

**KERN WATER BANK
CONSERVATION BANK AGREEMENT**

By And Among

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

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

and

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

October 2, 1997

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List of Exhibits

- Exhibit A Map of Kern Water Bank
- Exhibit B Map of Kern Water Bank Conservation Bank
- Exhibit C Map and Legal Description of the Credit Area
- Exhibit D Form of Conservation Easement
- Exhibit E Form of Conservation Credit Certificate
- Exhibit F-1 Form of Project Requirements Agreement/CESA MOU
- Exhibit F-2 Form of Project Requirements Statement
- Exhibit G Form of Disclosure Letter
- Exhibit H Form of Certificate of Inclusion
- Exhibit I Form of Certificate of Compliance
- Exhibit J Form of Amendment to Environmental Indemnity

KERN WATER BANK

CONSERVATION BANK AGREEMENT

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

Recitals

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

B. Under the California Endangered Species Act (“CESA”) and other State law, the Department has jurisdiction over the conservation, protection, restoration, enhancement and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. The Department is also the manager and trustee of fish and wildlife resources and their habitat pursuant to California Fish and Game Code section 1802.

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

D. KWBA has prepared a natural community conservation plan / habitat conservation plan relating to Kern Water Bank (the “KWB HCP”) which describes, inter alia, a program of KWBA to establish a portion of the Kern Water Bank as a multiple species conservation bank (the “KWB Conservation Bank”), and to permit KWBA to use the Conservation Credits relating to the KWB Conservation Bank for KWBA’s own benefit or to sell the Conservation Credits relating to the KWB Conservation Bank to qualified third parties. Concurrently herewith, the Parties are entering into the Kern Water Bank Natural Community Conservation Plan / Habitat Conservation Plan Implementation Agreement (the “Implementation Agreement”), which describes the mechanism for implementing the KWB HCP.

E. In the Implementation Agreement, the Service has committed to issuing to KWBA a Master Section 10(a) Permit relating to the KWB Conservation Bank and the Department has committed to issuing to KWBA a Master Section 2081/2835 Management Authorization relating to the KWB Conservation Bank. The Master Section 10(a) Permit and Master Section 2081/2835 Management Authorization will provide for Project Applicants to become Included Parties under the Master Section 10(a) Permit and Master Section 2081/2835 Management Authorization in order to obtain Incidental Take authorization in accordance with their Project Requirements Agreements/CESA MOUs.

The Master Section 10(a) Permit and Master Section 2081/2835 Management Authorization will further provide for KWBA to use Conservation Credits on its own behalf for projects outside the KWB HCP boundary but contained within the Credit Area and to obtain Incidental Take authorization thereunder in accordance with a Project Requirements Agreement/CESA MOU. The Master Section 10(a) Permit and Master Section 2081/2835 Management Authorization will permit the Incidental Take of Covered Species under FESA and CESA, respectively, by Included Parties and potentially KWBA to the extent the Covered Species are regulated by such laws and exist at the land to be developed.

F. The Parties desire to enter into this Agreement and the KWB HCP to set forth the terms and conditions pursuant to which the KWB Conservation Bank will be established, maintained, and funded and the Conservation Credits relating to the KWB Conservation Bank may be utilized or sold.

G. This Agreement addresses only the establishment of the KWB Conservation Bank and the sale of Conservation Credits pursuant to the KWB HCP. Management of the habitat values of the KWB Conservation Bank, among other issues, is addressed in the KWB HCP and Implementation Agreement.

Agreement

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

1. DEFINITIONS

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

“Agreement” means this Agreement Regarding the Conservation Bank in the Kern Water Bank, dated the Effective Date, by and among the Service, the Department, and KWBA.

“Annual Report” means the annual report regarding the status of Conservation Credits prepared by KWBA pursuant to Section 5.1 of this Agreement.

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

“Certificate of Compliance” mean the certificate of compliance, a form of which is attached as Exhibit “I”, evidencing that KWBA has Incidental Take authority for Covered Species pursuant to the Master Permits for an Eligible Project.

“Certificate of Inclusion” mean the certificate of inclusion, a form of which is attached as Exhibit “H”, evidencing that an Included Party has Incidental Take authority for Covered Species pursuant to the Master Permits.

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

"Conservation Credits" means the credits established pursuant to this Agreement which shall serve as approved mitigation or compensation for the activities of qualified third parties in the Credit Area impacting Covered Species.

“Conservation Credit Certificate” means a certificate substantially in the form attached hereto as Exhibit “E” signed by KWBA certifying that a specified number of Conservation Credits, or interests therein, have been transferred to the person named in the certificate.

“Conservation Easements” means the easements granted to protect habitat in perpetuity with regard to the KWB Conservation Bank granted by KWBA to the Department on an annual basis and substantially in the form of Exhibit “D” hereto.

“Covered Species ” means those species listed as “Covered Species” in the Project Requirements Agreement/CESA MOU or Project Requirements Statement, as applicable, and that are included in the definition of “Covered Species” in the Implementation Agreement.

“Credit Area” shall mean the area shown on the Credit Area Map and more particularly described in the legal description of the Credit Area, both attached as Exhibit “C”, which is intended to include, approximately, any property within Kern County, the Allensworth area of Tulare County and the Kettleman Hills area of Kings County.

