

## **APPENDIX L Draft Implementing Agreement**

**Implementing Agreement by and between Butte County Association of Governments and the U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Wildlife, Butte County, City of Biggs, City of Chico, City of Gridley, City of Oroville, Western Canal Water District, Richvale Irrigation District, Butte Water District, Biggs West Gridley Water District and Caltrans District 3 Concerning the “Butte Regional Habitat Conservation Plan”**

**May 2019**

## 1.0 Parties

The Parties to this Implementing Agreement (Agreement) are the Butte County Association of Governments (BCAG), the Butte Regional Conservation Plan Joint Powers Authority (the “BRCP JPA” or the “Implementing Entity”), the County of Butte (“County”), the City of Oroville (“Oroville”), the City of Chico (“Chico”), the City of Biggs (“Biggs”), the City of Gridley (“Gridley”), the Western Canal Water District (“WCWD”), Biggs-West Gridley Water District, Butte Water District, Richvale Irrigation District, the California Department of Transportation (“Caltrans”), the United States Fish and Wildlife Service (“USFWS”), the National Marine Fisheries Service (“NMFS”), and the California Department of Fish and Wildlife of the State of California Natural Resources Agency (“CDFW”).

## 2.0 Recitals and Purpose

### 2.1 Recitals.

- (a) The Butte County region provides habitat for the Covered Species, as defined in Section 3 of this Agreement.
- (b) The Butte County region is currently developed with a variety of purposes including, but not limited to agriculture; livestock production; residential, utility, and commercial projects; and hunting, equestrian and other recreational activities. The Permittees are desirous of undertaking additional development in portions of Butte County over the 50 year term described in Chapter 1, Section 1.3.6 of the BRCP in a manner that is designed to avoid adverse impacts to the Covered Species. Additionally, the Permittees wish to undertake or assist in actions that would be beneficial to and contribute to the conservation of the Covered Species and ensure that Butte County remains hospitable to those species' presence.
- (c) BCAG, with technical assistance from the USFWS, NMFS, and CDFW, has developed a series of measures, described in the BRCP, to minimize and mitigate to the maximum extent practicable the effects on the Covered Species and their associated habitat incidental to the activities in Butte County that are subject to the Permits and this Agreement and to provide long-term conservation of habitat for covered species and undertake other activities to benefit, and assist the recovery of, the Covered Species.

**2.2 Purpose.** 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 Covered Activities within the Permit Area, and to provide for the conservation of the Covered Species within the Permit Area. The purposes of this Agreement are:

- To ensure implementation of each of the terms and conditions of the Permits; To note the existence of long term assurances to the Permittees that, pursuant to the Federal “No Surprises” provisions of 50 Code of Federal Regulations, sections 17.22(b)(5) and 17.32(b)(5), and California Fish and Game Code section 2820, subdivision (f), as long as the terms and conditions of this Agreement, the BRCP, and the Permits are fully satisfied, the Wildlife Agencies will not require of the Permittees the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources, either to minimize and mitigate the impacts of Authorized Take, or to provide for the conservation and management of the Covered Species in the Permit Area, except as provided in this Agreement and the BRCP; and
- To describe remedies and recourse should any Party fail to perform its obligations as set forth in this Agreement.

## 3.0 Definitions

The following terms as used in this Agreement shall have the meanings set forth below:

- 3.1** The term "**Annual Progress Report**," means the Annual Progress Report prepared by the Implementing Entity about implementation of the BRCP as provided in this Agreement, Section 14 and further described in the BRCP Chapter 8, Section 8.2.2.
- 3.2** The term "**BRCP**" means the "Butte Regional Conservation Plan," the joint habitat conservation plan and natural community conservation plan prepared by the Permittees with technical assistance and approved by the USFWS, NMFS, and CDFW, collectively referred to as the Wildlife Agencies, under section 10 of the ESA and Section 2820 of the California Fish and Game Code.
- 3.3** The term "**BRCP Conservation Lands**" means the BRCP Conservation Lands that are 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 Conservation Strategy of the BRCP. The BRCP Preserve System is designed to enhance the function of existing Public and Easement Habitat Lands (PEHL) as of the Effective Date as further described in BRCP Chapter 5, Section 5.2.3.6. Also, CM 8 allows that the Implementing Entity work with public agencies to enhance habitat on PEHL.
- 3.4** The term "**BRCP Conservation Strategy**" or "Conservation Strategy" means all components of the conservation strategy described in BRCP Chapter 5, including the biological goals and objectives, and conservation measures; the avoidance and minimization measures described in Chapter 6; and the monitoring and adaptive management requirements described in Chapter 7.
- 3.5** The term "**BRCP Fees**" means the Base Fee (Base Fee), the Riparian Restoration Fee (Riparian Fee), a Vernal Pool Restoration Fee (Vernal Pool Fee), an Emergent Wetland Restoration Fee (Emergent Wetland Fee), a Butte County Meadowfoam Fee (Meadowfoam Habitat Fee), Water and Irrigation District Channel Maintenance Fee (Water District Fee), and temporary impact fee, as further described in BRCP Chapter 9, Section 9.3.1.1.
- 3.6** The term "**BRCP Joint Powers Authority**" or "BRCP JPA" means the non-profit entity created to preserve in perpetuity, enhance and restore the native biodiversity and ecosystem values of the Conservation Lands for the benefit of California's future generations on the areas of Butte County to be conserved through the Conservation and Land Use Agreement.
- 3.7** The term "**Certificate of Inclusion**" means a document executed by a Permittee and a third party that extends the incidental take authorization granted to the Permittee to such third party for the purpose of carrying out a Covered Activity on Covered Lands. Execution of the Certificate of Inclusion by the third party places such third party under the legal control of the Permittee for purposes of enforcing and implementing relevant portions of the BRCP, this Agreement, and the Permits. A Certificate of Inclusion template is attached as Exhibit A. Only applies to Neighboring Landowner Assurances and/or Participating Special Entities.
- 3.8** The term "**Changed Circumstances**" as defined at 50 C.F.R. Section 17.3 means changes in circumstances affecting a species or geographic area covered by the BRCP that can reasonably be anticipated by the Parties and that can be planned for in the BRCP (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events). Changed Circumstances and the

planned responses to those circumstances are described in Chapter 8, Section 8.5.1 of the BRCP. Changed Circumstances and the planned responses to them are part of the BRCP's Operating Conservation Program (see definition below).

**3.9** The term "**Conservation Lands**" means the lands acquired through fee title, conservation easement, or dedication within the Plan Area that meet all requirements for protection, restoration, management, monitoring, and adaptive management as described in the BRCP Conservation Strategy in BRCP Chapters 5, 6, and 7.

**3.10** The term "**Conservation Lands System**" means all of the Conservation Lands collectively at a point in time during the Permit Period or at completion of the entire system as described in the BRCP Conservation Strategy in BRCP Chapter 5. The BRCP Conservation Lands System equates to the "Reserve System" as defined in the Natural Community Conservation Planning Act.

**3.11** The term "**Covered Activities**" means certain activities and projects described in BRCP Chapter 2 carried out by the Permittees, Third Party Participants, or a holder of a Certificate of Inclusion on the Covered Lands for which incidental take of Covered Species is authorized by the Wildlife Agencies under the Permits. Covered Activities include plan-wide and development-related activities which are described in detail in Chapter 2 of the BRCP. Covered Activities exclude hunting and mineral extraction and processing.

**3.12** The term "**Covered Lands**" means the lands of the Plan Area described in Chapter 1, Section 1.3.1 of the BRCP which are covered by the Permits. During the Permit term, the Permits' authorization of take of Covered Species incident to Covered Activities and the BRCP's Operating Conservation Program apply or may apply to those Covered Lands that are approved for development by the Permittees as of the Effective Date.

**3.13** The term "**Covered Species**" means the 25 species listed in Chapter 1, Table 1-1 of the BRCP

**3.14** The term "**Effective Date**" means the date of the first business day after all of the following have occurred: execution of this Agreement by all Parties; issuance of both of the Permits; adoption of an BRCP implementing ordinance by each of the Cities and the County, as provided in Agreement Section 7.1, and formation of the Implementing Entity described in 3.6 of the Agreement.

**3.15** The term "**ESA**" means the Endangered Species Act of 1973 (16 U.S.C. Sections 1531 *et seq.*), as amended.

**3.16** The term "**incidental take**" means the "take" under Federal and State law of a covered wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity.

**3.17** The term "**Management Plan**" means the plan governing the management of the BRCP Conservation Lands managed by the BRCP Joint Powers Authority which includes prescribed management standards to assure that existing natural resource and conservation values of the BRCP Conservation Lands are protected in accordance with CM5 in BRCP Chapter 5, Section 5.4.2.2 and provided in this Agreement Section 10.1.

**3.18** The term "**Participating Neighboring Landowner**" means an owner of specific types of agricultural and range (grazing) lands described in Chapter 8, Section 8.7 that are within one-half (0.5)

mile of lands included in the BRCP Conservation Lands System (a "Neighboring Landowner") who has received a special certificate from the Implementing Entity pursuant to Agreement Section 5.1.2 that extends Authorized Take coverage for certain Covered Species resulting from certain agricultural land uses.

**3.19** The term "**Operating Conservation Program**" means the totality of take avoidance, minimization, and mitigation measures, responses to changed circumstances, monitoring and reporting measures, conservation measures, and other implementation measures, provided for under the BRCP.

**3.20** The term "**Participating Special Entity**" means an entity that is not subject to the City's or the County's land use or other regulatory authority that has entered into a special agreement with the Implementing Entity and Chapter 8, Section 8.10 of the BRCP to receive Authorized Take coverage for a project or activity within the Plan Area.

**3.21** The terms "**Parties**" and "**Party**" means BCAG, the BRCP JPA, the County, Chico, Oroville, Biggs, Gridley, WCWD, Biggs-West Gridley Water District, Butte Water District, Richvale Irrigation District, Caltrans, USFWS, NMFS, and CDFW, the parties to this Agreement.

**3.22** The term "**PEHL**" means Public and Easement Habitat Lands in the BRCP Plan Area as further described in BRCP Chapter 5, Section 5.2.3.6.

**3.23** The term "**Permits**" means the incidental take permits issued by the USFWS and NMFS pursuant to section 10(a)(1)(B) of the ESA and the incidental take permit issued by the CDFW pursuant to California Fish and Game Code Section 2835.

**3.24** The term "**Permittee**" means BCAG, the BRCP JPA, the County, Chico, Oroville, Biggs, Gridley, WCWD, Biggs-West Gridley Water District, Butte Water District, Richvale Irrigation District and Caltrans, individually. Collectively, these entities are referred to as, the "Permittees."

**3.25** The term "**Project Proponent**" means a private person or entity that has received Take Authorization coverage from a City or the County \_\_\_ for a project or activity in the Plan Area that is subject to the land use or other regulatory authority of the City or the County.

**3.26** The term "**take**" as defined in section 3 of the ESA means to harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Under 50 C.F.R. section 17.3, "Harm" in the definition of "take" in the ESA means an act that actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. For purposes of State law, take shall have the same meaning provided in Section 86 of the California Fish and Game Code with regard to activities subject to CESA and NCCPA.

**3.27** The term "**Plan Area**" means the area shown in BRCP Chapter 1, Figure 1-1 *Plan Area* for the Butte Regional Conservation Plan, and encompasses 564,270 acres of land as further described in Chapter 1, Section 1.3.1 of the BRCP.

**3.28** The term "**Third Party Project Participant**" means Project Proponents, Participating Special Entities, Neighboring Landowners and other persons or entities that that are not Permittees and that

receive Authorized Take coverage from a Permittee in accordance with Agreement Section 7.4 and Chapter 8, Sections 8.7.2, 8.9 and 8.10 of the BRCP.

**3.29** The term "**Unforeseen Circumstances**" as defined in the "No Surprises" rule at 50 C.F.R. section 17.3 means changes in circumstances affecting a species or geographic area covered by the BRCP that could not reasonably have been anticipated by Permittee and USFWS at the time of the BRCP's negotiation and development, and that result in a substantial and adverse change in the status of a Covered Species.

