse Flow Channel Project only within the Kern Water Bank. To the extent that KWBA desires to extend the Kern River Reverse Flow Channel Project beyond the borders of the Kern Water Bank, KWBA shall obtain all necessary permits, including those required under FESA and CESA, for such action.

(b) **Vegetation Management.** KWBA shall manage vegetation growth in the dry recovery basins and on the land between the recovery basins in accordance with Adaptive Management practices as directed by the KWB HCP Vegetation Management Plan, which is attached as Appendix C to the KWB HCP and incorporated herein by this reference (the "Vegetation Management Plan"). Under the Vegetation Management Plan, the primary methods of vegetation management are anticipated to be mowing, grazing

and burning. Herbicide use, tilling and by-hand removal will be secondary methods of vegetation management. As part of the Vegetation Management Plan, KWBA may also engage in, or authorize, public health control measures, including (1) mosquito abatement; (2) rodent control; (3) weed control and (4) enforcement of other health and safety laws.

(c) **Habitat Management.** KWBA shall use Adaptive Management practices to enhance the habitat quality of the wetlands and other waters created by the Water Related Operations in accordance with the Vegetation Management Plan.

(d) **Recreational/Educational Activities.** Subject to approval by the Resource Agencies and following a Minor Amendment to the KWB HCP pursuant to Section 6.2 of this Agreement, KWBA may allow third persons to engage in recreational and educational activities including (1) fishing; (2) hunting; (3) wildlife viewing; (4) bicycling; (5) hiking; (6) aquatic recreation, (7) equestrian recreation; and (8) scientific research. All invitees shall be responsible for obtaining any permits and/or licenses that may be required in order to engage in the desired activity.

#### **4.2.2. Compatible Habitat.**

The Compatible Habitat Sector consists of at least 5,592 acres of upland habitat between the recharge basins, as shown on **Exhibit A**. The Permitted Uses thereon are as follows:

(a) **Water Related Operations.** KWBA may install, construct, maintain, repair and operate access roads, pipelines, canals and related facilities as may be necessary to carry out the Water Related Operations Permitted Uses specified in Section 4.2.1(a).

(b) **Vegetation Management.** KWBA shall manage vegetation growth in accordance with Adaptive Management practices as directed by the Vegetation Management Plan, as specified in Section 4.2.1(b). The primary methods of vegetation management are anticipated to be mowing, grazing and burning. Herbicide use, tilling and by-hand removal will be secondary methods of vegetation management. As part of vegetation management, KWBA may also engage in, or authorize, public health control measures, including (1) mosquito abatement; (2) rodent control; (3) weed control and (4) enforcement of other health and safety laws.

(c) **Habitat Management.** KWBA shall use Adaptive Management practices to restore and enhance upland habitat for Covered Species, focusing on alkaline sink communities and desert grassland with characteristic shrub vegetation.

(d) **Recreational/Educational Activities.** Subject to approval by the Resource Agencies and following a Minor Amendment to the KWB HCP pursuant to Section 6.2 of this Agreement, KWBA may allow third persons to engage in recreational and educational activities including (1) fishing; (2) hunting; (3) wildlife viewing; (4) bicycling; (5) hiking; (6) aquatic recreation; and (7) scientific research. All invitees shall be responsible for obtaining any permits and/or licenses that may be required in order to engage in the desired activity.

#### **4.2.3. Sensitive Habitat.**

Three areas, comprising 960 acres, are designated as Sensitive Habitat, as shown on **Exhibit A**. The Permitted Uses thereon are as follows:



(a) **Vegetation Management.** KWBA shall maintain and enhance the habitat of Covered Species using Adaptive Management as provided in the Vegetation Management Plan.

(b) **Scientific/Educational Activities.** Subject to approval by the Resource Agencies and following a Minor Amendment to the KWB HCP pursuant to Section 6.2 of this Agreement, KWBA may allow third persons to engage in educational activities including (1) wildlife viewing; and (2) scientific research. All invitees shall be responsible for obtaining any permits and/or licenses that may be required in order to engage in the desired activity.

#### **4.2.4. Permanent Mitigation Land.**

The Permanent Mitigation Land is comprised of the DWR Mitigation Parcel (530 acres) and the KWBA Mitigation Parcel (635 acres, made up of 146 acres of Recharge Basins and Other Water Banking Facilities Sector land and 489 acres of Compatible Habitat Sector land). The Permitted Uses thereon are as follows:

(a) **KWBA Mitigation Parcel.** During the existence of the Section 10(a) Permit and the Section 2081/2835 Management Authorization, the Permitted Uses for the KWBA Mitigation Parcel are the same as all the Permitted Uses set forth in Section 4.2.1, except that KWBA will not construct any buildings on the KWBA Mitigation Parcel. The only structures to be constructed on the KWBA Mitigation Parcel are pump sheds. KWBA may install, build, operate, repair and maintain a Kern River Reverse Flow Channel within the KWBA Mitigation Parcel. Following the termination of the Section 10(a) Permit and the Section 2081/2835 Management Authorization, KWBA shall

manage the KWBA Mitigation Parcel as set forth in the KWBA Mitigation Parcel Conservation Easement, the form of which is attached as **Exhibit J**.

