

APPENDIX F

**This is a model agreement.
The agreement that each purveyor signs will reflect the provisions of the
purveyor's specific *Water Forum Agreement*.**

AGREEMENT FOR REDUCTION IN WATER DIVERSIONS AND DELIVERIES FOR IMPLEMENTATION OF REVISED INSTREAM FLOW STANDARDS FOR THE LOWER AMERICAN RIVER

This agreement is entered into as of _____, by and between the United State of America, acting by and through the Department of the Interior, U.S. Bureau of Reclamation ("Reclamation"), and _____ ("District"), a public agency of the state of California, duly organized, existing and acting pursuant to the laws thereof.

RECITALS

A. The United States has constructed and is operating Folsom Dam and Reservoir and appurtenant facilities ("Project Facilities"), which are part of the Central Valley Project, for diversion, storage, carriage and distribution of waters of the American River for irrigation, municipal, domestic, industrial water supplies, fish and wildlife mitigation, protection and restoration, generation and distribution of electric energy, salinity control, navigation, flood control, recreation and other beneficial uses.

B. **[Alternative 1: for a district with a CVP contract only]** The District and Reclamation have entered into Contract No. _____, dated _____, as amended ("District CVP Contract"), which entitles the District to receive a CVP water supply upstream from Nimbus Dam from Reclamation under the terms of the District CVP Contract.

[Alternative 2: for a district with a CVP contract and water rights] The District and Reclamation have entered into Contract No. _____, dated _____, as amended ("District CVP Contract"), which entitles the District to receive a CVP water supply upstream from Nimbus Dam from Reclamation under the terms of the District CVP Contract. In addition, the District holds water rights for diversion and beneficial use of water from the American River and/or its tributaries upstream from Nimbus Dam ("District Water Rights"), which are identified as follows: _____.

[Alternative 3: for a district with water rights only] The District holds water rights for diversion and beneficial use of water from the American River and/or its tributaries upstream from Nimbus Dam ("District Water Rights"), which are identified as follows: _____
_____.

C. In 1957, the State Water Resources Control Board ("State Board") issued Decision No. 893, which set forth instream flow standards for the Lower American River that Reclamation is required to meet. Since 1996, Reclamation, in consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, has attempted on a voluntary basis to release water from Project Facilities in a manner consistent with the flow objectives for the Lower American River set forth in the draft Anadromous Fish Restoration Plan to the extent Reclamation's available water supply has permitted it to do so.

D. The Lower American River, which is the 23 miles of river flowing below Nimbus Dam to its confluence with the Sacramento River and includes the American River Parkway, is a significant local and national resource. Current use of the American River Parkway is estimated to be approximately 5.5 million visitors per year, and is expected to increase to 7.5 million visitors per year by the year 2000, and to 9.6 million visitors per year by the year 2020. The Lower American River provides water supply, fish, wildlife, recreation and aesthetic benefits, and provides habitat for threatened and endangered species. The Lower American River provides a significant economic benefit to the region. Adequate instream flows in the Lower American River are essential to preserve and protect the Lower American River for use by future generations.

E. Representatives of a diverse group of business and agricultural leaders, environmental advocates, citizen groups, water purveyors and local governments are signatories to the *Water Forum Agreement* ("Water Forum Agreement") to achieve the coequal objectives to (a) provide a reliable and safe water supply for the Sacramento region's economic health and planned development through the year 2030, and (b) preserve the fishery, wildlife, recreational and aesthetic values of the Lower American River. The *Water Forum Agreement* refers to activities of the District for securing a reliable and safe water supply ("District's Project") that the other signatories to the *Water Forum Agreement* agree to support. The Water Forum and Reclamation have developed a method of allocating the water that is available for Lower American River instream purposes in a manner that attempts to optimize the instream beneficial use of the available water supply, which is referred to herein as the "Release Pattern". The quantity of water that is available for release by Reclamation for Lower American River instream purposes will depend in part on the quantity of water diverted upstream of Nimbus Dam.

F. The District is a signatory to the *Water Forum Agreement*, and is willing, in the manner and to the extent set forth in Exhibit B, including conference year principles, attached hereto and incorporated herein, to agree (1) to reduce its diversion or delivery of surface water from the American River and/or its tributaries upstream from Nimbus Dam in certain dry years, or (2) implement alternative dry year actions to achieve the equivalent of such a reduction through arrangements with other water users, to increase the water supply available for the Lower American River, consistent with the terms and conditions of the *Water Forum Agreement*. The alternative dry year actions are referred to herein as "Alternative Dry Year Actions".