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

“Development Transfer” shall have the meaning set forth in Section 2.4 of this Agreement.

“Development Zone” shall have the meaning set forth in Section 2.4 of this Agreement.

“Eligible Project” shall have the meaning set forth in Section 3.2 of this Agreement.

“Endowment Deposit” means the sum of \$ 375, as revised pursuant to section 6.6, per Conservation Credit deposited into the Endowment Fund upon the sale of any Conservation Credit for purposes of endowing the management of the KWB Conservation Bank in perpetuity for the benefit of the Covered Species.

“Endowment Fund” means an investment fund maintained by the Department or a designee of the Department under the oversight of the Department as a non-wasting endowment exclusively for the management in perpetuity of the KWB Conservation Bank for the benefit of the Covered Species.

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

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

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

“Incidental Take” means the Take of a taxa which is incidental to an otherwise lawful activity, and includes, but is not limited to, Take resulting from the modification of habitat of Covered Species.

“Included Party” means a Project Applicant who obtains a Certificate of Inclusion to the Master Permits granting the Project Applicant Incidental Take authority for Covered Species for a particular project in accordance with this Agreement.

"Kern Water Bank" means the approximately 19,900-acre area shown on the map attached hereto as Exhibit “A.”

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

"KWB Conservation Bank" means the area on which KWBA may sell Conservation Credits, consisting of approximately 3,267 acres and generally shown on the map attached hereto as Exhibit “B.”

“KWB HCP” means the natural community conservation plan / habitat conservation plan prepared by KWBA regarding the Kern Water Bank.

“Master Permits” mean the Section 10(a) Master Permit and the Section 2081/2835 Master Management Authorization that have been issued to KWBA to authorize the Incidental Take of Covered Species by Included Parties in accordance with the Implementation Agreement, this Agreement, the Master Permits and the terms and conditions of the applicable Project Requirements Agreement/CESA MOU.

“Mineral Rights” shall have the meaning set forth in Section 3.9 of this Agreement.

“Minor Amendment” means a modification to the KWB HCP pursuant to Section 6.2 of the Implementation Agreement.

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

“Off-Site Mitigation” shall have the meaning set forth in Section 3.1 of this Agreement.

“On-Site Measures” means any on-site minimization or mitigation measure that the Resource Agencies deem appropriate to require from a Project Applicant and that do not require the control, oversight or enforcement by KWBA. An example of an On-Site Measure is an easement at the project site that protects habitat that is held and managed by a person other than KWBA.

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

“Pre-existing Rights” shall have the meaning given to such term in the Implementation Agreement.

“Project Applicant” means (a) a person who desires to become an Included Party under the Master Permits in order to obtain Incidental Take authority for a particular project in the Credit Area; and (b) a person who desires to acquire Conservation Credits in order to comply with the terms and conditions of that person’s own permits and/or management authorizations issued by the Service and the Department.

“Project Requirements Agreement/CESA MOU” means an agreement and memorandum of understanding under CESA, which may be in the form attached hereto as Exhibit “F-1”, by and between a Resource Agency, or both Resource Agencies if applicable, and a Project Applicant who seeks to become an Included Party to the Master Permits relating to an Eligible Project, or between the Resource Agencies and KWBA relating to an Eligible Project of KWBA.

“Project Requirements Statement” means a statement, which may be in the form attached hereto as Exhibit “F-2” by and between a Resource Agency, or both Resource Agencies if applicable, and a Project Applicant who seeks only to acquire Conservation Credits and does not seek to become an Included Party.

“Property Analysis Record” and “PAR” shall have the meaning set forth in section 6.7 of this Agreement.

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

“Revocation Notice” shall have the meaning set forth in Section 7.5 of this Agreement.

“Section 10(a) Master Permit” means the permit, that has a term of seventy-five years from the “Effective Date” (as that term is defined in the Implementation Agreement) of the Implementation Agreement, for the Incidental Take of threatened and endangered species pursuant to section 10(a) of FESA, 16 U.S.C. § 1539, that has been

issued to KWBA to authorize the Incidental Take of Covered Species by Included Parties in accordance with the KWB HCP, the Implementation Agreement, this Agreement, the terms and conditions of the applicable Project Requirements Agreement/CESA MOU and the Section 10(a) Master Permit.

“Section 2081/2835 Master Management Authorization” means the management authorization, that has a term of seventy-five years from the “Effective Date” (as that term is defined in the Implementation Agreement) of the Implementation Agreement, authorizing the Incidental Take of threatened and endangered species pursuant to sections 2081 and 2835 of the California Fish and Game Code that has been issued to KWBA to authorize the Incidental Take of Covered Species by Included Parties in accordance with the KWB HCP, the Implementation Agreement, this Agreement, the terms and conditions of the applicable Project Requirements Agreement/CESA MOU and the Section 2081/2835 Management Authorization.

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

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

2. ESTABLISHMENT OF THE KWB CONSERVATION BANK

2.1. Establishment of Conservation Bank.

The KWB Conservation Bank shall be deemed established upon the occurrence of each of the following events:

- a. the execution of this Agreement by all Parties hereto;
- b. the execution of the Implementation Agreement by all Parties;
- c. the delivery by the Department to KWBA of the Section 2081/2835 Master Management Authorization; and

- d. the delivery by the Service to KWBA of the Section 10(a) Master Permit.

