

# Staff Report

**TO:** Board of Directors

**FROM:** Tonia M. Tabucchi Herrera, P.E., Senior Engineer  
Doug Roderick, P.E. Engineering Manager

**DATE:** April 13, 2022

**SUBJECT: Hemphill Diversion Structure Fish Passage Project  
(Project #7032) – Participating Special Entity Agreement**

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## ***ENGINEERING***

### **RECOMMENDATION:**

Approve the Nevada Irrigation District's (NID) participation in the Placer County Conservation Program for the Hemphill Diversion Structure Fish Passage Project (Project) and authorize General Manager to execute a Participating Special Entity Agreement between the Placer Conservation Authority and Nevada Irrigation District for the Project.

### **BACKGROUND:**

The Hemphill Diversion Structure is identified as a fish barrier to anadromous and year-round resident fish migration within Auburn Ravine. It has been listed on California Department Fish and Wildlife 2019 Fish Passage Priority as well as in the Placer County Conservation Program (PCCP) Habitat Conservation Plan and Natural Community Conservation Plan (HCP/NCCP).

NID seeks to participate in the (PCCP) for coverage under the PCCP's Incidental Take and Programmatic Clean Water Act Section 401/404 permits to streamline the permitting process for the Project. NID staff has been in communication with PCCP Staff and permitting agencies regarding the Project and have received positive feedback and support for this permitting path.

NID is not a permittee under the PCCP. The Participating Special Entity (PSE) Agreement is for special districts and other entities in the PCCP Plan Area that are not under the jurisdiction of the City of Lincoln or Placer County. As noted above, if the Project is covered under the PCCP, it would streamline the permitting

process by minimizing the timeline for permitting review, allowing construction of the Project to begin this year.

The PSE requires payment of fees for Land Conversion, Special Habitat, Temporary Effect, Planning Cost, and Contribution to Conservation, and Administrative Costs. Since the District is not a permittee under the PCCP, it did not contribute to the cost of developing the HCP/NCCP and Programmatic 401/404 permits. Additionally, the Permittees (City, County, PCWA, and SPRTA) are responsible for an additional commitment to conservation above and beyond the requirements of mitigation. An additional "Commitment to Conservation" fee is assessed in the PSE agreement to offset plan development costs and the conservation obligation incurred by the Permittees. The total potential PCCP permit fees for this Project could be up to \$120,000. Staff is working with PCCP staff to determine if these fees could be reduced.

The Programmatic PCCP 401 NOI permit fee is \$575 with a potential annual fee of \$276 until project completion.

The CDFW 1600-Streambed Alteration Agreement permit and fee are not covered by the PCCP. The fee for a Streambed Alteration Agreement for this Project is estimated to be \$5,749.

**BUDGETARY IMPACT:**

The 2022 budget for the Project is \$4,025,000.00. Potential permit fees totaling \$126,324 will be paid from the 2022 budget. Administrative cost of \$15,000 to the PCCP for the PSE agreement will also be paid from the 2022 budget.

TMTH

Attachments: (1)

- Participating Special Entity Agreement

# PARTICIPATING SPECIAL ENTITY AGREEMENT

Between

**THE PLACER CONSERVATION AUTHORITY  
and the  
NEVADA IRRIGATION DISTRICT**

## **1.0**            **PARTIES**

This Agreement is made and entered into by the Placer Conservation Authority (“**Authority**”) and the Nevada Irrigation District (the “**Participating Special Entity**” or “**PSE**”) as of the Effective Date.