(b) DWR Mitigation Parcel. During the existence of the Section 10(a) Permit and the Section 2081/2835 Management Authorization, the Permitted Uses for the DWR Mitigation Parcel are the same as all the Permitted Uses set forth in Section 4.2.2, except that KWBA will not install, construct, repair, maintain, or operate water recharge facilities, including but not limited to recharge basins, levees, and recharge canals, on the DWR Mitigation Parcel. KWBA will continue to perform the obligations of DWR described in the Mitigation Documents and set forth on Exhibit "C" to the Assumption Agreement, but only to the extent and in the manner that such responsibilities as described in Exhibit "C" to the Assumption Agreement. The Parties acknowledge that the obligations under the Mitigation Documents are consistent with using the DWR Mitigation parcel as provided in this Section 4.2.4. Following the termination of the Section 10(a) Permit and the Section 2081/2835 Management Authorization, KWBA shall manage the DWR Mitigation Parcel as set forth in the DWR Mitigation Parcel Conservation Agreement, the form of which is attached as **Exhibit M**.

(c) Vegetation Management. KWBA shall manage vegetation growth in the Permanent Mitigation Land Sector in accordance with Adaptive Management practices as directed by the Vegetation Management Plan, as specified in Section 4.2.1.(b). The primary methods of vegetation management are anticipated to be mowing, grazing and burning. Herbicide use, tilling and by-hand removal will be secondary methods of vegetation management. As part of vegetation management, KWBA may also engage in,

or authorize, public health control measures, including (1) mosquito abatement; (2) rodent control; (3) weed control and (4) enforcement of other health and safety laws.

(d) **Habitat Management.** KWBA shall use Adaptive Management practices to restore and enhance upland habitat for Covered Species, focusing on alkaline sink communities and desert grassland with characteristic shrub vegetation.

(e) **Recreational/Educational Activities.** Subject to approval by the Resource Agencies and following a Minor Amendment to the KWB HCP pursuant to Section 6.2 of this Agreement, KWBA may allow third persons to engage in recreational and educational activities including (1) fishing; (2) hunting; (3) wildlife viewing; (4) bicycling; (5) hiking; (6) aquatic recreation; and (7) scientific research. All invitees shall be responsible for obtaining any permits and/or licenses that may be required in order to engage in the desired activity.

#### **4.2.5. Farming.**

The Farming Sector consists of 3,170 acres, as shown on **Exhibit A**. The Permitted Uses thereon are as follows:

(a) **Farming.** KWBA may engage in any commercially reasonable agricultural activity, including but not limited to the cultivation and tillage of the soil, the production, cultivation, growing and harvesting of any agricultural commodity, dairying, viticulture, apiculture, horticulture and the raising of livestock, fur-bearing animals, fish or poultry, and all activities incident to such agricultural activity. KWBA, and any lessee, may use pesticides in accordance with commercially reasonable agricultural

practices and all applicable laws, regulations and label restrictions, but only on those portions of the Farming Sector on which farming activities are taking place.

(b) **Recharge Basins and Other Water Banking Facilities Sector Uses.** The Farming Sector land may also be used for all the Permitted Uses described in Section 4.2.1. Use of pesticides in non-farming areas shall be pursuant to the Vegetation Management Plan.

#### **4.2.6. Conservation Bank Land.**

A 3,267-acre parcel has been designated by the KWB HCP as Conservation Bank Land, as shown on **Exhibit A**. The Service and the Department have agreed to enter into the Conservation Bank Agreement, attached as **Exhibit C**, permitting KWBA to utilize for its own purposes and to sell conservation credits relating to the Conservation Bank Land to qualified third parties that need off-site mitigation. The Service and the Department have further agreed, pursuant to the Conservation Bank Agreement, to permit KWBA to sell or use up to 490 acres of the Conservation Bank Land for commercial development purposes within the commercial development zone set forth on **Exhibit A** hereto. KWBA's mitigation obligation, if any, for the sale of such land for commercial development purposes shall be determined pursuant to the Conservation Bank Agreement.

The Permitted Uses for the Conservation Bank Land are as follows:

(a) **Water Related Operations.** KWBA may install, construct, repair, maintain, and operate water recharge, water recovery, and water conveyance facilities, including, but not limited to, water wells, pipelines, recharge canals, recovery canals,

pumps, and appurtenant facilities such as storage buildings, fences and access roads, but excluding recharge basins and levees. KWBA may line the recovery canals with concrete. KWBA will ensure that the access road system is adequate for emergency response and fire protection needs.

(b) **Vegetation Management.** KWBA shall manage vegetation growth in accordance with Adaptive Management practices as directed by the Vegetation Management Plan, as specified in Section 4.2.1(b). The primary methods of vegetation management are anticipated to be mowing, grazing and burning. Herbicide use, tilling and by-hand removal will be secondary methods of vegetation management. As part of vegetation management, KWBA may also engage in public health, or authorize, control measures, including (1) mosquito abatement; (2) rodent control; (3) weed control and (4) enforcement of other health and safety laws.

(c) **Fencing.** KWBA shall maintain the existing fencing on Conservation Bank Lands. KWBA shall erect and maintain such additional fencing as the Resource Agencies may reasonably require in order to prevent unauthorized access to the Conservation Bank Lands by the general public.

(d) **Conservation Easement Lands.** KWBA shall manage Conservation Bank Land on which a Conservation Easement has been recorded in accordance with the Conservation Bank Agreement as set forth in the applicable Conservation Easement and shall manage vegetation growth in accordance with Adaptive Management practices as directed by the Vegetation Management Plan, as specified in Section 4.2.1(b).

(e) **Commercial Development.** As set forth above, KWBA may sell or utilize land located within the commercial development zone identified on **Exhibit A** for

commercial development; provided that such use or sale for such purposes does not exceed, in the aggregate, 490 acres of the Conservation Bank Land.

(f) **Recreational/Educational Activities.** Subject to approval by the Resource Agencies and following a Minor Amendment to the KWB HCP pursuant to Section 6.2 of this Agreement, KWBA may allow third persons to engage in recreational and educational activities including (1) fishing; (2) hunting; (3) wildlife viewing; (4) bicycling; (5) hiking; (6) aquatic recreation; and (7) scientific research. All invitees shall be responsible for obtaining any permits and/or licenses that may be required in order to engage in the desired activity.