2.2. Establishment of Credits.

Upon establishment of the KWB Conservation Bank, there are established for use in accordance with this Agreement three thousand two hundred and sixty-seven (3,267) Conservation Credits. Each Conservation Credit represents one acre in the KWB Conservation Bank.

2.3. Conservation Bank Evaluation and Acceptance.

Representatives of the Service and Department have inspected and evaluated the KWB Conservation Bank for purposes of determining its biological values in connection with the establishment of Conservation Credits. On the basis of such inspection and evaluation, the Service and Department acknowledge and agree that the KWB Conservation Bank possesses biological values for species listed as threatened and endangered pursuant to FESA and/or CESA, as well as other species, which values support the Conservation Credits established by this Agreement. The Conservation Credits shall serve as mitigation and compensation for impacts to Covered Species in the Credit Area pursuant to evaluation of individual cases by the Service and the Department as set forth in this Agreement.

2.4. Use of Conservation Bank land for Development Purposes.

There exists in the KWB Conservation Bank a development zone as marked on Exhibit "B" (the "Development Zone") comprising approximately fifteen percent (15%)

of the KWB Conservation Bank lands, approximately four hundred ninety (490) acres. At any time, or from time to time, KWBA has the right to transfer land located in the Development Zone out of the KWB Conservation Bank (a “Development Transfer”) and use that land for commercial development purposes subject to the conditions of the KWB HCP and the Implementation Agreement.

Upon its decision to do a Development Transfer, KWBA shall notify the Resource Agencies of KWBA’s proposed Minor Amendment in accordance with Section 6.2 of the Implementation Agreement advising the Resource Agencies of the location and number of acres subject to the Development Transfer. None of the acreage chosen for the Development Transfer shall previously have had recorded a Conservation Easement thereon. Upon consent by the Resource Agencies to that Minor Amendment, the number of Conservation Credits created pursuant to this Agreement shall be reduced by the total number of acres, or fraction thereof, transferred out of the KWB Conservation Bank by each Development Transfer, and the KWB HCP shall be deemed amended to reflect such reduction in acreage in the KWB Conservation Bank. Furthermore, the acreage subject to the Development Transfer shall no longer be covered by, or subject to, the Section 10(a) Permit and the Section 2081/2835 Management Authorization issued by the Resource Agencies pursuant to the Implementation Agreement, or the terms and conditions of such Section 10(a) Permit and Section 2081/2835 Management Authorization. KWBA shall regain Incidental Take authority on the acreage subject to the Development Transfer only upon agreement by the Resource Agencies in accordance with applicable law and regulations.

KWBA shall have the right, but not the obligation, to use Conservation Credits to mitigate and compensate for impacts to Covered Species caused by any use by KWBA of the land transferred out of the KWB Conservation Bank pursuant to a Development Transfer, subject to the consent of the Resource Agencies, as further set forth in Section 4 of this Agreement. If KWBA elects to attempt to use Conservation Credits to mitigate the effects of its use of such land, the Parties shall follow the procedures by which KWBA may utilize Conservation Credits on its own behalf as set forth in Section 4.

KWBA is under no obligation to do a Development Transfer. KWBA in its sole and absolute discretion may sell Conservation Credits representing land within the Development Zone and send to the Department a Conservation Easement covering land within the Development Zone. As set forth above, if KWBA elects to sell Conservation Credits representing land within the Development Zone, KWBA may not thereafter do a Development Transfer on that land.

2.5. Use of Conservation Bank Lands for HCP Purposes.

In accordance with the HCP and Implementation Agreement and as shown on Exhibit "A", KWBA may install, construct, repair, maintain, and operate water recharge, water recovery, and water conveyance facilities, including the following: water wells, pipelines, recharge canals, recovery canals, pumps, and appurtenant facilities such as storage buildings, fences and access roads. Recharge basins and levees will not be constructed. KWBA may line the recovery canals with concrete. KWBA will ensure that the access road system is adequate for emergency response and fire protection needs.

2.6. Adjustment of Conservation Credits for Activities of Owners of Pre-Existing Rights.

If the actions of owners of Pre-Existing Rights within the Conservation Bank result in the disturbance of habitat within the Conservation Bank, KWBA shall reduce the number of Conservation Credits available for sale in equal number to the number of acres disturbed, during the time the disturbance exists.

3. SALE OF CREDITS TO THIRD PARTIES AND USE OF CREDITS BY THIRD PARTIES; MARKETING OF CREDITS.

3.1. Establishment of Project Applicant's Conservation Requirements.

For any project or activity within the Credit Area for which a Project Applicant seeks Incidental Take authority or the authority to conduct the project or activity in compliance with FESA, CESA and/or CEQA, each Resource Agency shall, as soon as practicable, determine whether the Project Applicant may, or must, mitigate all or a portion of the project's adverse impacts by protecting a certain number of acres of appropriate habitat off-site ("Off-Site Mitigation"). The Off-Site Mitigation determination will be made without regard as to whether the Project Applicant desires to use Conservation Credits to satisfy those requirements. The Resource Agencies may establish any On-Site Measures for a project they deem appropriate.