Agreement

In consideration of the mutual covenants contained herein, the parties agree as follows:

1. Definitions.

The following terms shall have the same meaning in this agreement as they do in the recitals: Reclamation, District, Project Facilities, District CVP Contract, District Water Rights, State Board, *Water Forum Agreement*, District's Project, Release Pattern and Alternative Dry Year Actions.

2. Updated Lower American River Flow Standard.

Reclamation shall petition the State Board to issue an order that amends Reclamation's water rights permits for operation of Project Facilities consistent with the terms and conditions of this agreement for implementation of the Release Pattern. The District shall support Reclamation's petition for that purpose. The procedures for determining annual dry-year water diversions or deliveries and confirming that alternative supplies will be available are set forth in Exhibit A, attached hereto and incorporated herein.

3. Reduction in Surface Water Deliveries and/or Diversions.

Subject to the terms and conditions of this agreement, the District shall do one or more of the following in the manner and to the extent set forth in Exhibit B: (a) reduce the quantity of water that it schedules for delivery upstream from Nimbus Dam under the District CVP Contract, or (b) reduce the quantity of water that it diverts upstream from Nimbus Dam under the District Water Rights, or (c) implement Alternative Dry Year Actions. Reductions or Alternative Dry Year Actions will be proportional to the increased diversions over the District's baseline amount, as set forth in Exhibit B.

4. Responsibility for Instream Flows.

Subject to the terms of this agreement, Reclamation (and not the District) shall be responsible for providing flows and operating the Project Facilities to meet the instream flow standards for the Lower American River, so that the District shall not be required to reduce its delivery and/or diversion of water from the American River and/or its tributaries for that purpose in addition to the actions agreed to in Section 3 of this agreement. Nothing in this agreement affects Reclamation's authority to determine the quantity of water available to the District under the water shortage provisions of the District CVP Contract. Reductions in CVP deliveries agreed to by the District under this agreement shall be credited by Reclamation to reductions imposed under the water shortage provisions of the District CVP Contract.

5. Conditions.

(a) Performance by the District of the provisions of Section 3 of this agreement shall not take effect before the effective date of a final order of the State Board that amends Reclamation's water rights permits for operating Project Facilities as proposed in Section 2 of this agreement, subject to the termination provisions of subsection (c).

(b) Performance by the District of the provisions of Section 3 of this agreement shall not be required unless and until the District has completed District's Project in whole or in part, in a manner consistent with the *Water Forum Agreement*.

(c) Reclamation and the District shall each have the right to terminate this agreement, and Reclamation may withdraw the petition referred to in Section 2, upon written notice to be delivered to the other party prior to the effective date of the final State Board order referred to in Section 2, if it reasonably determines that any term or condition proposed in the State Board order referred to in Section 2 is inconsistent with the intent of the parties as set forth in this agreement. The parties shall consult with each other and make a good faith effort to amend this agreement, if necessary, to attempt to resolve an unacceptable term of the State Board order.

6. Changed Conditions.

If either party notifies the other party that it believes that changed conditions have or will significantly affect its ability to perform its obligations under this agreement, such as a revision to the Release Pattern after it has been adopted by the State Board, or action by a court, regulatory body or other public agency that results in a significant reduction in the water supply available for use by the District, the parties agree to consult with each other and make a good faith effort to amend this agreement in a manner that achieves the coequal objectives to (a) provide a reliable and safe water supply for the District through the year 2030, and (b) preserve the fishery, wildlife, recreational and aesthetic values of the lower American River. Third party beneficiaries to this agreement shall be provided notice and an opportunity to participate in that negotiation. If the parties do not agree to an amendment of this agreement, they may pursue whatever remedies they may have (e.g., termination or reformation). This section shall not be construed as an admission or acknowledgment that changed circumstances justify any form of relief.

7. Term.

The term of this agreement shall be until December 31, 2030, provided however, that this agreement may be terminated prior to that date pursuant to Sections 5 and 6. The parties shall commence discussions no later than December 31, 2023 concerning renewal or extension of this agreement beyond its termination date.

8. Water Rights Protection.

(a) This agreement sets forth limitations on the manner in which the District may exercise its water rights and entitlements. This agreement is not intended to and should not be interpreted to grant or deprive any party to this agreement of any right to divert, release or use the quantity or flows of water agreed to in this agreement except as expressly set forth herein.

(b) The parties acknowledge and agree that the District (1) shall not relinquish control of or otherwise abandon the right to any quantity of water that it has foregone delivery and/or diversion of under this agreement, and (2) shall retain the right (if any) to transfer that water for other beneficial uses, after that water has served its purpose of assisting Reclamation in the implementation of the Release Pattern, for diversion or rediversion at or downstream of the confluence of the lower American River and the Sacramento River (including the proposed joint project for diversion of water at or upstream of I-5). The parties recognize that any such transfer of water by the District must be in accordance with applicable provisions of federal and state law.