**4.3. Administrative Modification of Kern Water Bank Map by KWBA.**

In order to facilitate Adaptive Management of the Kern Water Bank and operation of the water recharge facilities, KWBA, in its sole discretion and without the prior approval of any other Party, may modify the Map of the Kern Water Bank attached as **Exhibit A** and modify Map 3, Land Use Plan, of the KWB HCP to redistribute the lands constituting the Recharge Basins and Other Water Banking Facilities Sector, the Compatible Habitat Sector and the Sensitive Habitat Sector, as follows.

(a) **Modifications Due to More Accurate Information Regarding Pond Boundaries.** KWBA may revise the Map of the Kern Water Bank at any time, and from time to time, in order to reflect more accurately the locations of the recharge basins.

These changes in the aggregate with all other administrative modifications:

(1) will not result in any net reduction of total number of acres in the Sensitive Habitat Sector at the time of the modification; and

(2) will not reduce the amount of Compatible Habitat Sector land in each half section by more than ten percent (10%).

(b) Modifications for Future Flexibility

KWBA may revise the Map of the Kern Water Bank at any time, and from time to time, for any reason. These changes in the aggregate with all other administrative modifications:

(1) will not reduce the amount of Sensitive Habitat Sector land in each quarter section by more than ten percent (10%);

(2) will not reduce the amount of the Compatible Habitat Sector land in each half section by more than ten percent (10%);

(3) will not reduce the size of the Permanent Mitigation Land Sector or the Conservation Bank Land Sector;

(4) will not result, in KWBA's knowledge, in the Take of any visible or known plant Covered Species that is a Federal Listed Species or a State Listed Species, as determined by a survey in only the Sensitive Habitat Sector where the proposed reduction in the acreage of the Sensitive Habitat Sector is to take place; and

(5) will not result, in KWBA's knowledge, in the Take of any Fully-Protected Species.

If KWBA believes all these conditions are met, KWBA shall give the Resource Agencies notice of an administrative modification of the Map of the Kern Water Bank and the KWB HCP by providing the Resource Agencies an amended Map of the Kern Water Bank. If the Resource Agencies do not provide KWBA notice of a dispute with the administrative modification within 60 days of receipt of the amended map, the KWB

HCP shall be deemed amended. If either Resource Agency provides a notice of dispute, the Parties shall meet and confer in good faith to resolve any dispute. Grounds for a dispute are limited to the Resource Agencies establishing, by the best available scientific data, that KWBA has not met one or more of the above criteria. If, following receipt of a notice of dispute, KWBA receives scientific data showing that one or more of the criteria for an administrative modification are not met, then KWBA shall process the change to the Map of the Kern Water Bank as a Minor Modification pursuant to Section 6.2 of this Agreement.

**4.4. Third-Party Activities on the Kern Water Bank.**

**4.4.1. Trespassers.**

So long as KWBA maintains the security at the Kern Water Bank in accordance with the terms of the HCP, the Conservation Easements and the Annual Management Plan, KWBA shall have no liability for any Take of Covered Species caused by any trespasser. KWBA is obliged to use reasonable efforts to eject trespassers promptly upon having actual knowledge of the presence of the trespassers on the Kern Water Bank.

**4.4.2. All Others.**

The Resource Agencies acknowledge that a significant number of persons have independent rights of access onto the Kern Water Bank, whether by easement, ownership of the subsurface estate, or otherwise. The Resource Agencies also acknowledge that KWBA does not know and cannot reasonably obtain the identity of all persons with such independent rights of access.



KWBA's obligations with regard to persons with independent rights of access to the Kern Water Bank shall be that once KWBA learns of the identity of a person with an independent right of access, (a) KWBA will put that person on notice of the existence of the HCP and the requirement of obtaining Take authorization; and (b) KWBA will notify the Resource Agencies if KWBA learns that such person will cause or has caused the Take of a Federal Listed Species and/or State Listed Species. So long as KWBA complies with its obligations under this section, KWBA shall not be liable for the Take of Federal Listed Species and/or State Listed Species by any person with an independent right of access onto the Kern Water Bank.

**5. MUTUAL ASSURANCES**

**5.1. Assurances of the Service.**

**5.1.1. Applicability of KWB HCP to Take of Covered Species  
Subsequently Listed as a Federal Listed Species.**

Concurrent with the execution of this Agreement, the Service has issued a Section 10(a) Permit to KWBA, authorizing the Take by KWBA and by Included Parties of each Federal Listed Species incidental to the Permitted Uses, subject to and in accordance with this Agreement and the Conservation Bank Agreement. The Section 10(a) Permit shall become effective as to each Covered Species which is not currently a Federal Listed Species concurrent with the listing of such species as a threatened species or endangered species under FESA. If, for any reason, the foregoing provision is determined to be illegal, or beyond the authority of the Service, the KWB HCP and this Agreement shall

be deemed adequate documentation to support an application for any necessary permit(s) pursuant to section 10(a) of FESA.

### **5.1.2. Future Listing of Covered Species.**

The Service agrees to consider the provisions of the KWB HCP in any determination involving the listing as an endangered species or threatened species of any Covered Species or any other species whose habitat is found in the Kern Water Bank.

### **5.1.3. Critical Habitat Designation.**

(a) Section 424.12 of the regulations implementing FESA specify the criteria to be used by the Service in designating critical habitat. These criteria include “those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection.” (50 C.F.R. § 424.12(b) (1995).) The KWB HCP will maintain net habitat value for Covered Species on a long-term basis, and, in so doing: (1) provide for the protection of “those physical and biological features that are essential to the conservation of” the Covered Species and (2) provide for, through Adaptive Management, “special management considerations” and “protection” specified in the foregoing regulation.