3.2. Establishment of Conservation Requirements.

If a Resource Agency determines that Off-Site Mitigation is appropriate or required, the Resource Agency shall then determine whether the Project Applicant may satisfy its Off-Site Mitigation obligations by acquiring Conservation Credits. Projects

that lie within the Credit Area shall be eligible to acquire Conservation Credits if the Resource Agencies determine that the land lost, temporarily or permanently, as a result of implementation of the Project Applicant's project contains habitat of comparable or lesser value to the replacement habitat found in the Conservation Bank and is occupied or has the potential to be occupied by Federal Listed Species or State Listed Species known to occur on the Kern Water Bank. Project Applicants seeking to use Conservation Credits as mitigation for take of a Covered Species whose presence is then undocumented on Conservation Bank lands shall be required to show, using best available scientific data, that such Covered Species is found on the Conservation Bank.

If the Resource Agency, or Resource Agencies collectively, determine that the Project may satisfy its Off-Site Mitigation by acquiring Conservation Credits, the Project Applicant's project shall be deemed to be an "Eligible Project".

3.3. No Discrimination.

In no event shall the Resource Agencies establish more onerous mitigation requirements if the Project Applicant uses Conservation Credits to satisfy its Off-Site Mitigation requirements than if it uses any other comparable off-site habitat with comparable habitat values in the Credit Area to satisfy its Off-Site Mitigation requirement. The intent of this paragraph is to ensure that KWBA is competing on an equal basis with all other mitigation and conservation banks in the Credit Area.

3.4. Sales and Transfers of Conservation Credits.

(a) Sales and Issuance of Certificates. KWBA may sell Conservation Credits only to Project Applicants who have delivered to KWBA a Project Requirements

Agreement/CESA MOU or Project Requirements Statement executed by the Project Applicant and the Resource Agencies. Each sale of Conservation Credits shall be evidenced by the issuance of a Conservation Credit Certificate. In accordance with the procedure set forth in Section 3.5(a) of this Agreement, the original Conservation Credit Certificate will be delivered, in duplicate, to each Resource Agency evidencing that a certain number of Conservation Credits have been dedicated to the Resource Agencies. A true copy of the Conservation Credit Certificate will be delivered to the buyer. Nothing in this Agreement shall prevent a Project Applicant from acquiring from KWBA and dedicating to the Resource Agencies Conservation Credits in excess of the amount required for that Project Applicant to meet its Off-Site Mitigation obligation.

KWBA may sell non-fee interests in Conservation Credits, such as options or rights of first refusal, to any person without reference to any particular project. However, the exercise of any interest in Conservation Credits shall be tied to the Off-Site Mitigation Requirements of specific Eligible Projects. Each sale of interests in Conservation Credits shall be evidenced by the issuance of a Conservation Credit Certificate clearly stating the non-fee interest that the holder of the Certificate has acquired.

(b) Disclosure. Before the sale of any Conservation Credits, or interest therein, KWBA shall provide to the potential buyer a disclosure statement (the “Disclosure Statement”) which states that the use of Conservation Credits is limited to Eligible Projects under this Agreement. The Conservation Credit Certificate evidencing the acquisition of Conservation Credits shall also disclose that the use of Conservation Credits is limited to Eligible Projects under this Agreement. A form of Disclosure

Statement is attached as Exhibit “G”. A form of Conservation Credit Certificate is attached as Exhibit “E”.

(c) Transfers of Interests In Conservation Credits. A holder of a Conservation Credit Certificate evidencing a non-fee interest in Conservation Credits may transfer the Conservation Credit Certificate to another person by presenting the existing Certificate to KWBA along with a request that a replacement Conservation Credit Certificate, containing the proper disclosures, be issued in the name of a specified transferee. KWBA shall cancel the existing Conservation Credit Certificate and issue a new Conservation Credit Certificate as requested by the Conservation Credit Certificate holder.

3.5. Incidental Take Authority.

The Resource Agencies have absolute discretion to determine whether a Project Applicant may obtain Incidental Take Authority under the Master Permits. A Project Applicant with an Eligible Project shall receive authority for the Incidental Take of Covered Species, which the Resource Agencies have determined are present in, and conserved by, the Conservation Bank, for the Eligible Project in compliance with FESA, CESA and/or CEQA under the Master Permits as follows:

(a) Project Requirements Agreements/CESA MOU. A Project Applicant may seek either (a) to become an Included Party under the Master Permits or (b) to acquire Conservation Credits in order to comply with the terms and conditions of the Project Applicant’s own permit and/or management authorization obtained from the Resource Agencies pursuant to applicable Environmental Laws.

If a Project Applicant seeks to become an Included Party, the Project Applicant shall submit to KWBA a Project Requirements Agreement/CESA MOU (a form of which is attached as Exhibit "F-1") signed by both the Project Applicant and the applicable Resource Agency or the Resource Agencies collectively, and including all the elements in Exhibit F-1.

If a Project Applicant seeks to acquire Conservation Credits but does not seek to become an Included Party, then the Project Applicant shall submit to KWBA a Project Requirements Statement (a form of which is attached as Exhibit "F-2") signed by the Project Applicant and the Resource Agencies.