**3.30** The term "**UPAs**" or "**Urban Permit Areas**" means the geographical extent of Authorized Take coverage for urban development as described in BRCP Chapter 2, Section 2.1.2 and further explained in BRCP Chapter 2, Section 2.2, and as delineated in Figure 2-1 of the BRCP.

**3.31** The term "**Wildlife Agencies**" means USFWS, NMFS and CDFW.

## 4.0 Incorporation

**4.1 Incorporation of BRCP.** The BRCP and each of its provisions are intended to be, and by this reference are, incorporated herein. This Agreement is intended to specify the obligations of the Parties under the BRCP, recognizing that the BRCP is a conservation plan and was not drafted as a contract. In the event of any direct contradiction, conflict or inconsistency between this Agreement and the BRCP, the terms of this Agreement will control. In all other cases, the provisions of this Agreement and the BRCP will be interpreted to be consistent with and complementary to each other.

**4.2 Incorporation into the Permits.** This Agreement and the BRCP shall be incorporated as terms and conditions of the Permits. In the event of any direct contradiction among the provisions of the BRCP, the terms of this Agreement or the terms of the Permits, the terms of the Permits shall control. Each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by the other Party or anyone acting on behalf of the other Party that is not embodied in the BRCP, this Agreement, or the Permits.

## 5.0 Obligations of the Parties

**5.1 Obligations of Permittees.** The Permittees will fully perform all obligations assigned to them under the Operating Conservation Program, this Agreement and the Permits.

**5.1.1 Authorized Take for Projects and Activities Implemented by Permittees.** Each Permittee will ensure that all Covered Activities it implements comply with the Permits. As further described in BRCP Chapter 8, Section 8.8, as of the Effective Date, each Permittee will document such compliance and provide a copy of that documentation to the Implementing Entity, which will maintain a record of compliance documentation for all Covered Activities implemented by Permittees.

Within three (3) months after the Effective Date, the Permittees will develop a template to standardize the form in which they document their compliance with the Permits. The template will be substantively similar to the process for use of permits described for Project Proponents, as described in Agreement Section 5.1 and BRCP Chapter 8, Section 8.8. However, the Permittees may adapt the form of the application package for their use as they deem appropriate. Until the template is developed for Covered

Activities implemented by the Permittees, the Permittees will use the process for use of permits outlined in BRCP Chapter 8, Section 6.7.2 used for Project Proponents.

When one or more BRCP Fees are required for a Covered Activity implemented by a Permittee, the Implementing Entity will calculate the required fee amount, and the Permittee will transfer that amount to the Implementing Entity before initiating the Covered Activity. Permittees with the ability to implement actions described in BRCP Chapter 5, pertaining to the BRCP Conservation Strategy, or BRCP Chapter 7, pertaining to the BRCP monitoring and adaptive management program, that contribute to the successful implementation of the BRCP Conservation Strategy, may obtain credit against all or a portion of a required fee amount in exchange for implementation of those actions. The Implementing Entity will prepare a written determination of whether any such credit proposed by a Permittee conforms to the BRCP and is approved. The written determination will include the amount of any approved credit, as described in BRCP Chapter 10, Sections 10.2.1 and 10.3.

Take Authorization coverage for any Covered Activity implemented by a Permittee will take effect upon the Permittee's delivery to the Implementing Entity of its documentation of compliance with this Agreement, the BRCP, and the Permits, and any required fee amount or any fee alternative approved by the Implementing Entity.

**5.1.2 Extension of Take Authorization to Third Party Participants.** As further provided by the Permits, Authorized Take coverage may be extended to "Third Party Participants," which include "Project Proponents," "Participating Special Entities" and "Neighboring Landowners." The Implementing Entity may extend Authorized Take coverage to Participating Special Entities and Neighboring Landowners and will be responsible for determining whether applications or requests from potential Participating Special Entities and Neighboring Landowners comply with all applicable terms and conditions of the Permits. The County and Cities may extend Authorized Take coverage to Project Proponents and will be responsible for determining whether applications from potential Project Proponents comply with all such terms and conditions and will make findings supporting such determination before extending Authorized Take coverage, as described in Section 5.1.3.2 of this Agreement and Chapter 8, Section 8.7 of the BRCP.

**5.1.3 Procedural Obligations of Project Proponents.** The County and the Cities will each require proponents of private projects that are subject to their land use or other regulatory authority and fall within the categories of projects and activities described in BRCP Chapter 2, Sections 2.2 and 2.3 to comply with all applicable terms and conditions of the Permits, and will extend Authorized Take coverage to such projects, as provided in this Section.

**5.1.4 BRCP Application Process.** As further described in BRCP Chapter 9, 9.3.1, the County and the Cities will require proponents of private projects that are subject to their land use or other regulatory authority and fall within the categories of projects and activities described in BRCP Chapter 2, Sections 2.2 and 2.3 to submit an application package as described in [BRCP Chapter 8, Section 8.7.2](#). The County and the Cities will review the application package based on an "Evaluation Checklist" (i.e., the template referenced in Section \_\_\_ of this Agreement) that will be prepared by the Implementing Entity. The County's and Cities' review of the application package will occur concurrently with the environmental review of the project pursuant to CEQA, for projects subject to CEQA.

Based on its review of each application package, the applicable City or the County will prepare a written determination regarding whether the private project, as proposed in the application package, includes

all applicable terms and conditions of the Permits and that take associated with the implementation of the proposed project is properly authorized through the Permits. The City or County may request the Implementing Entity to prepare this determination. If the City or County concludes that the project as proposed does not include all applicable terms and conditions, it will explain the deficiency or omission in writing to the private project proponent and will reject the application. If the City or County concludes that the project as proposed includes all applicable terms and conditions, it will prepare a written determination to that effect.

The Cities and the County will provide each determination to the Implementing Entity and maintain a copy of all BRCP application packages for which they have prepared a Compliance Determination, which shall be made available to the Implementing Entity as part of annual and other reviews.

Nothing in this Section shall be construed to affect the ability of the County or a City to determine that an application for a private project is incomplete or to deny a private project application for any reason unrelated to the BRCP or the Permits.

**5.1.4.1 Extension of Authorized Take Coverage to Project Proponents.** If a City or the County prepares a Compliance Determination for a private project following completion of the BRCP application process prepared in accordance with the BRCP, the private project proponent will be eligible for Authorized Take coverage as a Project Proponent. The City or County will require the private project proponent to comply with all applicable terms and conditions of the Permits. The City or County may enter into an agreement in which the Project Proponent assumes the obligation to comply with such terms and conditions or may require such compliance as a condition of project approval. Once the agreement is entered into or the conditions of approval are imposed, all applicable BRCP Fees have been paid to the Implementing Entity as provided in Agreement Section 5.2.3 and further described in BRCP Chapter 9, Section 9.3.1, and any lands in lieu of fees have been provided as provided in Agreement Section 5.2.3 and further described in BRCP Chapter 9, 9.3.1 and the City or County has otherwise finally approved the project, the applicable City or the County will extend Authorized Take coverage to the project proponent. The project proponent thereafter will have Authorized Take coverage as a Project Proponent.

Once Authorized Take coverage has been extended to a Project Proponent, it will remain in effect with regard to the project for as long as the Project Proponent fully complies with all applicable terms and conditions of the Permits, unless:

- the Wildlife Agencies have suspended or revoked the Permits;
- Take has not yet occurred; or
- The Permits expire and are not renewed.

If the Project Proponent does not comply with such terms and conditions, or if the applicable City or County suspends or revokes its approval of the project, the City or County will also suspend or revoke the Authorized Take coverage for the project. The County and the Cities will not require Project Proponents to provide any additional mitigation to address impacts to Covered Species beyond what is required in the Permits for purposes of extending Authorized Take; provided, however, that the County and Cities may impose additional requirements and impose BRCP Fees on a particular project for purposes of other state or Federal environmental permits such as permits issued pursuant to Section 404 of the Federal Clean Water Act.



**5.1.4.2 Extension of Authorized Take Coverage to Participating Special Entities.** The Implementing Entity, with concurrence of the Wildlife Agencies, may extend take coverage to Participating Special Entities through issuance of a Certificate of Inclusion in accordance with the process and provisions described in BRCP Chapter 8, Section 8.7.2.

**5.1.4.3 Extension of Authorized Take Coverage to Neighboring Landowners.** The Implementing Entity, with concurrence of the Wildlife Agencies, may extend take coverage to a Neighboring Landowner through issuance of a Certificate of Inclusion (**Exhibit C**) in accordance with the process and provisions described in BRCP Chapter 8, Section 8.7.

**5.1.4.4 BRCP Implementing Ordinances.** Before the Effective Date, the Cities and the County will each consider the adoption of a BRCP implementing ordinance substantively similar to the model ordinance attached to this Agreement as **Exhibit B** that sets forth the application process for potential Project Proponents. The implementing ordinance will, among other things: provide for the imposition of BRCP Fees; establish the jurisdiction's procedure for extending Authorized Take coverage to Project Proponents, as provided in this Agreement Section 5.1.3; and provide for the conveyance of land in lieu of BRCP Fees, in accordance with BRCP Chapter 9, 9.3.1.1. The Cities and the County may extend Authorized Take coverage to Project Proponents only after adopting a BRCP implementing ordinance in accordance with this Section. In addition, the Permittees recognize that the Wildlife Agencies' findings regarding the adequacy of funding for BRCP implementation will be based, in part, on the expectation that the Cities and the County will adopt implementing ordinances that require the payment of BRCP Fees and that failure by a City or the County to adopt an implementing ordinance will prevent the Permits from taking effect until such time as a city or the County adopts the ordinance.

The model ordinance in **Exhibit B** is intended to exemplify the necessary substantive terms of a BRCP implementing ordinance; it is not intended to dictate the precise terms of each such ordinance. The County and each City may each adapt the model ordinance to reflect its independent findings, to maximize administrative efficiency, or for other reasons, provided the substance of the operative terms in the model ordinance is reflected in each implementing ordinance.

**5.2 Obligations of Project Participants.** The impacts to Covered Species and natural communities resulting from Covered Activities will be minimized and mitigated by the implementation of the BRCP Conservation Strategy, including limitations on take described in BRCP Chapters 4 and 5 by avoidance and minimization measures for Covered Activities described in BRCP Chapter 6, and related application and survey requirements, and by the payment of certain fees that will be used to fund implementation of the BRCP described in BRCP Chapter 9. The avoidance and minimization measures described in BRCP Chapter 6, measures described in BRCP Chapter 8, and the fee requirements described in BRCP Chapter 9 are referred to herein as "Conditions." Most of these Conditions apply to specific types of Covered Activities; no individual Covered Activity is anticipated to need to comply with all Conditions. Instead, each Covered Activity will comply with certain applicable Conditions. The Permittees will ensure that all applicable Conditions are incorporated in Covered Activities, as provided in this Section.

**5.2.1 Avoidance and Minimization of Impacts.** As further described in BRCP Chapter 6, the BRCP includes Conditions to avoid or minimize the Take of Covered Species resulting from Covered Activities. These Conditions are designed to form a regional program that will be implemented systematically to: prevent Take of individuals of certain Covered Species; avoid impacts to Covered Species to the maximum extent practicable; minimize adverse effects on Covered Species and natural communities to the maximum extent practicable; and avoid and minimize direct and indirect impacts on wetlands and

streams. Each Permittee will incorporate all applicable Conditions within all Covered Activities that it implements. In addition, the County and the Cities will require all applicable Conditions as conditions of approval for all Project Proponent Covered Activities, and the Implementing Entity will ensure that the Conditions are incorporated in all Participating Special Entity Covered Activities. Participating Special Entity Covered Activities are activities identified by entities that are not subject to the jurisdiction of the Permittees, or whose project is not specifically identified and not precluded as a covered activity but which may receive take authorization under the BRCP via a Certificate of Inclusion in accordance with the provisions of BRCP Chapter 8, Section 8.7.2.