(b) Principal biological and physical constituents within the Kern Water Bank essential to the conservation of the Covered Species are contained in the Sensitive Habitat Sector, the Permanent Mitigation Sector, and the Conservation Bank sector.

(c) Given the size of the Kern Water Bank and the comprehensive nature of the special management considerations incorporated into the Required and Adaptive Management, the Service concludes that Adaptive Management, the Sensitive Habitat

Sector, the Permanent Mitigation Sector and the Conservation Bank sector collectively identify the habitat “essential to the conservation” of the Covered Species and the “special management” measures necessary to manage Covered Habitat in a manner that will “provide for the conservation of the species involved.”

(d) Based on subparagraphs (a) through (c) of this Section and the information contained in the HCP, the Service agrees that in the event that Critical Habitat is designated for any Covered Species, and upon a determination that the KWB HCP has been implemented as provided in this Agreement, no additional mitigation or compensation in the form of land, restrictions on the use of land or financial compensation shall be required of KWBA in connection with Permitted Uses.

#### **5.1.4. Future Recovery Plans.**

The Service agrees that upon a determination that the KWB HCP has been implemented as provided in this Agreement, any Recovery Plan applicable to Covered Species found on the Kern Water Bank shall: (1) not require any additional financial compensation or mitigation by KWBA or any Included Party; (2) be prepared only after the Service has made reasonable efforts to give notice to KWBA; and (3) not in any way affect the Section 10(a) Permit issued pursuant to the KWB HCP and the provisions of this Agreement.

#### **5.1.5. Migratory Bird Treaty Act.**

(a) The Section 10(a) Permit shall also constitute a Special Purpose Permit under 50 C.F.R. § 21.27 for the Take those species listed at 50 C.F.R. § 10.13 which are also Federal Listed Species, excluding bald eagles (*Haliaeetus leucocephalus*) and golden

eagles (*Aquila chrysaetos*). Any Take by KWBA arising from the Permitted Uses and any Incidental Take by any Included Party will not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-12). The Special Purpose Permit shall be valid for a period of three years from its effective date, provided the Section 10(a) Permit remains in effect for such period. The Special Purpose Permit under 50 C.F.R. § 21.27 as described in this section shall be renewed automatically, provided that KWBA remains in compliance with the terms of this Agreement. Each such renewal shall be valid for a period of three years, provided that the Section 10(a) Permit remains in effect for such period.

(b) The Service shall not refer or recommend to the Department of Justice that it prosecute KWBA, its directors, officers, employees, members or agents, or any Included Party, or any of their directors, officers, employees, members or agents, pursuant to the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d) with regard to any Take or injury to a migratory bird, including any bald eagle (*Haliaeetus leucocephalus*) and golden eagle (*Aquila chrysaetos*), that occurs incidental to the Permitted Uses or that is an Incidental Take by an Included Party.

**5.1.6. Identification of Unforeseen or Extraordinary Circumstances.**

(a) In the event that the Service determines that mitigation beyond, or inconsistent with, that provided by the KWB HCP and this Agreement (excluding any Adaptive Management method agreed to by the Parties) is needed for a Covered Species, and where an Extraordinary Circumstances finding has not been made pursuant to this

Section and KWBA is otherwise in compliance with this Agreement, the Service shall not impose or seek to impose on KWBA or any additional mitigation or compensation, including but not limited to commitments of additional land or financial compensation.

(b) For the purposes of this Agreement the term "Extraordinary Circumstances" means a significant and substantial adverse change in the population of a Covered Species, which was not contemplated by the KWB HCP. Extraordinary Circumstances shall include a decline in the populations of Covered Species within the meaning of 50 C.F.R. 13.28(a)(5). Extraordinary Circumstances shall include "unforeseen circumstances", as that term is used in 50 C.F.R. section 17.22(b)(1)(iii)(B) and 17.32. Any such decline in populations shall be addressed in accordance with the provisions of this section.

(c) In deciding whether any Extraordinary Circumstances exist, the Service shall consider, but not be limited to, the following factors:

- The size of the current range of the affected species.
- The percentage of the range of the species that has been adversely affected by the activities contemplated by the KWB HCP.
- The percentage of the range of the species that has been conserved by the KWB HCP.
- The ecological significance of that portion of the range of the species affected by the KWB HCP.
- The level of knowledge about the affected species and the degree of specificity of the species' conservation program under the KWB HCP.

- Whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.
- Whether the KWB HCP was originally designed to provide an overall net benefit to the affected species.

(d) The Service acknowledges that any determination regarding Extraordinary Circumstances provided for in this Agreement must be made in the context of and in response to the KWB HCP. In the event that the Service believes that Extraordinary Circumstances may have occurred it shall notify KWBA, in writing, of the specific facts that may constitute Extraordinary Circumstances and the evaluation of the factors described above. In the notification the Service shall clearly document the basis or bases for the proposed finding regarding the existence of Extraordinary Circumstances. Within sixty (60) days of receiving such notice KWBA, the Service and the Department shall meet to consider the facts cited in the notice and to determine if Adaptive Management measures can address the concerns raised in the notice. The Service may finalize a finding of Extraordinary Circumstances only after the Service determines, following consultation with KWBA, that Adaptive Management measures cannot satisfactorily address the concerns raised in the notice.