(b) No Required Sale. KWBA is under no obligation to sell Conservation Credits to a Project Applicant. If KWBA and a Project Applicant are unable to reach an agreement for the sale of Conservation Credits, KWBA shall return the Project Requirements Agreement/CESA MOU or Project Requirements Statement, as applicable, to the Project Applicant and notify the applicable Resource Agency or Agencies that the Project Applicant will not be using Conservation Credits to satisfy its Off-Site Mitigation requirements.

(c) Notice of Sale Of Conservation Credits: Preparation of Certificate of Inclusion. Once KWBA has sold and the Project Applicant has acquired the required number of Conservation Credits, KWBA shall notify the Resource Agencies that it has sold Conservation Credits to the Project Applicant. KWBA shall attach the Project Requirements Agreement/CESA MOU or Project Requirements Statement, as applicable, and the original Conservation Credit Certificate to the notice given to the Resource Agencies. If the Project Applicant has a Project Requirements Agreement/CESA MOU,

KWBA's notice shall include a Certificate of Inclusion and request that the Resource Agencies concur with the issuance of the Certificate of Inclusion.

(d) Effectiveness. If the Project Applicant has a completed Project Requirements Agreement/CESA MOU, then that Project Applicant shall automatically become an Included Party upon the concurrence of the Resource Agencies with the issuance of the Certificate of Inclusion.

(e) Dedication and Retirement of Credits. Upon issuance of a Certificate of Inclusion, or upon completion of a Project Requirements Statement and issuance of a Conservation Credit Certificate, the Conservation Credits underlying the applicable Conservation Credit Certificate shall be permanently retired. KWBA may not thereafter reacquire the Conservation Credits from the Included Party or resell such Conservation Credits.

3.6. Proceeds from Credit Sales.

Except as set forth in Section 6.2, the entire proceeds of all sales of Conservation Credits, and interests therein, shall be the property of KWBA.

3.7. Marketing and Terms of Sale of Conservation Credits.

The marketing and sale of Conservation Credits shall be under the exclusive authority and control of KWBA. KWBA may advertise and market Conservation Credits, and interests therein, in any manner it sees fit so long as it accurately represents the terms and conditions for the use of Conservation Credits as set forth in this Agreement and the Master Permits. KWBA may determine, in its sole and absolute discretion, the prices and terms upon which each sale of Conservation Credits shall occur.

Without limiting the generality of the foregoing, KWBA may sell Conservation Credits for cash, finance the sale of Conservation Credits, sell Conservation Credits subject to third-party financing, or enter into agreements for the sale of non-fee interests in Conservation Credits. KWBA may not, however, repossess retired Conservation Credits for non-payment.

3.8. Cooperation of Agencies in the Marketing and Sale of Credits.

The Resource Agencies shall cooperate in the marketing of Conservation Credits as follows:

- (a) No discrimination. The Resource Agencies shall not in any way discriminate against the KWB Conservation Bank or discourage the use of the KWB Conservation Bank when describing to members of the public the means available to comply with regulations regarding Covered Species within the Credit Area.
- (b) Confirmation. The Resource Agencies shall confirm in writing to prospective purchasers of Conservation Credits that Conservation Credits are available to mitigate impacts to Covered Species for projects within the Credit Area.
- (c) Acknowledgment of Approval. The Resource Agencies shall acknowledge that the KWB Conservation Bank is a conservation bank “approved” by the Resource Agencies.
- (d) Conservation bank lists. The Resource Agencies shall include the KWB Conservation Bank on any list maintained by them of mitigation or conservation banks approved by the Resource Agencies and shall make any such list available to prospective purchasers of Conservation Credits within the Credit Area.

3.9. Cooperation of KWBA in selling Conservation Credits to Mineral Rights Holders.

The Parties recognize that third persons not party to this Agreement own rights in the subsurface estate underlying the Conservation Bank (the “Mineral Rights”). KWBA agrees to use reasonable efforts to sell Conservation Credits to the owner(s) of the Mineral Rights in the event that the Resource Agencies require Off-Site Mitigation from such owners due to the exercise of the Mineral Rights by the owner thereof.

Notwithstanding the foregoing, nothing in this Agreement shall be deemed to require KWBA to sell Conservation Credits to any person, nor does this Agreement authorize Take by those exercising their Mineral Rights.

4. USE OF CONSERVATION CREDITS BY KWBA.

Subject to the approval of the applicable Resource Agency, KWBA can itself receive authority for the Incidental Take of Covered Species and otherwise satisfy the requirements of applicable Environmental Laws under the Master Permits for projects undertaken by KWBA which are not covered by the Incidental Take authority issued to KWBA pursuant to the Implementation Agreement and KWB HCP as follows:

For KWBA’s project to be an Eligible Project, the site must be located either (a) outside the KWB HCP boundary but within the Credit Area, or (b) within the Development Zone. If a Resource Agency determines that Off-Site Mitigation is appropriate or required for KWBA’s project, the Resource Agency shall then determine whether KWBA may satisfy its Off-Site Mitigation obligations by acquiring Conservation Credits, and thereby become an Eligible Project. Once the Resource

Agencies have determined that KWBA's project is an Eligible Project and the Resource Agencies and KWBA reach agreement on Off-Site Mitigation and On-Site Conditions, the Resource Agencies and KWBA shall execute a Project Requirements Agreement/CESA MOU for such project. Thereafter, KWBA shall prepare and deliver to the Resource Agencies the Project Requirements Agreement/CESA MOU, a Conservation Credit Certificate evidencing compliance with the Off-Site Mitigation requirements, and a Certificate of Compliance. The Resource Agencies shall then concur with the Certificate of Compliance. Upon receipt of the Certificate of Compliance evidencing the Resource Agencies' concurrence, KWBA shall have the Incidental Take authority described in the Master Permits as further defined in the Project Requirements Agreement/CESA MOU for its Eligible Project.