## **2.0**            **RECITALS**

The Parties have entered into this Agreement in consideration of the following facts:

- 2.1**    The Placer County Conservation Program (“**PCCP**”) includes a Habitat Conservation Plan (“**HCP**”) under the Federal Endangered Species Act and a Natural Community Conservation Plan (“**NCCP**”) under the California Natural Community Conservation Planning Act (“**NCCPA**”). The PCCP also includes the County Aquatic Resources Program (“**CARP**”), which supports issuance of permits related to the Federal Clean Water Act (“**CWA**”). The PCCP is intended to provide a regional comprehensive program to protect, enhance and restore natural resources while streamlining permitting for public and private projects in Western Placer County and the City of Lincoln and for projects carried out by the Placer County Water Agency (“**PCWA**”) and the South Placer Regional Transportation Authority (“**SPRTA**”). The primary policy priority of the PCCP is to provide comprehensive species, wetlands, and ecosystem conservation and contribute to recovery of endangered and threatened species within west Placer County while balancing open space, habitat, agriculture, and urban development. To that end, the PCCP establishes consistent, predictable environmental review and mitigation requirements for state and federal wetland and endangered species permitting and related California Environmental Quality Act (“**CEQA**”) compliance, shortens permitting processes, and enables the implementation of a long-term conservation strategy.
- 2.2**    The Authority is a joint powers authority formed by its members, the County of Placer (“**County**”) and the City of Lincoln (“**Lincoln**”) to implement the PCCP.
- 2.3**    The HCP/NCCP covers approximately 260,000 acres, all in the County and Lincoln, in which impacts from certain development and other activities are evaluated, and in which conservation will occur.

- 2.4 The area covered by the HCP/NCCP has been determined to provide, or potentially provide, habitat for fourteen (14) species that are listed as endangered or threatened, that could in the future be listed as endangered or threatened, or that have some other special status under federal or state laws.
- 2.5 The CARP provides for the conservation of wetlands, streams, and the waters and the watersheds that support them while streamlining the CWA Section 404 and Regional Water Quality Control Board Section 401 permit process for HCP/NCCP covered activities.
- 2.6 The Authority has received authorization under the federal Endangered Species Act (“**FESA**”) from the United States Fish and Wildlife Service (“**USFWS**”) (incidental take permit TE 88628D-0) and from the National Marine Fisheries Service (“**NMFS**”) (incidental take permit 25641) (the “**Federal Permits**”), and has received authorization under the NCCPA from the California Department of Fish and Wildlife (“**CDFW**”) (incidental take permit 2835-2020-001-02) (the “**State Permit**”), for the Take of the fourteen (14) special-status species and certain other species, as take is defined respectively under federal and state law, while carrying out certain development and other activities.
- 2.7 The Authority may enter into agreements with participating special entities that allow certain activities of theirs to be covered by the Federal Permits and the State Permit, subject to the conditions in the Implementing Agreement (“**IA**”), the HCP/NCCP and the Federal and State Permits. Projects that are covered by the Federal and State Permits under the HCP/NCCP can also be covered under the CARP.
- 2.8 PSE proposes to construct the Hemphill Diversion Structure Project and seeks coverage under the HCP/NCCP and the CARP for the Project, as further described in Exhibit 1, the Application, which is hereby incorporated by reference into this Agreement.
- 2.9 The Authority has concluded, based on the terms of this Agreement and the Application, that PSE has provided adequate assurances that it will comply with all applicable terms and conditions of the IA, the HCP/NCCP, and the Federal and State Permits.

### 3.0 **DEFINITIONS**

The following terms as used in this Agreement will have the meanings set forth below. Terms specifically defined in the FESA, the California Endangered Species Act (“**CESA**”) or the NCCPA, or the regulations adopted by USFWS, NMFS, and CDFW under those statutes, shall have the same meaning when used in this Agreement. Definitions used in this Agreement may elaborate on, but are not intended to conflict with, such statutory or regulatory definitions.