(e) The Service shall make an Extraordinary Circumstances determination only upon the basis of: (1) a finding by the Director or Regional Director of the Service, based on the best scientific evidence available and after considering any responses submitted by any person, including those submitted by the Department and KWBA, that there are Extraordinary Circumstances; and (2) a finding by the Director or Regional

Director of the Service that the Extraordinary Circumstances cannot be addressed by Adaptive Management measures under the KWB HCP and this Agreement. In making such determination, the Service shall have the burden of demonstrating the existence of Extraordinary Circumstances.

(f) In the event that the Service makes a finding of Extraordinary Circumstances and such Extraordinary Circumstances warrant the requirement of additional mitigation or compensation, any such additional mitigation and compensation shall be restricted to modification of the management of the Sensitive Habitat, Conservation Bank Lands, Permanent Mitigation Lands, and Compatible Habitat, and shall be the least burdensome measures available to address the Extraordinary Circumstances. The Service shall take any necessary action to ensure that the ability of KWBA to maintain the Take authorization and other benefits of this Agreement is not adversely affected by a finding of Extraordinary Circumstances.

**5.1.7. Section 7 Consultations.**

In any consultation that may be required or processed relating to activities of KWBA at the Kern Water Bank pursuant to section 7 of FESA (16 U.S.C. § 1536(a)) subsequent to the Effective Date with regard to the Permitted Uses at the Kern Water Bank, the Service shall, to the maximum extent permitted by law, rely upon, and/or utilize, the section 7 biological opinion issued with regard to the approval of the KWB HCP.

**5.1.8. Section 404 Permits.**

In any consultation for projects at the Kern Water Bank that may be required or processed pursuant to section 404 of the federal Clean Water Act with regard to the Project, the Service agrees that it will not impose, or seek to impose, any additional mitigation requirements directed specifically at the protection and conservation of Covered Species on the Kern Water Bank through any agency approval process whether or not such agency is a party to this Agreement, beyond those mitigation measures for Covered Species which are provided for in this Agreement and the HCP.

Notwithstanding the foregoing, activities on the Kern River or that are subject to the jurisdiction of the United States Army Corps of Engineers will require further consultation among the Parties.

**5.2. Assurances of the Department.**

**5.2.1. Applicability of KWB HCP to Take of Covered Species.**

(a) The Department agrees that the implementation of the KWB HCP and this Agreement will adequately provide for the conservation, protection, restoration, enhancement, and management of the Covered Species and Covered Habitat in the Kern Water Bank. Compliance with the terms of this Agreement constitutes compliance with the provisions of the California Native Plant Protection Act (Fish & Game Code § 1900 et seq.) and CESA.

(b) CESA and the NCCP Act provide for the Take of species listed under CESA as endangered or threatened, and of CESA candidate species. The Department authorizes the Take of Covered Species and Covered Habitat subject to the terms and



conditions of this Agreement. Accordingly, this Agreement constitutes the conditions of a present management authorization to Take State Listed Species in conjunction with Permitted Uses pursuant to CESA and the NCCP Act. In the event that one or more of the Covered Species is listed under CESA as an endangered species, threatened species or candidate species after the Effective Date of this Agreement, Take of such Covered Species by KWBA for the Project and by Included Parties for their projects covered by the Section 2081/2835 Management Authorization is then authorized pursuant to this Section 2081/2835 Management Authorization. No additional permit or authorization shall be required by the Department to allow Take of Covered Species as provided by the KWB HCP and this Agreement.

(c) The Department concurs in the Service's commitments regarding Recovery Planning set forth above, and determines that the KWB HCP satisfies all present requirements under CESA to protect and conserve species in a manner comparable to the FESA Recovery Plan provisions.

#### **5.2.2. Applicability of KWB HCP in Future Decisions.**

The Department agrees to specifically consider the provisions of the KWB HCP in any determination, including but not limited to any recommendations to the California Fish and Game Commission, regarding any proposed listing of any Covered Species or any other species whose habitat is found in the Kern Water Bank.

#### **5.2.3. Department Listing Procedures.**

In preparing a report evaluating a petition presented to the Fish and Game Commission to add any species found within the Kern Water Bank to either the list of

endangered species or the list of threatened species under Fish and Game Code section 2074.6, or in making recommendations to add a species to such lists under Fish and Game Code section 2072.7, the Department shall (1) inform KWBA within a reasonable period of time if a petition has been received, and (2) during its review period under section 2074.6, or prior to making its recommendation under section 2072.7, consider specific information provided by KWBA describing the existing management efforts undertaken pursuant to this Agreement, and whether the approved KWB HCP and Adaptive Management procedures will reasonably assure that the species proposed for listing will be protected.

#### **5.2.4. Fully-Protected Species.**

If at any time there is a change in the Environmental Laws such that the Department may issue a management authorization permitting the Incidental Take of any Fully-Protected Species, the Department may, at its own discretion, conduct a survey of the Kern Water Bank to determine whether any Fully-Protected Species exists thereon. Thereafter, if appropriate, the Department shall amend the Section 2081/2835 Management Authorization to permit the Incidental Take of Fully-Protected Species.

#### **5.3. Assurances of the Resource Agencies regarding Future Designation of New Covered Species.**

(a) In the event that one or more species is proposed by any Party to be added as a new Covered Species, such species shall be added to the list of Covered Species if the Service and the Department determine that the conservation and management measures set forth in the KWB HCP satisfy the requirements of Section 10(a)(1)(B) of

FESA and Fish and Game Code section 2081 and 2835 with respect to the proposed Covered Species. Under FESA, no Take of new Covered Species is authorized until the Section 10(a) Permit is amended to authorize such Take. KWBA may request amendment of the Section 10(a) Permit at any time to add a new Covered Species, and the Service shall promptly review and process such amendment request.