5. CONSERVATION CREDIT REPORTING PROCESS

5.1. Annual Report

On an annual basis, by March 1, KWBA shall submit to the Resource Agencies an Annual Report on the status of the Conservation Credits. The Annual Report shall document:

- (a) Conservation Credits created and available by this Agreement or any amendment hereto;
- (b) Conservation Credits sold to Included Parties or used by KWBA for itself and concurrently retired within the previous year;
- (c) Interests in Conservation Credits sold to third parties within the previous year;

- (d) Interests in Conservation Credits transferred from one third party to another within the previous year;
- (e) Conservation Credits eliminated due to a Development Transfer within the previous year;
- (f) Conservation Credits voided and nullified by the Resource Agencies within the previous year;
- (g) Adjustments made by KWBA to the total number of Conservation Credits available pursuant to Section 5.3 of this Agreement due to the existence of surface improvements on the Conservation Bank within the previous year;
- (h) Conservation Credits suspended or eliminated by the Resource Agencies due to habitat degradation that reasonably could have been prevented by KWBA, pursuant to section 7.3 of this Agreement;
- (i) Conservation Credits suspended due to habitat degradation caused by owners of Pre-Existing Rights;
- (j) Any other transaction or occurrence within the previous year affecting the number of Conservation Credits sold, available for sale or dedicated;
- (k) the name and address of each person and the number of Conservation Credits involved to whom Conservation Credits have been sold, optioned or transferred in the preceding year;
- (l) the cumulative total of Conservation Credits sold, optioned, eliminated or dedicated pursuant to this Agreement since the Effective Date;
- (m) a summary of all Certificates of Inclusion and Compliance issued pursuant to this Agreement since the Effective Date;

(n) a map showing the portion of the KWB Mitigation Bank for which KWBA has delivered a Conservation Easement to the Department, and the portion of the KWB Mitigation Bank unencumbered by a Conservation Easement; and

(o) copies of the annual reports submitted by the Included Parties.

5.2. Objections to Annual Report

Unless objected to within sixty (60) days from receipt thereof by the Service and/or the Department, each Annual Report shall conclusively establish the status of the Conservation Credits.

5.3. Recordation of Conservation Easement; Further Documents.

Concurrently with KWBA's submission of the Annual Report, KWBA shall submit to the Department the following documents, with copies to the Service:

(a) an executed Conservation Easement (a form of which is attached as Exhibit "D") for a parcel of land within the KWB Conservation Bank and for which no Conservation Easement has previously been recorded equal in acreage to the number of Conservation Credits dedicated to any Resource Agency during the previous year;

(b) an executed Amendment to the Environmental Indemnity (a form of which is attached as Exhibit "J"), adding the land covered by the Conservation Easement to the land already covered by the Environmental Indemnity delivered to the Department pursuant to the Implementation Agreement; and

(c) a preliminary title report evidencing that no prior liens exist which could extinguish the Conservation Easement.

KWBA shall make reasonable efforts to ensure that the Conservation Easement for any year is (a) a contiguous single tract of land; and (b) contiguous to Conservation Easements previously delivered to the Department. Unless the Department and/or the Service objects to the Conservation Easement, the Department shall record the Conservation Easement as soon as practicable after receiving a Conservation Easement executed by both KWBA and the Service, and shall send to KWBA and the Service a true copy of the recorded Conservation Easement. The Department and the Service may object to a Conservation Easement on only two grounds: (i) KWBA has miscalculated the amount of acreage to be covered by the Conservation Easement; and (ii) there exists a better configuration and/or location for the Conservation Easement. Notwithstanding the foregoing, the Parties recognize that the Department's acceptance of the Conservation Easement is subject to the approval of the State of California's Department of General Services and the Fish and Game Commission.

The Implementation Agreement and the KWB HCP authorize KWBA to have on the land on which a Conservation Easement is to be recorded water extraction facilities, including but not limited to canals, pipelines and pump sheds. In determining the size of any Conservation Easement, KWBA shall exclude the acreage on which above-ground water extraction facilities are located when such facilities are located within the boundaries of the Conservation Easement. For example, if KWBA has sold 100 Conservation Credits in a year and the next parcel to be covered by a Conservation Easement contains a canal and a pump shed covering 10 acres, then KWBA shall deliver a Conservation Easement covering 110 acres. If in any year the actual acreage covered by the Conservation Easement exceeds the number of Conservation Credits sold in that

year due to the existence of surface improvements, KWBA shall process a Minor Amendment to the KWB HCP to reflect the decrease in the number of Conservation Credits available, representing the difference between the actual acreage covered by that year's Conservation Easement and the number of Conservation Credits sold. The Conservation Easement relating to the sale of the last Conservation Credit shall include any remaining fractional interests.