**5.2.2 Avoidance and Minimization of Impacts to Species Protected under Laws other than the ESA or CESA.** All Covered Species that are bird species are protected under the Migratory Bird Treaty Act. However, unless and until each of the unlisted MBTA Covered Species that may become Federal Listed Species and the Federal Permit becomes a Special Purpose Permit for those species, the Migratory Bird Treaty Act will prohibit killing or possessing them or their young, nests, feathers, or eggs.

The Permits authorize Take of Covered Species only. Covered Activities must comply with applicable state and Federal laws that protect species that are not Covered Species just as they would without the Permits.

**5.2.3 BRCP Fees.** As provided in this Section and further described in BRCP Chapter 9, the Implementing Entity will use revenues generated from certain fees placed on Covered Activities to fund the implementation of the conservation strategy described in BRCP Chapter 5. Such actions include, but are not limited to creation of the BRCP Conservation Lands, management of BRCP Conservation Lands, monitoring of and reporting on BRCP implementation, adaptive management, responses to Changed Circumstances, and related planning and administrative costs. These actions, together with the avoidance and minimization measures provided for in Agreement Section 5.2.1, will fulfill all requirements under the ESA and the NCCPA to minimize and mitigate for the impacts of Covered Activities on Covered Species and natural communities. The BRCP includes several types of fees, which are referred to collectively in this Agreement as the “BRCP Fees.” The BRCP Fees, fee reductions through impact avoidance, and the method of calculating the fees is further described in BRCP Chapter 9, Section 9.3.1.

#### **5.2.4 Payment and Collection of Fees**

The Permittees will ensure that all applicable BRCP Fees are paid, and all applicable fee credits are applied, for all Covered Activities, as further described in BRCP Chapter 9, 9.3.1. The County and the Cities will make payment of all applicable BRCP Fees a condition of final approval for Project Proponent Covered Activities; the Implementing Entity will require payment of all applicable BRCP Fees for Participating Special Entity Covered Activities; and the Permittees will pay all applicable BRCP Fees for Covered Activities that they implement. The Implementing Entity may require Participating Special Entities to pay an amount in addition to applicable BRCP Fees to reimburse the Implementing Entity for costs associated with extending take coverage to Participating Species Entities and to help fund BRCP conservation actions intended to contribute to the recovery of Covered Species.

The Cities and the County will collect fee payments from Project Proponents and provide the fee revenues to the Implementing Entity at least quarterly (i.e., within 3 months). The Implementing Entity will collect all fee revenues, including fee payments from the Permittees for Covered Activities that they implement. The Implementing Entity will comply with all applicable provisions of the Mitigation Fee Act

(Gov. Code §66000, et seq.) as to the deposit, accounting, expenditure and reporting of such fee revenues.

### **5.2.5 Avoidance of Resources to Reduce Fee**

The Implementing Entity may reduce Project Proponent impact fees if the Implementing Entity determines that the implementation of a covered activity will effectively avoid impacts on natural communities and covered species per the requirements described in in BRCP Chapter 9, Section 9.3.1.1.

### **5.2.6 Timing of Fee Payment**

All applicable BRCP Fees, subject to any BRCP Fee credits as described in Agreement Section 5.1.1, will be collected before the Covered Activity for which the fees are required is implemented. The County and the Cities will require Project Proponents to pay all applicable fees after project approval and before or concurrent with the issuance of a grading permit for each Project Proponents' Covered Activity. If a grading permit is not required for the Covered Activity, payment of the fees will be required before the first building or construction permit is issued. The Implementing Entity will require Participating Special Entities to pay all applicable fees before initiating ground-breaking activities for their Covered Activities, and the Permittees will pay all applicable fees before implementing any Covered Activity.

**5.2.7 Adjustment of Fees.** As further described in BRCP Chapter 9, 9.3.1.1, there are two ways in which the Implementing Entity will evaluate the amount of BRCP Fees and adjust them as necessary to account for increases or decreases in the cost of implementing the BRCP: by annual adjustments based on standard indicators and by periodic assessments and adjustments. The Implementing Entity will adjust the rate of the BRCP Fees annually, by April 1 of each year following issuance of the BRCP permits adjustment, according to the indices and procedures described in BRCP Chapter 9, Section 9.3.1.1, beginning the calendar year following the Effective Date.

The Implementing Entity will conduct a periodic assessment concurrent with an annual adjustment of the BRCP Fees to evaluate whether fee revenues are adequate to cover the appropriate portion of implementation costs, as described in BRCP Chapter 9, Section 9.3.1.1. Detailed reviews will be conducted by the Implementing every five years through Year 50 as further discussed in BRCP Chapter 9, Section 9.3.1.1.

BRCP fees may be increased or decreased based on the results of the annual adjustments, biennial review, or periodic assessment. However, BRCP fees must always be based on the mitigation requirement methodology described in BRCP Chapter 9, Section 9.3.1.1. The Permittees will not be required to increase BRCP Fees to address shortfalls in other sources of funding or to decrease the Fees in response to windfalls in other sources of funding.

**5.3 Creation of BRCP Conservation Lands System.** The creation and management of the BRCP Conservation Lands System is an essential element of the BRCP Conservation Strategy. The Implementing Entity will create the BRCP Conservation Lands System on behalf of the Permittees as provided in this Section and further described in BRCP Chapter 5 and BRCP Chapter 9. With the exception of existing PEHL, described in Agreement Section 3.25, the BRCP Conservation Lands will be created by permanently protecting land containing certain terrestrial, wetland, and aquatic land cover types and managing and monitoring them in perpetuity. Lands consistent with the conservation strategy that are owned by a Permittee may be added to the BRCP Conservation Lands System upon approval by

the Implementing Entity and Wildlife Agencies and protection through a conservation easement, as provided in this Section and as further described in BRCP Chapter 5. BRCP Conservation Lands will be actively managed for the benefit of Covered Species, and habitat on BRCP Conservation Lands will be enhanced or restored where appropriate, to improve habitat for Covered Species and natural communities, as provided in Agreement Section 5.4.2 and further described in BRCP Chapter 5, Section 5.4 and 5.6.

The Implementing Entity will create and complete the BRCP Conservation Lands according to prescribed deadlines as provided in Agreement Section 5.4 and further described in BRCP Chapter 8, Section 8.1. In addition, lands must be added to the BRCP Conservation Lands at a pace that is roughly proportional to the rate at which Covered Activities are implemented and Authorized Take occurs, as provided in Agreement Section 9.4 and further described in BRCP Chapter 8 and Sections 8.3.1.

**5.3.1 Criteria for BRCP Conservation Lands.** As further described in BRCP Chapter 5, Section 5.4.1.1 and Chapter 8, Section 8.4.1, the Implementing Entity and Wildlife Agencies must concur with all lands to be added to the BRCP Conservation Lands, including lands owned by a Permittee, fee title transfers and conservation easement acquisitions.

Only lands that meet all of the following criteria may be counted toward the BRCP Conservation Land requirements of the BRCP.

- The lands must contribute to the BRCP Conservation Strategy.
- The lands must be consistent with BRCP preserve design and assembly principles, as described in BRCP Chapter 5.
- The lands must meet all relevant criteria in BRCP Chapter 5, Section 5.4.1.1 for landscape linkages, land cover types, plant populations, modeled species habitat, and species occupancy.
- The biological functions and values on the lands that contribute to the BRCP Conservation Strategy must be permanently protected, with the exception of existing PEHL, described further in BRCP Chapter 8, Section 8.4.1 and Agreement Section 3.25.
- A management plan must be prepared for the conservation lands, as provided in Agreement Section 10 and further described in BRCP Chapter 5.4.2.2 (CM 5).
- The lands were not used to fulfill mitigation requirements for a project or activity that is not a Covered Activity.

**5.3.2 Permanent Protection of BRCP Conservation Lands.** As provided in this Section 3.2, BRCP Conservation Lands will be permanently protected. For purposes of the Permits, BRCP Conservation Lands will be regarded as permanently protected if the biological functions and values on the lands that contribute to the BRCP Conservation Strategy are protected by a permanent, recorded conservation easement that meets the requirements of this Section and BRCP Chapter 8, 8.4.1.

**5.3.2.1 Conservation Easements.** As further described in BRCP Chapter 8, Section 8.4.1, the Implementing Entity will negotiate the specific terms and conditions of conservation easements used to permanently protect BRCP Conservation Lands with each landowner on a case-by-case basis, based on site conditions, land uses, and Covered Species and habitat needs. However, all BRCP Conservation Lands conservation easements will comply with California Civil Code section 815 et seq., Government Code section 65965 et seq., and other applicable laws; will achieve certain objectives and prohibit certain uses, as further described in BRCP Chapter 5, Section 5.2.3.5; and will identify the Wildlife Agencies as third party beneficiaries for purposes of enforcing the terms of the easement. BRCP Conservation Lands conservation easements will be held by the Implementing Entity in most cases. If

the Implementing Entity owns fee title to the land covered by the conservation easement, the conservation easement will be held by another conservation organization approved by the Wildlife Agencies. In addition, the Implementing Entity may, on a case-by-case basis, allow other conservation organizations approved by the Wildlife Agencies to hold BRCP Conservation Lands conservation easements, provided such conservation organizations enter into a binding agreement with the Implementing Entity in which they assume the obligation to enforce the terms of the conservation easement in accordance with the BRCP, this Agreement, and the Permits and comply with all applicable legal requirements including, but not limited to, Government to Code section 65965 et seq.

For purposes of lands added to the BRCP Conservation Lands, the Implementing Entity will follow the minimum conservation easement requirements identified in Chapters 5 and 8 of the BRCP). Reasonable variations from conservation easements may be needed to address site-specific constraints. CDFW and USFWS, along with the Implementing Entity, must review and approve all conservation easements as well as any modifications to the template easement prior to its execution

**5.3.2.2 Requirement for Management Plans for the Conservation Lands.** As provided in Agreement Section 5.4.2, all BRCP Conservation Lands will be managed in perpetuity according to the applicable Management Plans. Lands may be counted toward the BRCP Conservation Lands System requirements of the BRCP before a Management Plan is prepared only if the lands are permanently protected and the fee owner of the lands is subject to an enforceable legal obligation to manage the lands, or to allow the lands to be managed, according to a BRCP Management Plan.

**5.3.2.3 Stay-Ahead or Rough Proportionality Requirement.** The Implementing Entity will ensure that protected lands are added to the BRCP Conservation Lands System, and that required habitat restoration occurs at or faster than the pace at which Covered Activities impact habitat. The Implementing Entity will also ensure that additional protection of habitat lands and restoration of habitat occurs as per the schedules in the BRCP Chapter 8 which will fulfill the NCCPA's requirement to ensure that implementation of mitigation and conservation measures on a plan basis is roughly proportional in time and extent to the impact on habitat or covered species. (Cal. Fish & G. Code section 2820(b)(3)(D)(9).) This requirement is also referred to in the BRCP as the "stay-ahead" requirement and will assist the USFWS in making a finding that the BRCP will meet the requirement of section 10(a)(2)(B)(ii) of the ESA. In order to make findings that the proposed impacts are mitigated to the maximum extent practicable, USFWS will consider temporal losses resulting from the time of impact relative to the time of mitigation. As further described in BRCP Chapter 8, 8.3, the amount of each land cover type protected and restored in the BRCP Conservation Lands System as a proportion of the total requirement for each land cover type will be equal to or greater than the impact on that land cover type as a proportion of the total impact expected by all Covered Activities. The Implementing Entity will in good faith attempt to maintain strict proportionality between establishment of the BRCP Conservation Lands System and the impacts of Covered Activities, but the Implementing Entity will fulfill the requirements of this Section and BRCP Chapter 8, Section 8.3, so long as it ensures that the pace at which the BRCP Conservation Lands are created, and at which required habitat restoration and creation occurs on BRCP Conservation Lands, does not fall behind the pace at which Covered Activities impact habitat with the exception of the allowable variances described in Chapter 8, Section 8.3. The Implementing Entity will measure and report on rough proportionality as described in Chapter 8, Sections 8.3.