- 3.1 “Agreement”** means this Agreement, which incorporates the IA, the HCP/NCCP, the Federal and State Permits, and the Application by reference.
- 3.2 “Application”** means the application submitted by the PSE in accordance with Chapter 8.9.4.1 of the HCP/NCCP, and which is attached hereto as Exhibit 1. The Application contains a cover sheet, the results of required planning surveys and the avoidance, minimization and mitigation measures that will be a condition of the PSE receiving coverage under the Federal and State Permits.
- 3.3 “Authorized Take”** means the extent of incidental Take of Covered Species authorized by the USFWS and NMFS in the Federal Permits issued to the Authority pursuant to Section 10(a)(1)(B) of FESA, and the extent of Take of Covered Species authorized by CDFW in the State Permit issued to the Authority pursuant to California Fish and Game Code section 2835.
- 3.4 “CDFW”** means the California Department of Fish and Wildlife, a department of the California Resources Agency.
- 3.5 “CESA”** means the California Endangered Species Act (Fish & G. Code, § 2050 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.6 “Changed Circumstances”** means changes in circumstances affecting a Covered Species or the geographic area covered by the HCP/NCCP that can reasonably be anticipated by the Parties and that can reasonably be planned for in the HCP/NCCP. Changed Circumstances and planned responses to Changed Circumstances are more particularly defined in Section 10.3 of the IA and Chapter 10.2.1 of the HCP/NCCP. Changed Circumstances do not include Unforeseen Circumstances.
- 3.7 “Covered Activities”** means the otherwise lawful activities and projects described in Chapter 2 of the HCP/NCCP that the Permittees or covered project proponents may implement in the HCP/NCCP plan area for which incidental Take is authorized pursuant to the Federal and State Permits.
- 3.8 “Covered Species”** means the species, listed and non-listed, whose conservation and management are provided for by the HCP/NCCP and for which limited Take is authorized pursuant to the Federal and State Permits.
- 3.9 “Effective Date”** means the date when this Agreement is fully executed.
- 3.10 “Federal Listed Species”** means the Covered Species which are listed as threatened or endangered species under FESA as of the Effective Date, and the Covered Species which are listed as threatened or endangered pursuant to FESA during the term of the HCP/NCCP as of the date of such listing.
- 3.11 “Federal Permits”** means the federal incidental Take permits issued by USFWS and NMFS pursuant to Section 10(a)(1)(B) of FESA (permit

number TE 88628D-0 and permit number 25641), as they may be amended from time to time.

- 3.12** “**FESA**” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C § 1531 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.13** “**HCP/NCCP**” or “**Plan**” means the Western Placer County Habitat Conservation Plan and Natural Community Conservation Plan.
- 3.14** “**Implementing Agreement**” or “**IA**” means the “Implementing Agreement for the Western Placer County Habitat Conservation Plan and Natural Community Conservation Plan,” dated March 22, 2021.
- 3.15** “**Jurisdictional Wetlands and Waters**” means State and federally regulated wetlands and other water bodies that cannot be filled or altered without permits from either the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, or from the Regional Water Quality Control Boards under either section 401 of the Clean Water Act or the Porter-Cologne Water Quality Act.
- 3.16** “**Listed Species**” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under FESA or CESA.
- 3.17** “**NCCPA**” means the Natural Community Conservation Planning Act (Fish & G. Code, § 2800 et seq.) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 3.18** “**NMFS**” means the National Marine Fisheries Service, an agency of the United States Department of Commerce.
- 3.19** “**Non-listed Species**” means a species (including a subspecies, or a distinct population segment of a vertebrate species) that is not listed as endangered or threatened under FESA or CESA.
- 3.20** “**Party**” or “**Parties**” means any or all of the signatories to this Agreement.
- 3.21** “**Permits**” means the Federal Permits and the State Permit.
- 3.22** “**Plan Area**” means the geographic area analyzed in the HCP/NCCP, located in the western portion of Placer County, as depicted in Figure 1-2 of the HCP/NCCP. The Plan Area is further described in detail in Chapter 1.2.1 of the HCP/NCCP.
- 3.23** “**Programmatic General Permit**” means Western Placer County HCP/NCCP Programmatic General Permit 18 issued by the U.S. Army Corps of Engineers.
- 3.24** “**Project**” means the Hemphill Diversion Structure Project, as described in the Application.
- 3.25** “**Reserve System**” means the land acquired and dedicated in perpetuity through either a fee interest or conservation easement intended to meet the

preservation, conservation, enhancement and restoration objectives of the HCP/NCCP.