9. General Provisions.

A. General Liability. Each party to this agreement shall be responsible for all losses, claims, liens, demands and causes of action of every kind and character caused by or resulting from that party's performance of this agreement.

B. Integration. This agreement constitutes the sole, final, complete, exclusive and integrated expression and statement of the terms of this agreement among the parties concerning the subject matter addressed herein, and supersedes all prior negotiations, representations or agreement, either oral or written, that may be related to the subject matter of this agreement, except those other documents that are expressly referenced in this agreement.

C. Construction and Interpretation. It is agreed and acknowledged by the parties that this agreement has been arrived at through negotiation, and that each party has had a full and fair opportunity to revise the terms of this agreement. Consequently, the normal rule of construction that any ambiguities are to be resolved against the drafting party shall not apply in construing or interpreting this agreement.

D. Waiver. The waiver at any time by any party of its rights with respect to a default or other matter arising in connection with this agreement shall not be deemed a waiver with respect to any subsequent default or matter.

E. Severability. The invalidity, illegality or unenforceability of any provision of this agreement shall not render the other provisions unenforceable, invalid or illegal.

F. Successors and Assigns. This agreement shall bind and inure to the benefit of the respective successors and assigns of the parties to the extent such successors and assigns are approved by the other party to this agreement, which approval shall not unreasonably be withheld.

G. Amendment. This agreement may be modified or amended only by a subsequent written agreement approved and executed by both parties.

H. Supporting Resolutions. Each party represents that it has legal authority to enter into this agreement and to perform its obligations hereunder, and shall submit to the other party concurrent with execution of this agreement a duly-authorized resolution or other document evidencing that authority and authorizing the person executing this agreement to do so.

I. Additional Documents. Each party agrees to make, execute, and deliver any and all documents reasonably required to implement this agreement.

J. Time. Time is of the essence in the performance of each and every term of this agreement.

K. Third Party Beneficiaries. The other signatories to the *Water Forum Agreement* shall be third party beneficiaries to this agreement solely for the purpose of seeking specific performance of the provisions of Section 3 of this agreement if Reclamation fails to enforce any of those provisions. The status of a signatory to the *Water Forum Agreement* as a third party beneficiary to this agreement is dependent on that signatory complying with all terms of the *Water Forum Agreement*, including support for the purveyor specific agreement for the District's Project. The parties to this agreement do not intend to create any other third party beneficiaries to this agreement, and expressly deny the creation of any third party beneficiary rights hereunder for any other person or entity.

L. Notices. Any notice, request, tender, demand, delivery, approval or other communication provided for, required, or arising under this agreement shall be in writing and shall be deemed delivered (1) upon confirmation of transmission by facsimile, or (2) three business days after deposit in the United States mail, certified or with return receipt requested, addressed to the party as follows:

[Addresses to be inserted]

The foregoing is hereby agreed to by the parties.

[Signature block to be inserted]

Attachment: Exhibit A: Procedures for Determining Annual Dry-Year Water Diversions and Confirming the Availability of Alternative Supplies

(Exhibit B's will be developed as each purveyor negotiates its individual agreement with the USBR. The content of Exhibit B will be consistent with each purveyor's dry-year actions as set forth in the purveyor's Purveyor Specific Agreement contained in the Water Forum Agreement.)

EXHIBIT A¹

PROCEDURES FOR DETERMINING ANNUAL
DRY-YEAR WATER DIVERSIONS AND CONFIRMING THE
AVAILABILITY OF ALTERNATIVE SUPPLIES

The State of California Department of Water Resources (DWR) conducts annual snowpack surveys and provides a forecast of runoff for the American River watershed along with other watersheds in the State beginning in February and ending in May of each year. Results of these surveys are published annually in a series of State DWR Bulletins (Bulletin 120-1 through 120-4).

If the February forecast indicates that the March through November unimpaired runoff from the American River will be less than 950,000 acre feet, the USBR shall notify the District as to permissible water diversions or agreed upon Alternative Dry Year Actions. This will be updated with information from the March, April and May forecasts. The rules that the District and the USBR have agreed upon for the Drier Years will be the basis for diversions or Dry Years Alternatives.

In years when diversion reductions are required under this agreement, the District will provide information confirming the availability of alternative supplies to meet their customer's needs. In these years, the District will also report their diversions to the USBR on a monthly basis.

¹. This item is still being discussed.