**5.3.2.4 BRCP Conservation Lands Acquired Using State or Federal Funding.** As provided in Agreement Section 8 and further described in BRCP Chapter 9, the BRCP funding strategy for completion of the BRCP Conservation Lands identifies and assumes contributions of state and Federal funding.

Lands added to the BRCP Conservation Lands using funds from state or Federal agencies will be counted toward the BRCP Conservation Lands requirements of the BRCP and the stay-ahead/rough proportionality requirement, but will not be credited toward BRCP mitigation requirements.

**5.3.2.5 Failure to Stay Ahead or to Maintain Rough Proportionality.** If the Wildlife Agencies determine that the requirements of this Section or BRCP Chapter 5, Section 5.2.3.5, Chapter 8, Sections 8.3.1 have not been fulfilled, they will so notify the Implementing Entity in writing, and the Implementing Entity and Wildlife Agencies will meet to develop a mutually agreeable plan of action that will fulfill such requirements, as further described in BRCP Chapter 8, Sections 8.3.1. If the Wildlife Agencies determine specifically that the requirements of this Section and BRCP Chapter 8, Sections 8.3.1 regarding the addition of land to the BRCP Conservation Lands System have not been fulfilled, they may, by written notice to the Implementing Entity, require it to initiate the requirement to dedicate land in-lieu of BRCP Fees set forth in Agreement Section \_\_\_. The Parties acknowledge that failure to fulfill the requirements of BRCP Chapter 8, 8.3.1 would constitute a violation of the Federal and State Permit and that the Wildlife Agencies will take appropriate responsive actions to address any such violation in accordance with the ESA and the NCCPA, which could include suspension or revocation of the Permits, in whole or in part.

**5.3.2.6 NCCPA Procedure for Addressing Failure to Maintain Rough Proportionality.** In addition to the response described in Agreement Section 9.4.2, the NCCPA requires a specific procedure for responding to a failure to maintain rough proportionality. This Section and BRCP Chapter 8, 8.3.1 fulfill that requirement. If CDFW determines that the requirements of this Section have not been fulfilled, with or without the concurrence of USFWS or NMFS, the Implementing Entity will either regain rough proportionality within forty-five (45) days or will enter into an agreement with CDFW within forty-five (45) days, which will set a course of action to expeditiously regain rough proportionality. The agreement may include any of a variety of commitments or adjustments to the BRCP designed to regain rough proportionality, including but not limited to, a plan to acquire, restore, or enhance lands of the appropriate land cover or plant population type expeditiously. However, if USFWS or NMFS concurs with CDFW's determination, and the Implementing Entity and the Wildlife Agencies meet to develop a plan of action, as described above, the agreement will be based on that plan of action. The Implementing Entity will provide written notice of the agreement to the other Permittees. Each Permittee will implement all actions set forth in the agreement that apply to the Permittee.

If the Implementing Entity does not regain rough proportionality within forty-five (45) days and does not enter into an agreement with CDFW within forty-five (45) days setting a course of action to regain rough proportionality, CDFW will suspend or revoke the State Permit, in whole or in part, pursuant to California Fish and Game Code section 2820, subdivision (c). The Parties agree that partial suspension or revocation may include removal of one or more Covered Species for purposes of the State Permit or reducing the geographic scope of Authorized Take under the State Permit. Before suspending or revoking the State Permit *in whole* due to a failure to maintain rough proportionality, CDFW will meet with the Permittees to determine whether mutually agreeable modifications to the BRCP would obviate a suspension or revocation *in whole*. The Parties agree that if CDFW suspends or revokes the State Permit, the Permittees may, based on the BRCP, apply for one or more CESA incidental take permits under section 2081, subdivision (b), of the California Fish and Game Code to replace the State Permit.

If the NCCPA procedure for addressing a failure to maintain rough proportionality in California Fish and Game Code section 2820 is amended, the new procedure shall supersede the procedure in this Section 5.3.2.6 to the extent they are inconsistent.

The Implementing Entity will follow the same procedure with USFWS and NMFS as described in this section 5.3.2.6 for responding to a failure to maintain rough proportionality for purposes of the ESA.

**5.3.2.7 Lands Conveyed by Permittees and Other Entities.** Lands acquired or owned by any Permittee or other entity that meet the requirements of Agreement Section 5.3.1 may be added to the Conservation Lands System and counted toward the Conservation Lands System requirements of the BRCP, as further described in BRCP Chapter 9, Section 9.3.1.1.

**5.3.3 Lands in Private Mitigation Banks.** Lands in private mitigation banks within the Plan Area can be counted toward the BRCP Conservation Lands System requirements of the BRCP as described in BRCP Chapter 8, Section 8.4.3. With the Implementing Entity's prior approval, a Permittee or Project Proponent may purchase credits at a private mitigation bank to fulfill the requirements of the BRCP only if the bank occurs within the Plan Area and meets all relevant requirements pertaining to the BRCP Conservation Lands System, habitat protection, habitat restoration, habitat management, adaptive management and monitoring described in BRCP Chapters 5 and 7, and BRCP Chapter 8, Section 8.4.3

**5.3.4 Gifts of Land.** The Implementing Entity may accept lands in fee title, or conservation easements on lands, as a gift or charitable donation. Such lands may be added to the BRCP Conservation Lands System only if they meet the criteria in Agreement Section 5.3.1 and the nature of the real property interest is consistent with the requirements of Agreement Section 5.3.2. The Implementing Entity may sell or exchange lands it receives as a gift or donation that do not meet the criteria in Agreement Section 5.3.1 or the requirements of Agreement Section 9.3.1.1. Funds from such a sale may only be used for the purpose of implementing the BRCP.

**5.3.5 Other Covered Species Measures.** In addition to the specific measures identified in this section, Permittees shall undertake all remaining obligations assigned to them under the BRCP.

**5.3.6 Changed Circumstances.** Permittees shall undertake all measures provided in Chapter 8, Section 8.5 of the BRCP to respond to Changed Circumstances.

**5.4 Obligations of the Implementing Entity.** The Permittees collectively are ultimately responsible for compliance with all applicable terms and conditions of the Permits. The Implementing Entity will have primary responsibility for implementing the BRCP on behalf of the other Permittees. The Implementing Entity may delegate the implementation of specific actions to other Parties or qualified third parties, including but not limited to public agencies, private conservation organizations, university scientists, and contractors, but the Implementing Entity itself will remain responsible for ensuring overall implementation of the BRCP on behalf of the other Permittees in accordance with the Permits. As further described in BRCP Chapter 8, the Implementing Entity's responsibilities generally include, but are not necessarily limited to, implementation and management of all of the following elements of the BRCP:

- administration of the BRCP, including staffing, and providing necessary scientific, legal, and financial expertise and consulting services;
- oversight of compliance with the Permits;
- creation of the BRCP Conservation Lands System;
- management of BRCP Conservation Lands System;
- monitoring, adaptive management and changed circumstances;
- funding; and
- information management.

**5.4.1 BRCP Implementation Key Deadlines for Compliance.** The Parties' agreement about how key elements of the BRCP will be implemented over time is described in the implementation compliance deadlines set forth in BRCP Chapter 8, Section 8.3. The Parties recognize that, under certain circumstances, it might be reasonable and appropriate to modify one or more of the deadlines by modifying or amending the BRCP, this Agreement, or the Permits. However, absent such a modification or amendment, the Implementing Entity, on behalf of the Permittees will meet the implementation deadlines set forth in BRCP Chapter 8, Section 8.3.

**5.4.2 Management of BRCP Conservation Lands.** The Implementing Entity, on behalf of the Permittees, will ensure that Conservation Lands are managed as provided in this Section and further described in BRCP Chapter 5, Section 5.2.3. The Implementing Entity may delegate management responsibility to other Parties or qualified third parties, including but not limited to public agencies, private conservation organizations, university scientists, and contractors. However, the Implementing Entity or any successor will be responsible for ensuring the management of Conservation Lands in perpetuity.

**5.4.2.1 Management Plans.** The Implementing Entity will ensure that all Conservation Lands are managed according to appropriate Management Plans. As further described in BRCP CM6 in Section 5.4.2.2, Management Plans will be prepared for each new land acquisition or groups of land acquisitions included in the Conservation Lands to identify, on the basis of site-specific conditions, the management and maintenance actions necessary to ensure that BRCP objectives regarding ecosystem characteristics and functions are maintained and enhanced, and to achieve other objectives, as further described in BRCP Chapter 5, Section 5.3.

**5.4.2.2 Role of the Implementing Entity in Preparation of Management Plans.** All Conservation Land management plans must be prepared and approved by the Implementing Entity and Wildlife Agencies. The Implementing Agency may seek input from the Wildlife Agencies to determine if other measures can be developed that improve management techniques.

**5.4.2.3 Preparation and Revision of Management Plans.** As further described in BRCP CM5 in Chapter 5, Section 5.4.2.2, the Implementing Entity will prepare a Management Plan for each newly acquired Conservation Land parcel or groups of parcels within three (3) years of acquisition. The Implementing Entity will manage the Conservation Lands System based on the best available information and management methods derived from other management plans or from other land management in the Plan Area. Within two (2) years of acquisition of conserved parcels, the Implementing Entity will complete baseline ecological surveys to collect the information necessary to assess the level of ecological condition and functional connectivity of Conserved Lands within and among habitats. Within one (1) year of completing the assessment of ecological condition and function, the Implementing Entity will prepare a Management Plan that will identify habitat enhancement actions to be implemented to enhance habitat functions for the target Covered Species and any subsequent ongoing management actions that are necessary to maintain habitat functions over time. Existing Management Plans, previously prepared by the Implementing Entity, may be extended to newly acquired Conservation Lands of similar ecological conditions to the existing Conservation Lands for which the Management Plan was prepared.

The Implementing Entity will periodically update each Management Plan as new lands are added to the reserve to include new management and monitoring methods, if any, needed for the new lands. The Implementing Entity will also review and, if necessary, revise Management Plans periodically and at



their discretion based on information provided through the BRCP monitoring and adaptive management program described in BRCP Chapter 7 and relevant outside research.

**5.4.2.4 Management Plan Components.** The Implementing Entity will ensure that Management Plans include the components identified in BRCP BRCP Chapter 5, Section 5.4.2.2.

**5.4.3 Recreational Uses.** Recreational and educational uses will be allowed on Conservation Lands where the Implementing Entity determines that such uses would be compatible with the preservation and enhancement of Covered Species and natural communities. The Implementing Entity will ensure that a recreational uses strategy is included in all Management Plans for Conservation Lands on which educational or recreational uses will be allowed, as further described in BRCP Chapter 5. The Implementing Entity will not allow recreational uses within any unit of the Conservation Lands System until the Wildlife Agencies have approved a Management Plan that includes a recreational uses strategy for the lands; provided, however, that existing recreational uses on lands incorporated into the BRCP Conservation Lands from existing open space (e.g., County Parks) will continue until the Management Plan and associated recreational use strategy is completed.

**5.4.4 Monitoring Program.** All Conservation Lands will be monitored as further described in BRCP Chapter 7. The Implementing Entity will prepare and implement a comprehensive monitoring program for the Conservation Lands in accordance with the monitoring actions and schedule set forth in BRCP Chapter 7.

**5.4.5 Technical Advisory Committee.** As further described in BRCP Chapter 8, Section 8.2.2, the Implementing Entity may create technical advisory committees to better inform implementation of conservation measures and coordinate habitat enhancement and land management activities with other entities.

**5.5 Obligations of the Wildlife Agencies.** Upon execution of this Agreement by the Parties, and a determination that all legal requirements have been satisfied, the Wildlife Agencies will undertake the following actions.

**5.5.1 Interim Obligations upon a Finding of Unforeseen Circumstances.** If the Wildlife Agencies make a finding of Unforeseen Circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, Permittees will avoid contributing to appreciably reducing the likelihood of the survival and recovery of the affected Covered Species.