- 3.26** “**State Permit**” means Take permit number 2835-2020-001-02 issued to the Authority and other local agencies pursuant to Section 2835 of the California Fish and Game Code, as it may be amended from time to time.
- 3.27** “**Take**” has the same meaning provided by FESA and its implementing regulations with regard to activities subject to FESA, and also has the same meaning provided in the California Fish and Game Code with regard to activities subject to CESA and NCCPA.
- 3.28** “**Unforeseen Circumstances**” under the Federal Permit means changes in circumstances affecting a Covered Species or geographic area covered by the HCP/NCCP that could not reasonably have been anticipated by the Plan developers and USFWS at the time of the Plan’s negotiation and development, and that result in a substantial and adverse change in the status of a Covered Species. “Unforeseen Circumstances” under the State Permit means changes affecting one or more species, habitat, natural community, or the geographic area covered by the Plan that could not reasonably have been anticipated at the time of Plan development, and that result in a substantial adverse change in the status of one or more Covered Species.
- 3.29** “**USFWS**” means the United States Fish and Wildlife Service, an agency of the United States Department of Interior.
- 3.30** “**Wildlife Agencies**” means USFWS, NFMS, and CDFW.

#### **4.0** **PURPOSES**

This Agreement defines the Parties’ roles and responsibilities and provides a common understanding of actions that will be undertaken to avoid, minimize and mitigate the effects on the Covered Species caused by the Project, and to provide for the conservation of the Covered Species within the Plan Area. The purposes of this Agreement are to ensure implementation of each of the terms and conditions of this Agreement, and the relevant terms of the IA, the HCP/NCCP, and the Permits, and to describe remedies and recourse should either Party fail to perform its obligations as set forth in this Agreement.

#### **5.0** **AVOIDANCE, MINIMIZATION AND MITIGATION OF IMPACTS**

##### **5.1** **General Framework**

As required by FESA and NCCPA, the HCP/NCCP includes measures to avoid and minimize take of Covered Species and to conserve natural communities and Covered Species at the landscape-, habitat- and species-level. Chapter 6 of the HCP/NCCP provides further instructions to determine which avoidance and minimization measures are applicable to particular Covered Activities. PSE shall implement all applicable avoidance and minimization measures as required by the HCP/NCCP, including but not limited to those identified in Chapter 6, as described in the Application and this Agreement.

## 5.2 Surveys and Avoidance Measures

Site assessments and surveys are required prior to carrying out any Covered Activity for which a fee is collected or land in lieu of a fee is provided. PSE has submitted the required site assessments and surveys for approval by the Authority in accordance with Chapter 6.2.4 of the HCP/NCCP. The Application, which includes the results of the site assessments and surveys, describes in detail the construction monitoring, avoidance measures and mitigation measures that apply to the Project and will be performed by PSE. Based on the Application, the Authority has determined that PSE will implement and comply with all applicable conditions on covered activities described in Chapter 6.3 of the HCP/NCCP.

## 5.3 Delineation of Jurisdictional Wetlands and Waters

Aquatic features, including Jurisdictional Wetlands or Waters, are present on the site of the Project, and PSE has provided to the Authority a wetland delineation for on-site HCP/NCCP aquatic features in accordance with Chapter 6.3.2.1 of the HCP/NCCP. PSE shall pay the applicable Special Habitat Fee based on the delineation, as specified in the Application.