(b) The KWB HCP shall be adequate documentation to support an amendment of the Section 10(a) Permit and Section 2081/2835 Management Authorization to incorporate additional Covered Species if:

(1) Surveys for such Species have been completed in accordance with protocols approved by the Department and the Service or, if no protocols exist, in accordance with accepted biological practice.

(2) The KWB HCP is amended, if necessary, to provide for any additional management measures or other mitigation determined necessary, after consultation with KWBA, by the Service and the Department to assure protection for such species consistent with the requirements of FESA Section 10(a)(1)(B) and California Fish and Game Code Sections 2081 and 2084, as applicable; and

(3) The KWB HCP amendment provides for adequate assurances, to the satisfaction of the Service and the Department, that the management measures identified pursuant to (2) above will be carried out.

(c) Upon a determination that standards for issuance of an Incidental Take permit have been met and satisfaction of any applicable public review requirements, the Service and the Department will formally certify that they have approved the Section 10(a) Permit and Section 2081/2835 Management Authorization amendments, and

corresponding amendments to this Agreement. As soon as the amendment to this Agreement and the Section 10(a) Permit become effective, the additional species shall be treated as Covered Species for all purposes and in the manner specified in this Agreement.

## **6. AMENDMENTS**

### **6.1. Generally.**

Without limiting the applicability of Section 4.3, amendments to the KWB HCP may be proposed by any Party. The Party proposing the amendment shall provide to all other Parties a statement of the reason for the amendment and an analysis of the effect of the amendment on the Covered Species. If the proposed amendment is a Minor Amendment, then the KWB HCP shall be deemed amended upon the approval by all Parties of the proposed Minor Amendment.

### **6.2. Minor Amendments.**

Minor Amendments to the KWB HCP shall not require amendment of this Agreement, the Section 10(a) Permit or the Section 2081/2835 Management Authorization. Minor Amendments include, but are not limited to, the following:

(a) An increase in the size of the Recharge Basins and Other Water Banking Facilities Sector, so long as (1) the related diminution in acreage is taken from the Compatible Habitat Sector, Sensitive Habitat Sector, Farming Sector and/or Conservation Bank Land Sector; and (2) the increase in size does not exceed, in the aggregate with all previous increases, fifteen percent (15%) of the original size of the Recharge Basins and Other Water Banking Facilities Sector. A diminution of the Conservation Bank Land

Sector shall require an amendment to the Conservation Bank Agreement to reflect the reduced number of Conservation Credits (as such term is defined in the Conservation Bank Agreement) available for use or sale by KWBA. Areas on which a Conservation Easement has been recorded pursuant to the Conservation Bank Agreement may not be reduced in size as a result of a Minor Amendment.

(b) A reduction in the size of the Recharge Basins and Other Water Banking Facilities Sector, so long as (1) the related increase is added to the Compatible Habitat Sector, Sensitive Habitat Sector and/or Conservation Bank Land Sector; and (2) the decrease in size does not exceed, in the aggregate with all previous decreases, fifteen percent (15%) of the original size of the Recharge Basins and Other Water Banking Facilities Sector. An increase in the Conservation Bank Land Sector shall require an amendment to the Conservation Bank Agreement to reflect the increased number of Conservation Credits available to KWBA.

(c) A relocation of the recharge basin located in the KWBA Mitigation Parcel.

(d) A reduction in the number of Conservation Credits available to KWBA of up to 15% due to a sale by KWBA of Conservation Bank Land for commercial development purposes in accordance with Section 4.2.6.

(e) An increase in the number of Conservation Credits available to KWBA of up to 35% due to a subsequent agreement among the Parties that KWBA be authorized to record conservation easements over land within the Sensitive Habitat Sector and sell conservation credits representing Sensitive Habitat Sector acreage.

(f) An increase of 15% or less in the acreage covered by permanent facilities or infrastructure above the 481 acres contemplated by the KWB HCP, which will be mitigated by a 3:1 ratio increase in the acreage of the Permanent Mitigation Sector.

(g) An increase or decrease of 15% or less in the aggregate in the acreage of the Kern Water Bank due to a lot line adjustment between the Kern Water Bank and any of its neighbors.

(h) A change in the Permitted Uses of any Sector whereby the Resource Agencies authorize third persons to engage in recreational and/or educational activities on that Sector.

(i) Corrections of typographical, grammatical or editing errors in this Agreement, the HCP, and related documents.

Minor Amendments also include any proposed amendment which all Parties agree is a Minor Amendment.

### **6.3. Major Amendments.**

A Major Amendment is any proposed amendment which is not a Minor Amendment or Administrative Modification. Major Amendments to the KWB HCP shall require an amendment of this Agreement, the Section 10(a) Permit and the Section 2081/2835 Management Authorization. Following receipt of the proposed Major Amendment, the Service shall publish notice of the proposed amendment to the Section 10(a) Permit in the Federal Register as required under FESA. The Service shall use its best efforts to process the proposed amendment within one hundred twenty (120) day of publication except where longer periods are required by law.

## **7. REMEDIES**

### **7.1. Notice of Default; Time to Cure.**

If at any time any Party (the “Notifying Party”) believes that another Party or an Included Party (the “Defaulting Party”) is in default of its obligations under this Agreement, the Notifying Party shall notify the Defaulting Party that a default has occurred and explain the basis for that belief. The Defaulting Party shall have sixty (60) days after receipt of such notice (i) to respond to or refute the allegation to the satisfaction of the Notifying Party, (ii) to cure such default, or (iii) to diligently commence to cure a default which cannot reasonably be cured within the 60-day time period.

### **7.2. KWBA’s Events of Default.**

The following is a non-exclusive list of occurrences which shall constitute an event of default by KWBA:

- (a) KWBA engaging or permitting others to engage in any activity on the Kern Water Bank other than Permitted Uses.
- (b) KWBA’s failure to implement the HCP in accordance with this Agreement.

### **7.3. Events of Default for the Resource Agencies.**

The following is a non-exclusive list of occurrences which shall constitute an event of default by the Resource Agencies:

- (a) A revocation, suspension, or attempted revocation or suspension of the Section 10(a) Permit or the Section 2081/2835 Management

Authorization while KWBA is acting in compliance with this Agreement and the KWB HCP.

**7.4. Remedies.**

After notice of and time to cure a default, the Notifying Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Section 10(a) Permit, the Section 2081/2835 Management Authorization, and the KWB HCP, and to seek remedies for any breach hereof against the Defaulting Party, subject to the following:

(a) No Money Damages. All Parties shall not be liable in damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing sentence:

(1) Retention of Liability. Each Party shall retain whatever liability it would possess for its present and future acts or failure to act without existence of this Agreement.

(2) Landowner Liability. Each Party shall retain whatever liability it possesses as an owner of interests in land.

(3) Responsibility of Federal and State Governments. Nothing contained in this Agreement is intended to limit the authority of the United States government or the State of California to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under FESA or CESA, as applicable.



(b) Injunctive and Temporary Relief. The Parties acknowledge that the Covered Species are unique and that their loss as a species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

**8. MISCELLANEOUS**

**8.1. Term.**

The term of this Agreement shall be seventy-five (75) years from the Effective Date.

**8.2. Due Authorization.**

The Service and the Department each represent and warrant for the benefit of KWBA and its successors and assigns that (i) the execution and delivery of this Agreement has been duly authorized and approved by all requisite action, (ii) no other authorization or approval, whether of governmental bodies or otherwise will be necessary in order to enable the Service and the Department, respectively, to enter into and comply with the terms of this Agreement, and (iii) the persons executing this Agreement on behalf of the Service and the Department have the authority to bind the Service and the Department, respectively.

**8.3. Conflict With KWB HCP.**

This Agreement is intended to specify, in contract language, the obligations of the Parties under the KWB HCP recognizing that the KWB HCP is intended to set forth in a planning document the components of a natural community conservation plan and a

habitat conservation plan, and was not drafted as a contract document. As a result, if possible, the terms of this Agreement and the terms of the KWB HCP shall be interpreted to be supplementary to each other. In the event of a direct contradiction or conflict between the terms of this Agreement and the terms of the KWB HCP, the terms of this Agreement shall control.

**8.4. Other Permits.**

The Parties acknowledge that, in order to engage in the Project, KWBA may be subject to the permit requirements of federal, state and local agencies not parties to this Agreement.

**8.5. Notices.**

(a) All notices, demands, or requests from one Party to another shall be in writing and shall be either personally delivered, sent by facsimile, sent by recognized overnight delivery service, or sent by mail, certified or registered, postage prepaid, to the addresses stated in this paragraph. Each such notice shall be deemed made upon receipt by the addressee unless delivery of a properly addressed and sent notice is not made because (i) acceptance of delivery was refused by the addressee; (ii) the addressee moved without providing proper notice of such move; or (iii) the addressee was not open for business on the date of attempted delivery (unless delivery was attempted on a Saturday, Sunday, national holiday, or after normal business hours), in which case such notice shall be deemed given on the date of attempted delivery. The addresses of the Parties for notices are as follows:

If to KWBA:

William D. Phillimore, Chairman  
Kern Water Bank Authority  
P.O. Box 80607 Bakersfield, CA 93380-0607

With a copy to:

Robert D. Thornton, Esq.  
Nossaman, Guthner, Knox & Elliott LLP  
Suite 1800  
18101 Von Karman  
Irvine, CA 92715-1007

If to the Department:

Director  
California Department of Fish and Game  
1416 Ninth Street, 12th Floor  
Sacramento, CA 95814

and

Regional Manager  
California Department of Fish and Game, Region 4  
1234 East Shaw Avenue  
Fresno, CA 93710

with a copy to:

General Counsel  
California Department of Fish and Game  
1416 Ninth Street, 12th Floor  
Sacramento, CA 95814

If to the Service:

Regional Director  
U.S. Fish and Wildlife Service  
Portland Eastside Federal Complex  
911 N.E. 11th Avenue  
Portland, OR 97232-4181

and

Field Supervisor  
U.S. Fish and Wildlife Service  
3310 El Camino Avenue, Suite 130  
Sacramento, CA 95821

with a copy to:

Office of the Solicitor  
Pacific Southwest Region Office  
2800 Cottage Way  
Sacramento, CA 95825

(b) Any Party may change the address to which such notices may be sent by giving the other Parties written notice of such change pursuant to subsection (a) above.

The Parties agree to accept facsimile transmitted signed documents and agree to rely upon such documents as if they bore original signatures. The Parties agree to provide to the others copies of such facsimile documents bearing original signatures, transmitted by regular mail.

**8.6. Entire Agreement.**

This Agreement, along with the exhibits attached hereto and the Section 10(a) Permit and Section 2081/2835 Management Authorization, constitutes the entire Agreement and understanding between the Parties with respect to the KWB HCP. This Agreement supersedes all prior and contemporaneous agreements, representations, negotiations or understandings of the Parties, if any, whether oral or written. Each Party

acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

**8.7. Elected Officials Not to Benefit.**

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

**8.8. Availability of Federal Funds.**

Implementation of this Agreement and the KWB HCP by the Service is subject to the requirements of the federal Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

**8.9. Availability of State Funds.**

Implementation of this Agreement and the KWB HCP by the Department is subject to the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the Treasury of the State of California. The Parties acknowledge that the Department will not be required under this Agreement to expend any State of California

agency's appropriated funds unless and until an authorized officer of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

**8.10. Relationship to FESA, CESA and Other Authorities.**

Nothing in this Agreement is intended to limit or diminish the legal responsibilities of the Service as an agency of the Federal government or the Department as an agency of the State of California. In that regard, nothing in this Agreement is intended to limit the authority of the Service to fulfill its responsibilities under FESA or the Department under CESA, including seeking penalties against KWBA if the Service and/or Department, as applicable, believes that penalties are appropriate.