**5.5.2 Incorporation of the BRCP, this Agreement, and Permit Obligations.** Except where, and to the extent that, the Permits have been transferred pursuant to Section \_\_ and applicable law and regulations, the incidental take authorization conferred by the Permits covers solely each Permittee and each holder of a Certificate of Inclusion.

**5.5.2.1 Obligations of the USFWS.** Upon execution of this Agreement by the Parties, and a determination that all legal requirements have been satisfied, the USFWS will issue to Permittees the Permits under section 10(a)(1)(B) of the ESA, authorizing the limited incidental take of the animal Covered Species resulting from Covered Activities on the Covered Lands. The Permits will be conditioned on compliance with all terms and conditions of the Permits, including the BRCP and this Agreement, and applicable law. In accordance with Chapter 8, Section 8.5 of the BRCP, during the section 7 consultation process, USFWS also agrees to not impose on covered activities with a Federal nexus to

Federal agencies (other than USFWS or NMFS) any measures under future biological opinions in excess of those that have been or will be required of the Permittees pursuant to the BRCP, this Agreement, or the BRCP biological opinion.

**5.5.2.2 Obligations of the NMFS.** Upon execution of this Agreement by the Parties, and a determination that all legal requirements have been satisfied, NMFS shall issue to Permittees the Permit under section 10(a)(1)(B) of the ESA, authorizing the limited incidental take of the Covered Species resulting from the Covered Activities. NMFS shall provide timely technical assistance and review, collaboration and consultation to the Permittees regarding implementation of the BRCP, as provided in this Agreement and the BRCP, throughout the duration of the Federal Permit. NMFS shall also use all reasonable efforts to assist the Permittees to achieve the BRCP conservation and recovery goals for the Covered Species, as described in BRCP Chapter 8, Section 8.2.2. In accordance with Chapter 8, Section 8.5 of the BRCP, during the section 7 consultation process, NMFS also agrees to not impose on covered activities with a Federal nexus to Federal agencies (other than USFWS or NMFS) any measures under future biological opinions in excess of those that have been or will be required of the Permittees pursuant to the BRCP, this Agreement, or the BRCP biological opinion.

**5.5.2.3 Obligations of CDFW.** Upon execution of this Agreement by the Parties, and a determination that all legal requirements have been satisfied, CDFW shall issue to Permittees the Permits under the NCCP Act. CDFW shall provide timely technical assistance and review, collaboration and consultation to the Permittees regarding implementation of the BRCP, as provided in this Agreement and the BRCP, throughout the duration of the State Permit. CDFW shall also use all reasonable efforts to assist the Permittees to achieve the BRCP conservation and recovery goals for the Covered Species, as described in BRCP Chapter 8, Section 8.2.2.

**5.5.3 Incorporation of the BRCP, this Agreement, and Permit Obligations in Certificates of Inclusion by Permittees.** Permittees commit to reserve in all Certificates of Inclusion, the legal authority to require the holder of the Certificate of Inclusion to abide by all applicable terms of the BRCP, this Agreement, and the Permits, and Permittees further commit to enforce such terms against each holder of a Certificate of Inclusion. The Parties anticipate that Permittees will issue Certificates of Inclusion to the parties identified in the BRCP. The Implementing Entity will enforce the terms of the Permits with regard to any such Participating Special Entity and will withdraw the Certificate of Inclusion and terminate any Authorized Take coverage extended to the Participating Special Entity if the Participating Special Entity fails to comply with such terms.

**5.5.4 Duty to Enforce.** The Permittees agree to take all necessary actions to enforce all applicable terms of the BRCP, this Agreement and the Permits as to themselves and all holders of Certificates of Inclusion over which the Permittees have committed to enforce the terms of the BRCP, this Agreement and the Permits. Any non-compliance by a Permittee or a holder of a Certificate of Inclusion with applicable terms of the BRCP, this Agreement or the Permits may be deemed a violation of the Permits by the Permittees. In addition, the failure by a Permittee to enforce applicable terms of the BRCP, this Agreement, or the Permits against itself, or a holder of a Certificate of Inclusion may be deemed non-compliance by Permittee with the BRCP, this Agreement or the Permits, and a violation of the Permits by the Permittee. In determining whether to suspend or revoke a Permit from Permittee for acts or omissions constituting non-compliance committed by a Permittee or a holder of a Certificate of Inclusion, the Wildlife Agencies shall take into account all efforts undertaken by the Permittee to enforce the terms of the BRCP, this Agreement and the Permits as to itself or a holder of a Certificate of Inclusion,

and all actions taken by the Permittee(s) to redress the effects of such non-compliance, particularly the enforcement efforts and redress actions specifically described in the BRCP.

**5.5.5 Duty to Notify of Incidental Take.** The Implementing Entity shall immediately notify the Wildlife Agencies if it concludes that incidental take of a Covered Species has occurred or is likely to occur in excess of the amounts identified in the BRCP and the permits or if the loss of suitable habitat for Covered Species has occurred or is likely to occur in excess of the amounts identified in the BRCP and the permits occurs.

**5.6 Permit Coverage.** The Permits will identify the Covered Species. The Permits will take effect to authorize incidental take by each Permittee for listed Covered Species upon the Effective Date of that Permit. Each Permit will take effect for a nonlisted animal Covered Species upon the listing of such species. Because take of listed plant species is not prohibited under the ESA and therefore is not authorized under the Federal Permits issued by USFWS, plant Covered Species are listed on the Federal Permits issued by USFWS in recognition of the conservation measures and benefits provided for such plant species under the BRCP.

**5.7 "No Surprises" Assurances.** The Wildlife Agencies acknowledge that the Permittees have agreed to take on the substantial responsibility of developing and implementing the BRCP in large part to obtain regulatory assurances, as provided in the ESA and the NCCPA and further described in this Section and BRCP Chapter 8.

- (a) Upon issuance of the Federal Permits, Permittees shall receive regulatory assurances pursuant to the "No Surprises" regulations at 50 C.F.R. Sections 17.22(b)(5) and (6) and 17.32(b)(5) and (6). Pursuant to the "No Surprises" regulations, as long as the BRCP, this Agreement and the Federal Permits are being properly implemented, USFWS and NMFS shall not require additional conservation and mitigation measures that involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water or other natural resources otherwise available for development or use under the original terms of the BRCP without the consent of the Permittees.
- (b) As long as the Permittees are properly implementing this Agreement, the BRCP, and the State Permit, CDFW will not seek to impose on the Permittees or Project Proponents, for purposes of compliance with the NCCPA or CESA, any avoidance, minimization, mitigation, or conservation measures or requirements regarding the impacts of Covered Activities on Covered Species within the Plan Area beyond those required by this Agreement, the BRCP, and the State Permit. If there are Unforeseen Circumstances, additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources will not be required without the consent of Permittees.

**5.8 Wildlife Agency Cooperation and Assistance.** Wildlife Agencies shall cooperate and provide, to the extent appropriated funds are available for that purpose, technical assistance to the Permittee. Nothing in this Agreement shall require the Wildlife Agencies to act in a manner contrary to the requirements of the Anti-Deficiency Act.

**5.9 Wildlife Agency Monitoring.** After issuance of the Permits, the Wildlife Agencies shall monitor Permittees' compliance with the BRCP, this Agreement, and the Permits in order to ensure compliance in accordance with Section 5 of this Agreement.

**5.10 Collaboration among the Parties.** The Parties agree that successful collaboration among them is important to the success of the BRCP. Notwithstanding any other Section of this Agreement or Chapter of the BRCP, each Party will make a reasonable effort to: meet and confer with any other Party upon the request of that Party to address matters pertaining to the BRCP, the Permits, or this Agreement; provide relevant, non-proprietary, non-confidential information pertaining to the BRCP upon the request of any Party; and provide timely responses to requests from any Party for advice, concurrence, or review and comment on reports, surveys or other documents, regarding matters pertaining to the BRCP, the Permits, or this Agreement.

## 6.0 Term

This Agreement shall become effective on the Effective Date of the Permits and shall remain in full force and effect for a period of 50 years, unless extended pursuant to Agreement Section 7.5, or until termination of the Permits, whichever occurs sooner. Notwithstanding the stated term, the Parties agree that the preservation of the BRCP Conservation Lands required under the BRCP, this Agreement and the Permits shall be permanent.

## 7.0 Early Permit Termination and Permit Renewal

**7.1 Relinquishment or Revocation of the Federal Permits.** Permittees may relinquish the Federal Permits in accordance with the regulations of the USFWS and NMFS in force on the date of such relinquishment. (These regulations are currently codified at 50 C.F.R. sections 17.22(b)(7) and 17.32(b)(7).) In addition, USFWS and NMFS may revoke the Permits for cause. (These regulations are currently codified at 50 C.F.R. sections 13.28, 17.22(b)(8) and 17.32(b)(8).) "Termination" as used in this Agreement refers to both relinquishment of the Federal Permits by Permittees and revocation of the Federal Permits by USFWS or NMFS. Consistent with 50 C.F.R. section 17.22(b)(8), this Agreement and those BRCP minimization and mitigation measures as described in this Section 7.0 shall remain in effect notwithstanding early termination of the Permits through either relinquishment by Permittees or revocation by USFWS or NMFS.

### 7.1.1 Early Termination of the Permits

- (a) If Permit termination occurs for any reason for any Permittee after Permittees have initiated Covered Activities of the BRCP, the Permittee whose Permit has been terminated will:
- (1) remain obligated to fulfill any existing and outstanding minimization and mitigation measures and conservation measures required under this Agreement, the BRCP and the Permit for any Take that occurs prior to such revocation, termination, or suspension, until the applicable Wildlife Agency determines that all Take of Covered Species that occurred under the Permit has been mitigated to the maximum extent practicable in accordance with the BRCP. Regardless of whether the Permit is terminated, suspended, or revoked, the Permittees acknowledge that lands added to the BRCP Conservation Lands must be protected, managed and monitored in perpetuity.
  - (2) continue to perform applicable and relevant tasks for the remainder of the original 50-year term of the Permits or, with the agreement of USFWS, provide funding to USFWS to carry out such tasks.
  - (3) early termination of the Permits shall not affect the conserved status of all BRCP Conservation Lands covered by an executed and recorded conservation easement granted under the terms of the Permits or required to be covered by an executed and recorded conservation easement under the terms of the Permits. The BRCP JPA shall execute and record conservation easements

on all such lands to ensure their permanent legal protection in accordance with the schedule provided for under this Agreement in Section \_\_\_\_\_.

- (4) Notwithstanding early termination, the BRCP JPA shall continue to submit all management plans to the Wildlife Agencies for review and approval for the remainder of the Permit term in accordance with Section \_\_\_\_ and Section \_\_\_\_ of this Agreement, until or unless the Wildlife Agencies determine agency review and approval is no longer necessary and shall continue to submit all management plans to the Wildlife Agencies for review and comment and all public access plans to the Wildlife Agencies for review and approval in perpetuity, until or unless the Wildlife Agencies determine agency review and comment, or with regard to the public access plans, review and approval, is no longer necessary.

- (b) If Permit termination occurs by voluntary withdrawal of a BRCP Permittee prior to initiation of any Covered Activity described in Section 7.1.1(a) of this Agreement, the Implementing Entity will preserve the BRCP Conservation Lands that were incorporated into the BRCP Conservation Land System prior to the Permittee's voluntary withdrawal in accordance with the BRCP Chapter 5.

**7.1.2 Post-Termination Access to Covered Lands by the Wildlife Agencies.** After early termination of any Permit, Permittees shall continue to allow reasonable access to Covered Lands by the Wildlife Agencies and their authorized agents in accordance with Section 9.4 of this Agreement for the limited purposes of implementing, and monitoring compliance with the post termination mitigation and minimization obligations described in this Section 7.0.