## 5.4 Fees and Contribution to Conservation

### 5.4.1 Fees

As set forth in the Application, PSE agrees to pay the Authority a one-time payment of \$XXX, which amount includes all HCP/NCCP mitigation fees necessary for the Project as stated in the Application. The overall payment amount is the sum of the following:

Land Conversion Fee: XX acres @ \$10,478/ac.

Special Habitat Fee: XX acres @ Riverine/Riparian/Stream System \$109,511/ac.

Temporary Effect Fee: TBD

### 5.4.2 Planning Costs and Contribution to Conservation

**5.1.1** In addition to the fee amount set forth in Section 5.4.1, PSE agrees to make a one-time payment to the Authority of \$XXX, which includes reimbursement for a portion of the costs to develop the PCCP (\$XXX) and a contribution to meeting PCCP conservation goals and objectives above and beyond PCCP mitigation requirements (\$XXX). **Timing of Payments; Adjustment of Fee Amounts**

The payments required by Section 5.4.1 and Section 5.4.2 of this Agreement must be paid in full to the Authority before any ground-disturbance associated with the Project occurs. Notwithstanding the above, the Parties acknowledge that the Authority adjusts its fee schedule annually on March 15 of each year in accordance with the fee adjustment provisions of Chapter 9.4.1.7 of the HCP/NCCP. If the PSE pays the amount required by Section 5.4.1 before March 15, 2023, and construction of the Project commences before March 15, 2023, the amount due will be as stated above. If PSE pays on or after March 15, 2023, or construction of the Project does not commence before March 15, 2023, the amount

due will be subject to annual fee adjustments for all fees. Based on these adjustments, if PSE pays before March 15 of any year, but construction does not commence before March 15 of that year, PSE will either be required to submit an additional payment for any increases or be entitled to a refund without interest for any decreases.

## **6.0 TAKE AUTHORIZATION**

### **6.1 Extension of Take Authorization to PSE**

As provided in Chapter 8.9 of the HCP/NCCP, after receipt of the Wildlife Agencies' written concurrence that the Project complies with the conditions in Chapter 8.9.4.1 of the HCP/NCCP and meets the objectives of a stream barrier modification project in accordance with Chapter 2.6.7.2.1 (Stream Barrier Modification Projects), execution of this Agreement, payment of the required fee amount, and compliance with the California Environmental Quality Act (Public Resources Code section 21000, et seq.) ("CEQA"), the Authority will issue a Certificate of Inclusion to PSE that extends Take authorization under the Permits to PSE. PSE is ultimately responsible for compliance with all applicable terms and conditions of this Agreement, the IA, the HCP/NCCP and the Permits.

#### **6.1.1 Compliance with the California Environmental Quality Act**

The Authority's issuance of a Certificate of Inclusion to the PSE is a public agency action that must comply with CEQA. The PSE prepared an Environmental Impact Report (EIR) for the Project, the [*"Hemphill Diversion Structure Project" and identifying information (e.g., SCH#2020090032)*], dated July 2021. The Authority is a CEQA responsible agency for purposes of the Project and, as such, will rely on the EIR prepared by the PSE for purposes of fulfilling its responsibilities under CEQA.

### **6.2 Duration of Take Authorization**

Once the Take authorization has been extended to the Project, it shall remain in effect for a period of two (2) years, unless and until the Permits are revoked by the Wildlife Agencies, in which case the Take authorization may also be suspended or terminated.

### **6.3 Section 7 Consultations with USFWS and NMFS**

Nothing in this Agreement is intended to alter the obligation of a federal agency to consult with USFWS pursuant to Section 7 of FESA (16 U.S.C. §1536(a)). The PSE acknowledges that, if the Project are authorized, funded, or carried out by a federal agency, the federal agency and the Project must also comply with Section 7. As provided in Section 10.5 of the IA, USFWS and NMFS have made a commitment that, unless otherwise required by law or regulation, they will not require any measures under Section 7 that are inconsistent with or exceed the requirements of the HCP/NCCP and the Permits for activities covered by the HCP/NCCP and the Permits.

The Project is not authorized, funded, or carried out by a federal agency and therefore PSE is not required to comply with Section 7 of FESA with regard to the Project.

## **7.0 RIGHTS AND OBLIGATIONS OF PSE**

## **7.1 Rights**

Upon the Authority's issuance of a Certificate of Inclusion to PSE, PSE may Take the Covered Species while carrying out the Project, as further authorized by and subject to the conditions of this Agreement, the IA, the HCP/NCCP, and the Permits. The authority issued to PSE applies to all of its elected officials, officers, directors, employees, agents, subsidiaries, contractors, and subcontractors, and their officers, directors, employees and agents to the extent that they participate in the implementation of the Project. PSE shall fully inform all such persons and entities of the terms and conditions of the Permits, and PSE shall be responsible for supervising their compliance with those terms and conditions. All contracts between PSE and such persons and entities shall require their compliance with the Permits.

## **7.2 General Obligations**

The PSE will fully and faithfully perform all obligations assigned to it under this Agreement, the IA, the HCP/NCCP, the Permits, including but not limited to the obligations assigned in the following chapters of the HCP/NCCP: Chapter 6.0 (Program Participation and Conditions on Covered Activities), Chapter 8.9.4 (Take Authorization for Participating Special Entities), and Chapter 9.0 (Costs and Funding). PSE shall implement all measures and adhere to all standards included in the Application, and PSE shall reserve funding sufficient to fulfill its obligations under this Agreement, the IA, the HCP/NCCP and the Permits throughout the term of this Agreement. PSE will provide the Authority will copies of all monitoring and reporting data referenced in **section XX** of the Application. [INCLUDE IF APPLICABLE: "In addition, PSE shall ensure that the monitoring, reporting, and adaptive management measures described in Section XXX of the Application are adequately funded in perpetuity.] PSE will promptly notify the Authority of any material change in its financial ability to fulfill its obligations under this Agreement.

## **7.3 Obligations In The Event of Suspension or Revocation**

In the event the Wildlife Agencies suspend or revoke any of the Permits pursuant to Sections 14 of the IA, PSE will remain obligated to fulfill its mitigation, enforcement, management, and monitoring obligations, and its other HCP/NCCP obligations, in accordance with this Agreement and applicable statutory and regulatory requirements for all impacts resulting from implementation of the Project prior to the suspension or revocation.

## **7.4 Obligation to Compensate Authority for Administrative Costs**

PSE shall compensate the Authority for its direct costs associated with this Agreement, including but not limited to, staff, consultant and legal costs incurred as a result of the review of the Application, drafting and negotiating this Agreement, monitoring and enforcement of this Agreement, and meetings and communications with PSE (collectively, Authority's "Administrative Costs"). Authority's Administrative Costs shall not exceed **\$15,000** in the aggregate. Authority shall provide PSE with invoices detailing its Administrative Costs monthly or quarterly, at Authority's discretion. PSE shall remit payment of each invoice within thirty (30) days of receiving it.

This provision is not intended to, and shall not be construed to, limit PSE's duty to indemnify the Authority as provided in Section 7.5 of this Agreement.

## **7.5 Indemnification**

PSE agrees to defend, indemnify, and hold harmless the Authority and its board members, officers, contractors, consultants, attorneys, employees and agents from any and all claim(s), action(s), or proceeding(s) (collectively referred to as "Proceedings") brought against Authority or its board members, officers, contractors, consultants, attorneys, employees, or agents arising out of or resulting from any of the following.

- Decisions or actions of the Authority related to the Project, this PSE Agreement, or compliance with the California Environmental Quality Act of 1970, as amended ("CEQA") with regard to the Project; and
- The negligence, recklessness, or intentional misconduct of any representative, employee, or agent of PSE.

Notwithstanding the above, (i) PSE shall have no duty to defend, indemnify, or hold harmless the Authority to the extent damages are sought in a tort claim arising out of or resulting from the individual negligence, recklessness, or intentional misconduct of any representative, employee, or agent of the Authority and (ii) the indemnification obligations set forth above shall in no way limit the rights and remedies of PSE with respect to any breach of the terms and conditions of this PSE Agreement by the Authority.

PSE's duty to indemnify the Authority includes, but is not limited to, damages, fees and/or costs awarded against or incurred by Authority, if any, and costs of suit, claim or litigation, including without limitation attorneys' fees and other costs, liabilities and expenses incurred in connection with any Proceedings.

### **7.5.1 Enforcement of Indemnification Provision**

PSE agrees to indemnify Authority for all of Authority's costs, fees, and damages incurred in enforcing the indemnification provisions of this Agreement.

### **7.5.2 Compliance Costs**

PSE agrees to defend, indemnify and hold harmless Authority, its officers, contractors, consultants, attorneys, employees and agents from and for all costs and fees incurred in additional investigation or study of, or for supplementing, redrafting, revising, or amending, any document (such as this Agreement or any document required for purposes of compliance with CEQA) if made necessary by any Proceedings.

### **7.5.3 Obligations in the Event of Litigation**

In the event that PSE is required to defend Authority in connection with any Proceedings, Authority shall have and retain the right to approve, which approval shall not be withheld unreasonably:

- the counsel to so defend Authority;
- all significant decisions concerning the manner in which the defense is conducted; and
- any and all settlements.

Authority shall also have and retain the right to decline to participate in the defense, except that Authority agrees to reasonably cooperate with PSE in the defense of the Proceedings. If Authority participates in the defense, all Authority fees and costs shall be paid by PSE.

PSE's defense and indemnification of Authority set forth herein shall remain in full force and effect throughout all stages of litigation including any and all appeals of any lower court judgments rendered in the Proceedings.

## **8.0 REMEDIES AND ENFORCEMENT**

If PSE fails to comply with the terms of this Agreement, the IA, the HCP/NCCP, or the Permits, the Authority may withdraw the Certificate of Inclusion and terminate any Take authorization extended to PSE. The Authority shall also have all of the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement, the IA, the HCP/NCCP and the Permits, and to seek redress and compensation for any breach or violation thereof. The Parties acknowledge that the Covered Species are unique and that their loss as species would be irreparable and that therefore injunctive and temporary relief may be appropriate in certain instances involving a breach of this Agreement.

## **9.0 FORCE MAJEURE**

In the event that a Party is wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of Party ("Force Majeure"), including, but not limited to, acts of God, labor disputes, sudden actions of the elements not identified as Changed Circumstances, or actions of non-participating federal or state agencies or local jurisdictions, the Party shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach, provided that nothing in this section shall be deemed to authorize either Party to violate FESA, CESA or NCCPA, and provided further that:

- The suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure;
- Within seven (7) days after the occurrence of the Force Majeure, the Party invoking this section shall give the other Party written notice describing the particulars of the occurrence;
- The Party shall use best efforts to remedy its inability to perform (however, this paragraph shall not require the settlement of any strike, walk-out, lock-out or other labor dispute on terms which in the sole judgment of the Party is contrary to its interest); and
- When the Party is able to resume performance of their obligations, it shall give the other Party written notice to that effect.

## **10.0**            **MISCELLANEOUS PROVISIONS**

### **10.1**    **Calendar Days**

Throughout this Agreement and the HCP/NCCP, the use of the term “day” or “days” means calendar days, unless otherwise specified.