6. ENDOWMENT FUND.

6.1. Creation of Endowment Fund.

Upon receipt by the Department of the first Endowment Deposit, the Department shall establish the Endowment Fund as a sub-account of the Department's Special Deposit Fund Account. The Endowment Fund shall be used only for the management of Endowment Deposits.

6.2. Contribution by KWBA to Endowment Fund.

KWBA shall pay the Endowment Deposit to the Endowment Fund upon each sale by KWBA of Conservation Credits and upon each use by KWBA of Conservation Credits for itself. KWBA shall not make Endowment Deposit payments upon the sale of interests, such as options or rights of first refusal, in Conservation Credits. Payment of the Endowment Deposit for options and rights of first refusal shall occur when the option or right is exercised, and the Conservation Credits are actually dedicated. Payments shall be directed as follows:

FASB
California Department of Fish and Game
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Attention: Cash Receipts Group
Fund: KWB Conservation Bank Endowment Fund

6.3. Principal and Interest.

No Party shall have any right to expend the principal of the Endowment Fund.

The Department shall not use any part of the Endowment Fund for any purpose at any time except for the conservation, protection, restoration and enhancement of the habitat of the Covered Species on the KWB Conservation Bank.

Except as provided in section 6.7 below, the Department shall pay to KWBA on a semi-annual basis the interest accrued in the Endowment Fund. The interest shall be used by KWBA solely for the conservation, protection, restoration, and enhancement of the habitat(s) of the Covered Species on the KWB Conservation Bank. The first interest payment shall be made on or before February 28 of each calendar year, and the second interest payment shall be made on or before August 30 of each calendar year. If practicable, interest payments shall be made by wire transfer.

Notwithstanding the previous paragraph, KWBA in its discretion may elect not to withdraw the accrued interest from the Endowment Fund. If KWBA so decides, KWBA shall set forth a statement to that effect in the Annual Management Plan for the Kern Water Bank prepared pursuant to the Implementation Agreement.

6.4. Audit Rights.

KWBA shall have the right to audit the Endowment Fund annually upon thirty (30) days' prior written notice to the Department, to the extent allowed by law.

6.5. Annual Report.

An annual report on the Endowment Fund, including interest accrued and paid out and overhead costs, shall be provided to KWBA within ninety (90) days after the end of each calendar year.

6.6. Adjustment of Endowment Deposit.

As of the Effective Date, the Endowment Deposit is Three Hundred seventy-five Dollars (\$375) per Conservation Credit. The Endowment Deposit amount shall be adjusted annually for inflation using the Implicit Price Deflator for State and Local Government Purchase of Goods and Services, as published by the U.S. Department of Commerce. In each calendar year, the Department shall give notice to KWBA of the adjusted Endowment Deposit amount to take effect as of the first day of the next following calendar year.

6.7. Reinvestment of Interest; Property Analysis Record.

The Resource Agencies may prepare, once every three years, a Property Analysis Record ("PAR"), under the guidelines developed by the Center for Natural Lands Management, or conduct an equivalent analysis, to determine whether the Endowment Fund and Endowment Deposit amount are adequate to fund management of the Conservation Bank lands in perpetuity. If, based on the PAR or equivalent analysis, the

Resource Agencies determine that the Endowment Fund is not adequate and will not be made adequate by payments of the Endowment Deposit, the Resource Agencies may reinvest the interest accrued in the Endowment Fund into the Endowment Fund until such time as the Endowment Fund reaches a level of funding that is adequate in proportion to the number of Conservation Credits that have been relinquished.

7. DEFAULT; DAMAGES

7.1. Notice of Default; Time to Cure.

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

7.2. KWBA’s Events of Default.

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

- (a) KWBA’s failure to provide the Department with the annual Conservation Easement in a timely fashion in accordance with the terms of this Agreement.

- (b) KWBA's use or transfer of Conservation Credits, or interests therein, in violation of the terms of this Agreement.
- (c) KWBA's failure to provide the Resource Agencies with the Annual Report in a timely manner in accordance with the terms of this Agreement.

7.3. Credit Reduction.

The Resource Agencies may at any time reduce the number of Conservation Credits available for sale due to the failure by KWBA to manage the Conservation Bank in accordance with the Implementation Agreement. The reduction shall be less than or equal to the number of acres the Resource Agencies believe, relying on best available scientific data, have been impacted due to KWBA's failure to manage the area in accordance with the Implementation Agreement. The reduction shall last until such time as KWBA resumes managing the Conservation Bank adequately and restores the degraded acreage to the reasonable satisfaction of the Resource Agencies.

7.4. Events of Default for the Resource Agencies.

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

- (a) Failure or refusal of a Resource Agency to accept Conservation Credits as compensation for the impacts of activities by Project Applicants acquiring Conservation Credits from KWBA, or by KWBA for its own use, consistent with this Agreement.