**7.1.3 Full Extent of Post-Termination Mitigation and Minimization Related to Early Termination.** After early termination of the Permits, the measures identified referenced in Agreement Section 7.1 constitute the full extent of post-termination mitigation and minimization required for any incidental take of Covered Species authorized under the Federal Permits pursuant to Section 50 C.F.R. sections 17.22(b)(7) and 17.32(b)(7) as a result of Covered Activities carried out in accordance with the Permits, including the BRCP and this Agreement.

**7.2 Procedure Applicable to Early Termination of the Permits.** If any Permittee elects to relinquish the Permit before expiration of the full term of the BRCP or if the Wildlife Agencies revoke any applicable Permit, after giving other BRCP Permittees a 60-day notice, in accordance with USFWS, NMFS or CDFW regulations in effect at the time of such early termination. (USFWS regulations are currently codified at 50 C.F.R. sections 17.22(b)(7) and 17.32(b)(7).) In addition to the **surrendered** Permit, Permittee will provide a status report detailing the nature and amount of any incidental take of the Covered Species, the minimization and mitigation measures provided for take up through the date of early termination, and the status of compliance with all other terms of the BRCP. Within 90 days after receiving the surrendered Permit and a status report meeting the requirements of this paragraph, the Wildlife Agency will give written notice to Permittee stating whether any of the post-termination mitigation or minimization measures required in Agreement Section 7.1 are outstanding, and identifying each of the outstanding required measures.

**7.3 Effect of Early Termination.** Upon a Permittee's surrender of a BRCP Permit per Agreement Section 7.2, no further take by that Permittee or Certificate of Inclusion holder shall be authorized under the terms of the **surrendered** Permit. Notwithstanding early termination of the Permit, the Permittee surrendering the Permit shall implement each of the post-termination mitigation and minimization measures described in Agreement Section 7.1, and identified by the Wildlife Agencies in their written notice under Agreement Section 7.2, for any incidental take of a Covered Species resulting from Covered Activities carried out in accordance with the BRCP and the surrendered Permit prior to the date of

termination. The Wildlife Agencies shall only cancel the surrendered Permit upon determination that all applicable post-termination mitigation and minimization measures have been implemented. If prior to termination of the surrendered Permit, the Wildlife Agencies have approved the transfer of a portion of the Permit in accordance with all applicable statutory and regulatory requirements, then the transferred portion of the Permit shall remain in effect notwithstanding termination of the remaining portion.

**7.4 Other Rights and Authorities Not Affected.** Nothing in this Section 7.0 prevents a Permittee from seeking review by a court of competent jurisdiction of any decision of the Wildlife Agencies to revoke that Permittee's Permit. Likewise, nothing in this Section 7.0 affects or circumscribes the authority of the Wildlife Agencies to carry out their enforcement and other responsibilities under the ESA and NCCPA.

**7.5 Renewal of the Permits.** Upon agreement of the Parties and compliance with all applicable laws and regulations, the Permits may be renewed beyond their initial term under regulations of the USFWS, NMFS and CDFW in force on the date of such renewal.

**7.6 Relinquishment or Revocation of the State Permit.** Any Permittee may relinquish the State Permit in accordance with the regulations of the CDFW in force on the date of such relinquishment. In addition, CDFW may revoke the State Permit for cause in accordance with California Fish & Game Code Section 2820. "Termination" as used in this Agreement refers to both relinquishment of the State Permit by Permittees and revocation of the State Permit by CDFW. Consistent with this Agreement and those BRCP minimization and mitigation measures as described in this Section 7.0 shall remain in effect notwithstanding early termination of the State Permit through either relinquishment by the Permittees or revocation by CDFW.

## 8.0 Funding

Permittees warrant that they have and will expend such funds as may be necessary to carry out their obligations under the BRCP.

**8.1 Funding of Mitigation and Conservation.** The Implementing Entity, BCAG, County, Cities, Water Districts, Irrigation Districts and Caltrans will ensure that all required mitigation, conservation, monitoring, and reporting measures are adequately funded throughout the term of this Agreement, and that certain monitoring, reporting and adaptive management measures are adequately funded in perpetuity. The Permittees do not intend to use, nor are they required to use, funds from their respective general funds to implement the BRCP; rather they intend to obtain sufficient funds through a comprehensive strategy further described in BRCP Chapter 9 that includes: fees and dedications from Covered Activities; Federal and state grants; grants from nonprofits and foundations; and ongoing conservation efforts by local and state agencies that have a demonstrated record of acquiring and managing lands for conservation purposes in the Plan Area. The Permittees may use or establish other local funding measures, including, but not limited to, utility surcharges, special taxes or assessments, or bonds, to the extent allowed by law. The Permittees are responsible for seeking all feasible increases in revenues that are necessary to keep pace with rising costs, as described in BRCP Chapter 9. Each Permittee will promptly notify the Wildlife Agencies of any material change in the Permittee's financial ability to fulfill its obligations under this Agreement. In addition, the Implementing Entity will include in its Annual Workplan and Budget, as described in BRCP Chapter 8, Section 8.8.1, reasonably available financial information to demonstrate the Permittees' collective ability to fulfill their obligations under this Agreement in light of a material change in a Permittee's finances, if any.

This Agreement does not require the obligation, appropriation, or expenditure of any money without express authorization by, as applicable, the County Board of Supervisors, appropriate City Councils and/or governing boards of the Implementing Entity, BCAG, Water Districts, Irrigation Districts, and Caltrans.

**8.2 Funding for Management and Monitoring in Perpetuity.** As further described in BRCP Chapter 9, Section 9.3, the Permittees, and specifically, the BRCP JPA, will manage the Conservation Lands in perpetuity in accordance with the requirements of the BRCP, including applicable BRCP adaptive management requirements and monitoring requirements. The Permittees anticipate that Conservation Lands management obligations will be fully funded by interest on the endowment created by the Endowment Fund, as described in BRCP Chapter 9.

The Permittees' obligations with regard to BRCP requirements other than Conservation Lands management requirements will terminate upon the termination of the Permits.

**8.3 Effect of Inadequate Funding.** In the event there is inadequate funding to implement the BRCP, the Wildlife Agencies will assess the impact of the funding deficiency on the scope and validity of the Permits. Unless the Permittees exercise the authority to withdraw, as provided in Agreement Section 7, or the Wildlife Agencies revoke the Permits, in whole or in part, as provided in Agreement Section 7, the Parties agree that they will meet and confer to develop a strategy to address the funding shortfall and to undertake all practicable efforts to maintain both the level of conservation provided under the BRCP and the level of Authorized Take coverage afforded by the Permits until the funding deficiency can be remedied. The strategy to address a funding shortfall may include, but is not necessarily limited to, the actions described in BRCP Chapter 9, Section 9.3.1. However, the Permittees do not intend to, nor are they required to use, funds from their respective general funds to implement the BRCP in the event of funding shortfalls, either in the short term or the long term.

If overall BRCP fee revenues for the term of the Permits fall short of BRCP projections because fewer Covered Activities are proposed or implemented, the resulting shortfall in BRCP funding could prevent or constrain the Permittees' ability to implement the BRCP fully. If it appears that the allowed Authorized Take will not be used during the term of the Permits, substantially reducing BRCP fee revenues, the Parties anticipate that the Permittees will apply for an extension of the Permits in accordance with Agreement Section 7.5 to allow the full use of Authorized Take and full implementation of the BRCP, or will apply for a Permit modification or amendment in accordance with Agreement Section \_\_.

**8.4 Conservation Component Funding Security.** As further described in BRCP Chapter 9, Section 9.3, through the BRCP and this Agreement, the Implementing Entity will be responsible for the acquisition of lands as part of the conservation component of the Plan, which will be a part of the BRCP Conservation Lands system and administered, managed, and monitored by the Implementing Entity. The funds provided to acquire the conservation lands could come from a variety of sources, including funds administered directly by USFWS, NMFS, or CDFW, as well as funds administered by other state and Federal sources. Additionally, other non-fee local funding sources could contribute to funding portions of the conservation component, including land acquisition by local land agencies, non-profits and foundations as well as funding through Butte County's agricultural mitigation ordinance. If, after the exercise of all available authority and use of all available resources, state and Federal funds are unable to contribute to the Conservation Lands System, the Implementing Entity, the Permittees, CDFW and

USFWS will reevaluate the BRCP and work together to develop or identify an alternative funding mechanism.

The Implementing Entity will track state and Federal funds progress toward the goal of contributing land, measured by the number of acres added to the BRCP Conservation Lands System, and will include a summary of the progress in each report it prepares under Agreement Section 9.1. State and Federal funds will be counted only toward that portion of the Conservation Lands System that contributes to the recovery of Covered Species or the conservation of natural communities. If, for any acquisition of lands that are added to the Conservation Lands System, state or Federal funding is used to pay a portion of the overall acquisition costs, the number of acres counted toward this goal will be the portion of the total acres acquired that reflects the proportion of total acquisition costs paid with state or Federal funds.

## 9.0 Monitoring and Reporting

The Implementing Entity, on behalf of the Permittees, will implement the BRCP monitoring and adaptive management program as provided in this Section and further described in BRCP Chapter 7. The Implementing Entity may delegate monitoring responsibilities to other Parties or qualified third parties, including but not limited to public agencies, private conservation organizations, university scientists, and contractors. The Implementing Entity will conduct two main types of monitoring, as further described in BRCP Chapter 7, Section 7.2: compliance monitoring and effectiveness monitoring. The Implementing Entity will provide the results of all BRCP monitoring annually in its Annual Progress Report. Compliance monitoring, also known as implementation monitoring, will track the status of BRCP implementation and verify that the Implementing Entity is meeting the terms and conditions of the Permits. Effectiveness monitoring assesses the biological success of the Plan—specifically, it evaluates the implementation and success of the Conservation Strategy described in BRCP Chapter 5.

**9.1 Annual Reports.** The Implementing Entity will prepare an annual progress report on implementation of the BRCP (the “Annual Progress Report”), as further described in BRCP Chapter 8, Section 8.8.2. The Annual Progress Report will summarize actions taken to implement the BRCP during the previous calendar year and will be submitted to the Wildlife Agencies within 3 months of the close of each reporting year, beginning the calendar year after the first full calendar year of implementation. The Annual Progress Report will document information required in Agreement Section 9 including, but not limited to: provide information necessary to demonstrate that the BRCP is being implemented in accordance with the Permits; include or describe the applications and approvals for take authorization, including take authorizations for Covered Activities that are exempt from BRCP Fees or Conditions; identify any significant problems encountered during implementation, including any Changed Circumstances or Unforeseen Circumstances, and any remedial measures taken; identify issues that require consultation with the Wildlife Agencies; and identify proposed Minor Modifications or Amendments that would support successful implementation of the BRCP. The Implementing Entity will provide a copy of the Annual Progress Report to all Parties. The Implementing Entity will also create and maintain a an Internet website for the public distribution of information regarding BRCP implementation and will maintain each Annual Progress Report on the website as further discussed in Chapter 8, Section 8.8.2 of the BRCP. As provided in Agreement Section 9.1, the Implementing Entity will provide the results of compliance monitoring, effectiveness monitoring and targeted studies annually in the Annual Progress Report. The Parties will use the results of the Implementing Entity’s monitoring to ensure that the BRCP is being properly implemented and to measure the Implementing Entity’s progress toward the successful implementation of the BRCP Conservation Strategy (BRCP Chapter 5), as further described in BRCP Chapter 8.