### **10.2**    **Notices**

Any notice permitted or required by this Agreement shall be in writing, and delivered personally, by overnight mail, or by United States mail, certified and postage prepaid, return receipt requested. Notices may be delivered by facsimile or electronic mail, provided they are also delivered by one of the means listed above. Delivery shall be to the name and address of the individual responsible for each of the Parties, as follows:

Gregg McKenzie, Administrator  
Placer Conservation Authority  
c/o Placer County Community Development Resource Agency  
3091 County Center Drive  
Auburn, CA 95603  
Email: gamckenz@placer.ca.gov  
Phone: 530-745-3074

Jennifer Hanson  
General Manager  
Nevada Irrigation District  
1036 W. Main Street  
Grass Valley, CA 95945  
Email: hansonj@nidwater.com  
Phone: 530-273-6185

Notices shall be transmitted so that they are received within the specified deadlines. Notices delivered personally shall be deemed received on the date they are delivered. Notices delivered via overnight delivery shall be deemed received on the next business day after deposit with the overnight mail delivery service. Notice delivered via certified mail, return receipt requested, shall be deemed received as of the date on the return receipt or five (5) days after deposit in the United States mail, whichever is sooner. Notices delivered by facsimile or other electronic means shall be deemed received on the date they are received.

### **10.3**    **Entire Agreement**

This Agreement, together with the IA, the HCP/NCCP and the Permits, constitutes the entire agreement among the Parties. This Agreement supersedes any and all other agreements, either oral or in writing, between the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise of 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.

#### **10.4 Amendment**

This Agreement may only be amended with the written consent of both Parties.

#### **10.5 Attorneys' Fees**

If any action at law or equity, including any action for declaratory relief is brought to enforce or interpret the provisions of this Agreement, the prevailing Party shall be able to recover its attorneys' fees and costs.

#### **10.6 Governing Law**

This Agreement shall be governed by and construed in accordance with the laws of the United States and the State of California, as applicable.

#### **10.7 Duplicate Originals**

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

#### **10.8 Relationship to the FESA, CESA, NCCPA and Other Authorities**

The terms of this Agreement are consistent with and shall be governed by and construed in accordance with FESA, CESA, NCCPA and other applicable state and federal law.

#### **10.9 No Third Party Beneficiaries**

Without limiting the applicability of rights granted to the public pursuant to FESA, CESA, NCCPA or other applicable law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary thereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages under the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third party beneficiaries shall remain as imposed under existing state and federal law.

#### **10.10 References to Regulations**

Any reference in this Agreement, the IA, the HCP/NCCP, or the Permits to any regulation or rule of the Wildlife Agencies shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

#### **10.11 Applicable Laws**

All activities undertaken pursuant to this Agreement, the IA, the HCP/NCCP, or the Permits must be in compliance with all applicable local, state and federal laws and regulations.

#### **10.12 Severability**

In the event one or more of the provisions contained in this Agreement is held invalid, illegal or unenforceable by any court of competent jurisdiction, such portion shall be deemed severed from this Agreement and the remaining parts of this Agreement shall remain in full force and effect as though such invalid, illegal, or unenforceable portion had never been a part of this Agreement.

#### **10.13 Due Authorization**

Each Party represents and warrants that (1) the execution and delivery of this Agreement has been duly authorized and approved by all requisite action, (2) no other authorization or approval, whether of governmental bodies or otherwise, will be necessary in order to enable it to enter into and comply with the terms of this Agreement, and (3) the person executing this Agreement on behalf of each Party has the authority to bind that Party.

**10.14 No Assignment**

The Parties shall not assign their rights or obligations under this Agreement, the Permits, or the HCP/NCCP to any other individual or entity.

**10.15 Headings**

Headings are using in this Agreement for convenience only and do not affect or define the Agreement's terms and conditions.

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**IN WITNESS WHEREOF, THE PARTIES HERETO** have executed this Agreement to be in effect as of the date last signed below.

**PLACER CONSERVATION AUTHORITY**

By: \_\_\_\_\_  
**Gregg McKenzie**, Executive Director

DATE: \_\_\_\_\_

**NEVADA IRRIGATION DISTRICT**

By: \_\_\_\_\_  
**Jennifer Hanson**, General Manager

DATE: \_\_\_\_\_

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