7.5. Revocation of Included Party's Certificate of Inclusion; Severability.

The Service or the Department may at any time provide notice (a "Revocation Notice") to KWBA and an Included Party that an Included Party has had or will have its Certificate of Inclusion revoked. Upon receipt of a Revocation Notice, KWBA in its sole discretion shall have 30 days to cure, or commence curing to the satisfaction of the Resource Agencies, the breach of the Included Party that lead to the issuance of the Revocation Notice.

The sole effect of this Revocation Notice shall be to deny that Included Party the ability to rely on the Master Permits to engage in the Incidental Take of Covered Species. The Revocation Notice shall have no effect on the Master Permits or on the ability of KWBA and the other Included Parties to continue the Incidental Take of Covered Species in accordance with the Master Permits and any applicable agreements between the Resource Agencies, any Included Party and KWBA. In no event shall the revocation of a Certificate of Inclusion require KWBA to return, repay or otherwise disgorge any consideration received from the defaulting Included Party.

If permitted by the applicable Project Requirements Agreement/CESA MOU, the Resource Agencies may declare all or a portion of the Conservation Credits dedicated by the breaching Included Party to be null and void as whole or partial remedy for the damages caused by the breaching Included Party's default. The Resource Agencies shall notify KWBA in writing of their decision to nullify any Conservation Credits.

7.6. Remedies.

After notice of and time to cure a default, the Parties shall have all remedies otherwise available to enforce the terms of this Agreement, the Implementation

Agreement, the Section 10(a) Permit, the Section 2081/2835 Management Authorization and the KWB HCP, and to seek remedies for any breach hereof against the Defaulting Party, subject to the following:

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

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

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

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

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

8. MISCELLANEOUS

8.1. Term; Termination.

This Agreement shall terminate upon the expiration of the Master Permits. Each and every Conservation Easement recorded and the Endowment Fund created pursuant to this Agreement is intended to survive this Agreement in accordance with its terms.

8.2. Reliance by KWBA; Due Authorization.

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

8.3. Notices

(a) All notices, demands, or requests from one Party to another shall be in writing and shall be either personally delivered, sent by facsimile, sent by recognized overnight delivery service, or sent by mail, certified or registered, postage prepaid, to the addresses stated in this paragraph. Each such notice shall be deemed made upon receipt

by the addressee unless delivery of a properly addressed and sent notice is not made because (i) acceptance of delivery was refused by the addressee; (ii) the addressee moved without providing proper notice of such move; or (iii) the addressee was not open for business on the date of attempted delivery (unless delivery was attempted on a Saturday, Sunday, national holiday, or after normal business hours), in which case such notice shall be deemed given on the date of attempted delivery. The addresses of the Parties for notices are as follows:

If to KWBA:

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

With a copy to:

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

If to the Department:

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

and to

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

with a copy to

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

If to the Service:

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

and to

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

with a copy to:

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

(b) Any Party may change the address to which such notices may be sent by giving the other Parties written notice of such change pursuant to subsection (a) above. The Parties agree to accept facsimile transmitted signed documents and agree to rely upon such documents as if they bore original signatures. The Parties agree to provide to the others copies of such facsimile documents bearing original signatures, transmitted by regular mail.

8.4. Entire Agreement

This Agreement, along with the exhibits attached hereto, the Implementation Agreement with the exhibits attached thereto, the HCP for the KWB and the Master Permits, constitutes the entire agreement and understanding between the Parties with respect to the Kern Water Bank Conservation Bank. This Agreement supersedes all prior and contemporaneous agreements, representations, negotiations or understandings of the Parties, if any, whether oral or written.

8.5. Governing Law

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

8.6. No Third Party Beneficiaries

This Agreement is solely for the benefit of KWBA, the Resource Agencies and the Included Parties. The Parties intend that only the Parties to this Agreement, the Included Parties and their approved assignees shall benefit from the Agreement. This Agreement shall not create in the public, any member of the public, or any other person or entity any rights as a third party beneficiary to this Agreement, nor shall it authorize anyone not a party to this Agreement to maintain a suit for injuries or damages under the provisions of this Agreement.

8.7. Signature in Counterparts

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

8.8. Amendments

This Agreement is not subject to amendment except in a writing signed by all the Parties.

8.9. Effective Date

This Agreement shall be effective upon execution by all Parties.

8.10. Pre-existing Rights

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

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

8.11. Interpretation and Headings

The subject headings of the sections of this Agreement are provided for convenience only and shall not affect the construction or interpretation of any of the

provisions of the Agreement. This Agreement shall not be construed as if it had been prepared by any one Party, but rather as if all Parties had prepared the Agreement.

Dated: _____

KERN WATER BANK AUTHORITY

By: _____

William D. Phillimore

Title: Chairman

Approved as to form:

Nossaman, Guthner, Knox & Elliott, LLP
(KWBA Counsel)

By: _____

Robert D. Thornton

Dated: _____

UNITED STATES FISH AND WILDLIFE
SERVICE

By: _____

Michael J. Spear

Title: Regional Director

Approved as to form:

Office of the Regional Solicitor
U.S. Department of the Interior
(Service Counsel)

By: _____

Dana Jacobsen

Dated: _____

CALIFORNIA DEPARTMENT OF FISH AND
GAME

By: _____

Jacqueline E. Schafer

Title: Director

Approved as to form:

General Counsel

California Department of Fish and Game

(Department Counsel)

By: _____