**9.2 Monitoring by Wildlife Agencies.** Permittees acknowledge the necessity for the Wildlife Agencies to monitor compliance with the BRCP and will cooperate fully in such monitoring. Pursuant to 50 C.F.R. section 13.21(e)(2), by accepting the Federal Permits, Permittees consent to and will allow entry to the Covered Lands by agents and employees of the USFWS or NMFS engaged in and for the purpose of ensuring compliance with the Federal Permits, and laws and regulations applicable to the Federal Permits, and/or undertaking any activities that are necessary to protect the Covered Species and/or are identified in the BRCP. Except where specified below, such entry will occur under the following conditions: (1) at reasonable hours; (2) in a manner consistent with the purpose of the entry, that minimizes any disruption of the Covered Activities or any other operation of Permittees or any holder of a Certificate of Inclusion; (3) after provision of advance notice to Permittees; and (4) with the opportunity for an agent or employee of Permittees to accompany the USFWS's or NMFS's agent or employee. These conditions on entry will not apply in the following circumstances: (1) when the USFWS or NMFS has reason to believe a Covered Species is at risk of injury or death and an immediate response is necessary; or (2) when the USFWS or NMFS has reason to believe a violation of the Permits, or laws or regulations applicable to the Permits, has occurred or may be occurring which, in the USFWS's good-faith judgment, warrants immediate or access without prior notice; or (3) entry, without consent, is otherwise for law enforcement purposes consistent with the Fourth Amendment to the Constitution.

## 10.0 Migratory Bird Act

The Permits issued in reliance on the BRCP and this Agreement also constitute a Special Purpose Permit under 50 C.F.R. section 21.27 for the take of listed Covered Species also listed under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. Sections 702 *et seq.*, as amended. The take of any of these birds as the result of any Covered Activity carried out in accordance with the BRCP, this Agreement, and the Permits will not constitute a violation of the MBTA. Such Special Purpose Permits shall be valid for a period of three years from the Effective Date, provided the Permits issued in reliance on this Agreement remains in effect for such period. Such Special Purpose Permits shall be renewed without application provided that the terms of the BRCP, this Agreement and the Permits are being properly implemented. Each such renewal shall be valid for the maximum period of time allowed under 50 C.F.R. section 21.27 or its successor at the time of renewal. The Permits shall also constitute a Special Purpose Permit for each of the unlisted MBTA Covered Species if and when they become listed under the ESA during the term of the Permits. Such Special Purpose Permits shall become effective concurrent with the listing of the MBTA Covered Species under the ESA, as provided in Agreement Section 5.6.

## 11.0 Consultations with Other Public Agencies

**11.1 Consultations on Activities Consistent with the BRCP and Permits.** To the maximum extent appropriate in any consultation on any Covered Activity with respect to the Covered Species under section 7(a) of the ESA and regulations issued thereunder, the USFWS and NMFS shall ensure that the biological opinions issued in formal consultation, or views expressed by the USFWS or NMFS in informal consultation, in connection with the proposed activity are consistent with the biological opinion(s) prepared on the Permits and BRCP, provided that the Covered Activities as proposed in the consultation are consistent, and will be implemented in accordance, with the BRCP, this Agreement, and the Permits. Any reasonable and prudent measures and terms and conditions in the biological opinion, or views expressed by the USFWS or NMFS in informal consultation, on the proposed activities shall, to the maximum extent appropriate, be consistent with and not in excess of the measures included in the BRCP, this Agreement, and the Permits.

## 12.0 Enforcement of Permit

**12.1 General Authorities and Legal Rights.** Nothing contained in this Agreement is intended to, or shall, limit the authority of the United States or California government to seek civil or criminal penalties or otherwise fulfill its enforcement and other responsibilities under the ESA or CESA or other applicable Federal or State law. Nothing contained in this Agreement limits the rights of the Permittees under the U.S. Constitution or other applicable Federal or State law to seek redress against the Wildlife Agencies as otherwise permitted by law.

**12.2 Permit Suspension or Revocation.** The Wildlife Agencies may suspend or revoke the Permits, in whole or in part, for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. Such suspension or revocation may apply to the entire Permit or Permits, or only to specified Covered Lands, Covered Species, or Covered Activities. In the event of suspension or revocation of a Permit, the Permittee that is the holder of that Permit must still comply with that Permittee's obligations under the Permit, including this Agreement and the BRCP, until the Wildlife Agencies determine that all incidental take of Covered Species that occurred under that Permit(s) have been fully mitigated in accordance with the BRCP and Section 7.0 of this Agreement. Unless the Parties agree otherwise, if no more incidental take than that authorized by the subject Federal Permit has occurred upon suspension or revocation, then, pursuant to 50 C.F.R. sections 17.22(b)(7) and 17.32(b)(7), the USFWS or NMFS, as may be appropriate may not require more, or different mitigation, beyond that specified under Agreement Section 7.0. Similarly, unless the Parties agree otherwise, if no more incidental take than that authorized by the subject State Permit has occurred upon suspension or revocation, then, pursuant to the NCCPA, CDFW may not require more, or different mitigation, beyond that specified under Agreement Section 7.0.

**12.3 Dispute Resolution.** The Parties recognize that disputes concerning implementation or interpretation of this Agreement, the BRCP, and the Permits may arise from time to time. The Parties intend to resolve most disputes at the staff or field personnel level. However, the Parties recognize that some disputes might not be resolved at the staff or field personnel level. The Parties agree to work together in good faith to resolve such disputes using the informal dispute resolution procedure set forth in this Section. Any Party may seek any available remedy without regard to this Section if the Party concludes that circumstances so warrant. However, unless the Parties agree upon another dispute resolution process, or unless a Party has initiated administrative proceedings or litigation related to the subject of the dispute in Federal or state court, the Parties agree to use the following procedures to attempt to resolve disputes.

**12.3.1 Notice of Dispute; Meet and Confer.** If a Wildlife Agency objects to any action or inaction by any Permittee on the basis that the action or inaction is inconsistent with the BRCP, the Permits, or this Agreement, it will so notify the Permittee and the Implementing Entity and when appropriate, other Wildlife Agencies, in writing, explaining the basis of such objection. The Permittee or Implementing Entity will respond to the notice within thirty (30) days of receiving it, stating what actions the Permittee or Implementing Entity proposes to take to resolve the objection or, alternatively, explaining why the objection is unfounded. If the response resolves the objection to the satisfaction of the Wildlife Agency, the agency will so notify the Permittee and the Implementing Entity, and the Permittee or Implementing Entity, as appropriate, will implement the actions, if any, proposed in the response to the agency. If the response does not resolve the objection to the Wildlife Agency's satisfaction, the agency will notify the Permittee or Implementing Entity accordingly, and the agency, the Permittee and the

Implementing Entity will meet and confer to attempt to resolve the dispute. The meeting will occur within thirty (30) days after the Permittee or Implementing Entity receives the Wildlife Agency's response, or at such later time as the Permittee, the Implementing Entity and the Wildlife Agency may agree. A representative of the Implementing Entity will take notes at the meeting, summarize the outcome, and distribute meeting notes to each Party in attendance.

The Implementing Entity or any other Permittee will use the same procedure to raise and to resolve objections to any action or inaction of a Wildlife Agency, and the Wildlife Agency will respond in the same manner to notices delivered by any Permittee.

**12.3.2 Elevation of Dispute.** If the Parties do not resolve a dispute after completing the dispute resolution procedure in Agreement Section 12.3.1, any one of the Parties may elevate the dispute to a meeting of the chief executives of the involved Parties. For purposes of this provision, "chief executive" means the city manager of a city, the county executive of the County, the chief executive officer of the Water District, the executive director of the Implementing Entity, the CDFW Regional Manager, and the USFWS Field Supervisor. Each Party will be represented by its chief executive in person or by telephone at the meeting, and the meeting will occur within forty-five (45) days of a request by any Party following completion of the dispute resolution procedure.

## 13.0 Modifications and Amendments

**13.1 Minor Modification Process.** Either Permittees or Wildlife Agencies may propose minor modifications to the BRCP or this Agreement by providing written notice to the other Parties as described in BRCP Chapter 8, Section 8.91. The notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under the BRCP and on the Covered Species. The other Parties will use reasonable efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon the other Parties written approval. If, for any reason, a Party objects to a proposed modification, the Permittees may propose it as an amendment to the Permits in accordance with Agreement Section 13.2 and 13.3. The Wildlife Agencies will not propose or approve minor modifications to the BRCP or this Agreement if the Wildlife Agencies determine that such modifications would result in operations under the BRCP that are different from those analyzed, or may result in adverse effects on the environment that are new or significantly different from those analyzed, or may result in additional take that was not authorized in connection with the original BRCP as of the Effective Date.

**13.1.1 Minor Modifications.** Subject to Agreement Section 13.1, minor modifications to the BRCP as described in BRCP Chapter 8, Section 8.91. and this Agreement processed pursuant to this Section 13.0 may include but are not limited to the following:

- (a) changes to the boundaries of the Covered Lands or the Conservation Lands which the Parties agree are minor and would not alter the analysis of environmental effects, and in particular, the effects of the BRCP on the Covered Species, contained in the Environmental Impact Statement/Environmental Impact Report, the USFWS ESA section 7 biological opinion, the NMFS section 7 biological opinion, or the CDFW Take Authorization for the BRCP and Permits.
- (b) minor changes to survey protocols;
- (c) minor modifications to reporting and monitoring requirements;

- (d) revisions of maps or exhibits to correct errors in mapping, or to reflect previously approved changes in the Permits or BRCP;
- (e) implementation of mitigation measures that are or may in the future become independently required by applicable laws or regulations;
- (f) transfer by conservation easement(s) of lands within the Conservation Lands to the BRCP JPA or another entity approved by, and on terms acceptable to, the Wildlife Agencies that ensure the permanent protection of such lands for conservation purposes consistent with the BRCP;
- (g) transfer by fee title of lands within the BRCP Conservation Lands that are covered by either (i) an executed and recorded conservation easement to an entity approved by, and which contains terms acceptable to, the Wildlife Agencies that ensure the permanent protection of such lands for conservation purposes consistent with the BRCP, or (ii) within the BRCP Conservation Lands, an executed and recorded easement to an entity approved by, and which contains terms acceptable to, the Wildlife Agencies that ensure the permanent protection of such lands for conservation purposes consistent with the BRCP;
- (h) other types of modifications that the Parties agree are minor in relation to the BRCP.

**13.1.2 Other Modifications.** Any other modifications to the BRCP or this Agreement that do not meet the criteria set forth in Agreement Section 13.1.1 and described in BRCP Chapter 8, Section 8.9.2 will be processed as amendments of the Permit in accordance with Agreement Section 13.2.

Formal amendments may include the following:

- a) Making revisions to the Plan Area or Permit Area boundary;
- b) Adding new covered species;
- c) Increasing the allowable take limits;
- d) Adding new covered activities;
- e) Making changes to biological goals and objectives if monitoring or research indicate that they are not attainable because technologies to attain them are either unavailable or infeasible;
- f) Extending the permit term; and Making adjustments to BRCP implementation schedules that extend the scheduled implementation of conservation actions.

**13.2 Amendment of the Permit.** The Permittees may apply for other amendments to the Permits. The Permits may be amended in accordance with all applicable legal requirements, including but not limited to the ESA and the National Environmental Policy Act, and USFWS and NMFS incidental take permit regulations, and with the NCCPA and the California Environmental Quality Act and CDFW regulations. The Permittee shall provide a statement of the reasons for the amendment and an initial analysis of its environmental effects, including its effects on operations under the BRCP and on the Covered Species.

**13.3 Amendment of this Agreement.** In addition to other approval requirements identified in Agreement Section 13 that may apply, this Agreement may only be amended consistent with the ESA and NCCPA with the written consent of all of the Parties.

**13.4 General Land Use and Regulatory Authority of the County and Cities.** The Parties acknowledge that the adoption and amendment of general plans, specific plans, community plans, zoning ordinances and other land use and regulatory ordinances, and the granting of land use entitlements or other regulatory permits by the County or Cities are matters within the sole discretion of the County or Cities and will not require amendments to the Permits or the approval of other Parties to

this Agreement. However, no such action by the County or Cities will alter or diminish their obligations under the Permits.