**8.11. Governing Law.**

Interpretation of this Agreement shall be governed by the laws of the State of California and applicable Federal law including the FESA.

**8.12. Severability.**

(a) The violation by any Included Party of the Section 10(a) Permit or the Section 2081/2835 Management Authorization shall not adversely affect or be attributed to KWBA or any other Included Party, nor shall the violation result in the loss or diminution of any right, privilege or benefit under this Agreement or the Conservation Bank Agreement of KWBA or any other Included Party.

(b) Except as specifically set forth at Section 5.1.1 of this Agreement, the various provisions of this Agreement, the KWB HCP and the Conservation Bank Agreement are not severable. The Parties contemplate that all these documents, and the

exhibits thereto, together reflect the agreement of the Parties and that no element of any of these documents may be severed without terminating the Section 10(a) Permit and the Section 2081/2835 Management Authorization, unless KWBA specifically agrees otherwise.

**8.13. Permit Suspension or Revocation.**

The Section 10(a) Permit shall be revoked or suspended only in conformance with the provisions of 50 C.F.R. sections 13.27 through 13.29, as the same exists as of the date hereof.

**8.14. Successors and Assigns.**

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns.

**8.15. References to Regulations.**

Any reference in this Agreement, the KWBA HCP or the Section 10(a) Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

**8.16. No Third-Party Beneficiaries.**

This Agreement is solely for the benefit of KWBA, the Department and the Service. The Parties intend that only the Parties to this Agreement and their approved assignees shall benefit from the Agreement. This Agreement shall not create in the public, any member of the public, any other person or entity, except a transferee or assignee of the Parties (including one pursuant to 50 C.F.R. § 13.24), any rights as a

third-party beneficiary to this Agreement, nor shall it authorize anyone not a party to this Agreement to maintain a suit for injuries or damages under the provisions of this Agreement.

**8.17. Signature in Counterparts.**

This Agreement may be executed by the Parties in several counterparts, each of which shall be deemed to be an original copy.

**8.18. Amendments.**

This Agreement is not subject to amendment except in a writing signed by all the Parties, in accord with Article 6 of this Agreement.

**8.19. Effective Date.**

This Agreement shall be effective upon execution by all Parties.

**8.20. Pre-existing Rights.**

The Parties agree and recognize that this Agreement is made subject to any and all existing rights-of-way, easements, surface leases, subsurface leases, contracts, and other instruments dated prior to the effective date of this Agreement which may affect any or all of the Kern Water Bank (collectively, "Pre-existing Rights"), including all rights of ingress and egress necessary for the owners of such Pre-existing Rights. To the extent that KWBA has actual notice of an exercise or intent to exercise any such Pre-existing Right, KWBA shall make reasonable efforts to notify the Resource Agencies of such exercise or intent to exercise the Pre-existing Right. To the extent it is within KWBA's power to do so, KWBA shall cooperate with the Resource Agencies and the owners of



Pre-existing Rights to minimize and avoid any impacts to Covered Species within the Kern Water Bank and the Conservation Bank.

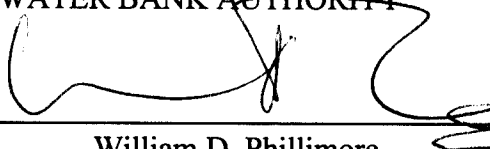
KWBA warrants that no exercise of any Pre-existing Right will result in the extinguishment of any Conservation Easement that will be recorded on the KWB Conservation Bank pursuant to the Conservation Bank Agreement.

**8.21. Interpretation and Headings.**

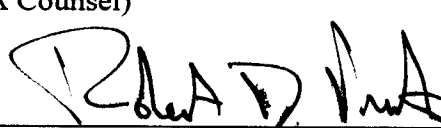
The subject headings of the sections of this Agreement are provided for convenience only and shall not affect the construction or interpretation of any of the provisions of the Agreement. This Agreement shall not be construed as if it had been prepared by any one Party, but rather as if all Parties had prepared the Agreement.

Dated: 10/2/07

KERN WATER BANK AUTHORITY

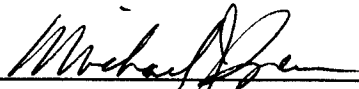
By:   
William D. Phillimore  
Title: Chairman

Approved as to form:  
Nossaman, Guthner, Knox & Elliott, LLP  
(KWBA Counsel)

By:   
Robert D. Thornton

Dated: 10/2/97

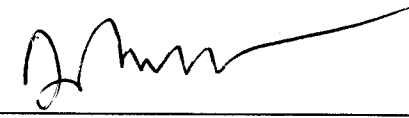
UNITED STATES FISH AND WILDLIFE  
SERVICE

By: 

Michael J. Spear

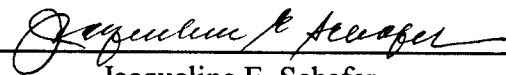
Title: Regional Director

Approved as to form:  
Office of the Regional Solicitor  
U.S. Department of the Interior  
(Service Counsel)

By: 

Dated: 10/2/97

CALIFORNIA DEPARTMENT OF FISH AND  
GAME

By: 

Jacqueline E. Schafer

Title: Director

Approved as to form:  
General Counsel  
California Department of Fish and Game  
(Department Counsel)

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