## 14.0 Adaptive Management

**14.1 Implementation of the BRCP Adaptive Management Provisions.** The Implementing Entity will implement the BRCP adaptive management plan, as further described in BRCP Chapter 7, Section 7.4. The purpose of adaptive management will be to adapt the design and management of the Conservation Lands System in order to maximize the likelihood of the successful implementation of the BRCP Conservation Strategy. The Implementing Entity will have ultimate responsibility for implementing the adaptive management program and will ultimately decide what adaptations will be made in the management of Conservation Lands. However, the Implementing Entity will consider the advice of the Wildlife Agencies, science advisors, other land management agencies, and the public, as provided in this Section and as further described in BRCP Chapter 7, Section 7.4. In addition, any major changes in the adaptive management program will require the approval of the Wildlife Agencies prior to implementation, including, but not limited to, any proposed actions that would be inconsistent with the BRCP or detrimental to a Covered Species, introducing new and untested management techniques, discontinuing and replacing ineffective management techniques that are recommended in the Conservation Strategy, or applying management techniques on a much larger or smaller scale than envisioned in the BRCP.

**14.1.1 Role of the Wildlife Agencies.** The Wildlife Agencies will provide biological expertise and policy-level recommendations to the Implementing Entity regarding potential changes to the design and management of the Conservation Lands System based on the results of monitoring and the advice of science advisors, as further described in BRCP Chapter 8, Section 8.2.2. The Implementing Entity will confer with the Wildlife Agencies before initiating substantial adaptations to the design or management of the BRCP Conservation Lands. The Implementing Entity and Wildlife Agencies will attempt in good faith to reach agreement regarding any such adaptations or alternative adaptations that the Wildlife Agencies may propose. If they cannot reach agreement, any of them may initiate the dispute resolution procedure provided in Agreement Section 6.6.

**14.1.2 Role of Science Advisors.** The Implementing Entity will establish an internal process of review by technical experts within the Implementing Entity or retained (e.g., biologists, restoration ecologists, physical scientists, habitat managers) regarding BRCP implementation when needed to obtain expert scientific advice and recommendation regarding key scientific aspects of BRCP implementation, such as the design, management and monitoring of the Conservation Lands System, as further described in BRCP Chapter 7, Section 7.4 and Chapter 8, Section 8.2.1.3. The Implementing Entity will from time to time seek additional science input on specific adaptive management-related issues as described in Chapter 8, Section 8.2.1.3. Science advisors will be selected by the Implementing Entity.

**14.2 Program Status Reviews.** The Implementing Entity will conduct a program-wide status review of BRCP implementation at least once every five (5) years to provide the Implementing Entity with a methodical process to periodically evaluate its BRCP implementation procedures, as further described in BRCP Chapter 7, Section 7.4.3.1. However, each review will in any case include a program-level evaluation of recommendations for the implementation elements described in BRCP Chapter 7, Section 7.4.1.

**14.2.1 Advice from Other Land Management Agencies.** The Implementing Entity will from time to time consult with land management agencies in the Plan Area to share information regarding land management generally and to coordinate management of lands adjacent to Conservation Lands with the management of BRCP Conservation Lands System. Organizations consulted for advice could include, but will not be limited to, private non-profit conservation organizations that are active in or near the Plan Area.

**14.2.2 Advice from the Public.** The Implementing Entity will provide members of the public with opportunities to learn about the status of BRCP implementation and to provide advice regarding the adaptive management program, as further described in BRCP Chapter 7, Section 7.4.

**14.3 No Increase in Take.** This Section 14.0 does not authorize any adaptive management changes that would result in an increase in the level and nature of incidental take, or increase the impacts of incidental take, of the Covered Species beyond those analyzed in connection with the original BRCP and any amendments thereto. Any such modification must be reviewed as a Permit amendment under Section 13.2.

## 15.0 Miscellaneous Provisions

**15.1 Incorporation into Permits.** This Agreement and the BRCP shall be incorporated as terms and conditions of the Permits. In the event of any direct contradiction among the provisions of the BRCP, the terms of this Agreement or the terms of the Permits, the terms of the Permits shall control. Each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by the other Party or anyone acting on behalf of the other Party that is not embodied in the BRCP, this Agreement, or the Permits.

**15.2 Defense of Permits.** The USFWS and Permittees acknowledge that Permittees have a significant and independent interest in maintaining the validity and effectiveness of the BRCP, this Agreement, and the Permits, and supporting documentation, including documentation under the National Environmental Policy Act and ESA, the California Environmental Quality Act and CEQA, and that Permittees' interests may not be adequately protected or represented in the event of a judicial challenge to the Permits unless Permittees are able to participate in such litigation. Subject to Agreement Section 15.9 (Availability of Funds), the USFWS or NMFS, will, upon the request of Permittees, and subject to the responsibilities of the U.S. Department of Justice in the conduct of litigation, use reasonably available resources to provide appropriate support to Permittees in defending, consistent with the terms of the BRCP, this Agreement, and the Permits, lawsuits against Permittees arising out of the USFWS's or NMFS' approval of the Federal Permits. Similarly, CDFW, will, upon the request of Permittees, and subject to the responsibilities of the California Attorney General, in the conduct of litigation, use reasonably available resources to provide appropriate support to Permittees in defending, consistent with the terms of the BRCP, this Agreement, and the Permits, lawsuits against Permittees arising out of CDFW's approval of the State Permit.

**15.3 Execution/Duplicate Originals.** This Agreement may be executed in duplicate originals. Each Party shall maintain in its records a complete original of this Agreement.

**15.4 Third Party Beneficiaries.** Without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. Section 1540(g), this Agreement shall not create any right or interest in the public, or any member of the public, as a third party beneficiary hereof, nor shall it

authorize anyone to maintain a suit for personal injuries or property damages or any other cause of action pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing Federal or State law.

**15.5 Relationship to ESA and Other Authorities.** The terms of this Agreement shall be governed by and construed in accordance with the ESA, the Fish and Wildlife Coordination Act, the Fish and Wildlife Act of 1946, the Marine Mammal Protection Act, the NCCPA, the Federal Clean Water Act, and other applicable Federal and State laws and regulations. In particular, nothing in this Agreement is intended to limit the authority of the USFWS or NMFS to seek penalties or otherwise fulfill its responsibilities under the ESA, or to limit the authority of CDFW to seek penalties or otherwise fulfill its responsibilities under the NCCPA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the USFWS or NMFS as an agency of the Federal government, nor is anything in this Agreement intended to limit or diminish the legal obligations and responsibilities of the CDFW as an agency of the State of California.

**15.6 References to Regulations.** Any reference in the BRCP, this Agreement, 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.

**15.7 Applicable Laws.** All activities undertaken pursuant to the BRCP, this Agreement, or the Permits must be in compliance with all applicable Federal and State laws and regulations.

**15.8 Terms Used.** Terms defined in the ESA or in regulations adopted by USFWS under the ESA shall have the same meaning when utilized in this Agreement. Terms defined in the Marine Mammal Protection Act or in regulations adopted by NMFS under the Marine Mammal Protection Act shall have the same meaning when utilized in this Agreement. Terms defined in the NCCPA or in regulations adopted by the Fish & Game Commission under the NCCPA shall have the same meaning when utilized in this Agreement.

**15.9 Availability of Funds.** This Agreement is subject to the requirements of the Anti-Deficiency Act and, where applicable, 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 United States Treasury. The Parties acknowledge that USFWS and NMFS will not be required under this Agreement to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

**15.10 Injunctive and Temporary Relief.** The Parties acknowledge that the Covered Species are unique and that their loss as 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 the Permit.

**15.11 No Limitation on the Police Power of the Cities or the County.** Nothing in this Agreement, the BRCP, or the Permits limits the exercise of or in any way surrenders the police power of these Cities or the County.

**15.12 Agreement not an Enforceable Contract.** Notwithstanding any language to the contrary in this Agreement, this Agreement is not intended to create, and shall not be construed to create an enforceable contract between the USFWS, NMFS, CDFW and the Permittees under law with regard to the Permits and none of the parties to this Agreement shall be liable in damages to the other parties or any other person for any performance or failure to perform any obligation identified in this Agreement. The sole purposes of this Agreement as between the USFWS, NMFS and CDFW and the Permittees are to clarify the provisions of the BRCP and the processes the Parties intend to follow to ensure the successful implementation of the BRCP in accordance with the Permits and applicable Federal and State laws.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this

Implementing Agreement as of the dates signed below:

Dated: \_\_\_\_\_ UNITED STATES DEPARTMENT OF THE INTERIOR, FISH & WILDLIFE SERVICE

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

Dated: \_\_\_\_\_ UNITED STATES DEPARTMENT OF THE COMMERCE, NATIONAL MARINE FISHERIES SERVICE

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

Dated: \_\_\_\_\_ CALIFORNIA DEPARTMENT OF FISH & WILDLIFE

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

Dated: \_\_\_\_\_ BUTTE COUNTY ASSOCIATION OF GOVERNMENTS

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

Dated: \_\_\_\_\_ BUTTE REGIONAL CONSERVATION PLAN JOINT POWERS AUTHORITY

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

Dated: \_\_\_\_\_ COUNTY OF BUTTE

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

Dated: \_\_\_\_\_ CITY OF OROVILLE

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

Dated: \_\_\_\_\_ CITY OF CHICO

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



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

CITY OF BIGGS

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

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

CITY OF GRIDLEY

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

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

WESTERN CANAL WATER DISTRICT

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

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

BIGGS-WEST GRIDLEY WATER DISTRICT

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

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

BUTTE WATER DISTRICT

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

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

RICHVALE IRRIGATION DISTRICT

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

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

CALIFORNIA DEPARTMENT OF TRANSPORTATION

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

# EXHIBIT A TO COME

# EXHIBIT B TO COME

## **EXHIBIT C BUTTE REGIONAL CONSERVATION HABITAT PLAN NEIGHBORING LANDOWNER CERTIFICATE OF INCLUSION**

The United States Fish and Wildlife Service and the California Department of Fish and Wildlife have issued Permits pursuant to the federal Endangered Species Act and the California Natural Community Conservation Planning Act (collectively "Permits") authorizing "Take" of certain species in accordance with the terms and conditions of the Permits, the Butte Regional Conservation Plan ("Conservation Plan") and the associated Implementing Agreement. Under the Permits, Section 8.9 of the Conservation Plan, and Section 5.1.2 of the Implementing Agreement, certain activities by the party or entity below are authorized to "Take" certain species, provided all applicable terms and conditions of the Permits, the Conservation Plan, and the Implementing Agreement are met.

As the owner/operator of the property described by Assessor's Parcel Number and gross acres on Exhibit 1 attached thereto and incorporated herein by this reference, you are entitled to the protection of the Permits to Take those species identified in Section 8.9 in connection with normal agricultural practices occurring within a 0.5 miles of the boundary of Conservation Lands and with the limitations set forth in Section 8.9 of the Habitat Plan and Section 5.1.2 of the Implementing Agreement. In the event that the property depicted on Exhibit 1 is used for other purposes without the express consent of the Butte Regional Conservation Plan Joint Powers Authority, Take Authorization under the Permits will automatically cease. Such authorization is provided as described in the Permits, the Conservation Plan, and the Implementing Agreement. By signing this Certificate of Inclusion you signify your election to receive Take Authorization under the Permits in accordance with the terms and conditions thereof. This Certificate of Inclusion does not give state and federal agencies additional regulatory control over the signatory nor require the signatory to provide additional information not called for in the Certificate of Inclusion, but instead ensures compliance with 50 Code of Federal Regulations, section 13.25(d). Coverage under the Permits will become effective upon receipt of the fully-completed and executed Certificate of Inclusion by the Butte Regional Conservation Plan Joint Powers Authority. In the event that the subject property is sold or leased, buyer or lessee must be informed of these provisions and execute a new Certificate of Inclusion.

**Subject Property:**

**Assessor's Parcel Number(s):**

**General Location:**

**Address**

**OWNER**

Print Name:

Signature:

Address:

City/State/Zip:

Phone:

**OPERATOR**

Print Name:

Signature:

Address:

City/State/Zip:

Phone:

Date:

Date:

**Butte Regional Conservation Plan Joint Powers Authority**

By (Print Name):

Signature:

Date: