

**From:** Che McFarlin  
**To:** Docket Optical System  
**Date:** 4/4/2007 3:59:26 PM  
**Subject:** Fwd: Panoche and Starwood Regulatory Process with US Fish and Wildlife Service

Please docket this email string.

Thank You

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Che McFarlin  
Siting Project Manager  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

tel: 916.651.0965  
fax: 916.654.3882

>>> <Susan\_P\_Jones@fws.gov> 03/30/07 5:19 PM >>>

We would prefer to use the EPA nexus if EPA is willing, but we can do an MOU directly with the applicant (see caveats below), and write our Biological Opinion, and a NEPA document, instead of going the route of an HCP. This will speed up the process, even if a low-effect HCP were to be done. From a practical standpoint, the low-effect HCPs take longer than an MOU with a Biological Opinion.

The MOU template I am attaching refers to a supporting Low Effect HCP document. Such a document can be the basis for an MOU, but it could be called a Biological Assessment instead. The Biological Assessment needs to lay out all of the avoidance, minimization, and compensation measures the applicant is planning to carry out. We have many avoidance and minimization measures in our Standard Recommendations for Small Projects San Joaquin Kit Fox (on our website) I have tried to make the MOU relatively generic, but it's obvious it was done for a project that affected the Valley elderberry longhorn beetle. The commitment to buy credits at the nearby bank should be included in the Assessment. Once the MOU is signed by all, we have 135 days to prepare and issue the Biological Opinion.

If you have any questions, e-mail works best. Thanks.

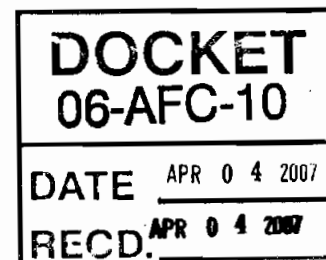
(See attached file: Template MOU based on WW2005.doc)

Susan Jones, San Joaquin Valley Branch Chief  
U.S. Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, CA  
95825  
916/414-6600, fax 916/414-6713

----- Forwarded by Susan P Jones/SAC/R1/FWS/DOI on 03/30/2007 04:01 PM

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"Rick York"



<Ryork@energy.state.ca.us>  
To  
<Susan\_P\_Jones@fws.gov>  
03/22/2007 02:41 PM cc  
"Heather Blair"  
<HBlair@aspenerg.com>, "Che  
McFarlin"  
<Cmcfarli@energy.state.ca.us>,  
"Deborah Dyer"  
<DDyer@energy.state.ca.us>  
Subject  
RE: Panoche and Bullard Conference  
Call: Friday 3/16 at 9:30AM

This is great info, Susan. Will this decision be shared with the Panoche and Starwood project applicants? Both applicants now need to be told, so will you provide the suggested Section 7 process to them? I think Angela Leiba (angela\_leiba@urscorp.com) (for Starwood) and Maggie Fitzgerald (Maggie\_Fitzgerald@URSCorp.com) (for Panoche) would be the appropriate contacts. Let us know if you need any help or have any questions. Thanks.

Rick

Rick York, Supervisor  
Biological & Cultural Resources Unit  
California Energy Commission  
Energy Facilities Siting Division  
Environmental Protection Office  
1516 Ninth Street, Mail Stop #40  
Sacramento, CA 95814  
(916) 654-3945 (office)  
(916) 651-8868 (fax)  
e-mail: ryork@energy.state.ca.us

>>> <Susan\_P\_Jones@fws.gov> 03/20/07 3:23 PM >>>

My management is interested in doing a section 7 biological opinion, whether we are the nexus through an MOU, or whether some other Federal agency provides the nexus. This is based on a cooperative relationship with the applicant, and the assurance that the applicant will provide the compensation before the start of construction. I checked with Ken Sanchez, my bosses' boss, and I explained that this would have some visibility, and he said to go with it.

My recent lack of two staff is starting to sink in. The mail is piling up.

Susan Jones, San Joaquin Valley Branch Chief  
U.S. Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, CA

95825  
916/414-6600, fax 916/414-6713

"Heather Blair"  
<HBlair@aspeneg.com>  
To  
<Susan\_P\_Jones@fws.gov>  
03/19/2007 05:03 PM cc  
<ryork@energy.state.ca.us>  
Subject  
RE: Panoche and Bullard Conference  
Call: Friday 3/16 at 9:30AM

Thanks for the recap. I hope that the consultation direction for Panoche and Starwood will be resolved at or before the CEC workshop on 4/13. Please let me know if you need anything from CEC/Aspen to work it out.

Initially you said that you didn't expect Bullard to have effect and listed species. Recall that if the project site would require 12.3 acres of permanent disturbance within an area that is currently used as an active truck depot and construction equipment fabrication and storage yard. The temporary construction laydown area would be a 9.2-acre section of an existing open field consisting of approximately 22 acres.

Using the index map you provided, the proposed project area is on the Fresno map (3B), in the northwest quarter. To help orient you, Bullard is 2.5 miles south of the San Joaquin River and adjacent to/east of Hwy 99. Note that there is a 1993 SJKF CNDDDB record adjacent to/west of the Bullard site that shows up on the index map.

Please let me know if you need more information.

Thanks!

Heather Blair  
Aspen Environmental Group  
(916) 379-0350 x17

-----Original Message-----

From: Susan\_P\_Jones@fws.gov [mailto: Susan\_P\_Jones@fws.gov]  
Sent: Friday, March 16, 2007 5:46 PM  
To: Heather Blair  
Cc: RYork@energy.state.ca.us  
Subject: RE: Panoche and Bullard Conference Call: Friday 3/16 at 9:30AM

Hi Heather - I just tried to call you but you're gone - hmm, I should be too. I thought the map came out well.

The call was shorter and smoother than our meeting with the previous applicant. I asked at the end if they are willing to do the compensation I had laid out - 0.3 to 1 for temporary (they are planning an 8 acre laid down area, and 1.1 to 1 for permanent - and they said they thought it was more than we should be asking for, but they'd rather do it than fight. They will check with EPA and see if EPA will take the nexus. I told them both you and I had long conversations with EPA lawyers and engineers before they took the nexus in Kern County, and I told them we would participate in such calls again if necessary. (Somebody on the call thought that EPA air permits are exempt from NEPA, but injection wells might not be, which would make it harder for EPA to take the nexus this time.) Your CEC rep on the call mentioned the MOU possibility if no Federal nexus is available. I stated that approach is untried and not universally accepted. We discussed the possibility of doing an HCP for both east Fresno power plants at the same time. We have shepherded 2 projects through the HCP process at the same time, and given them separate stand alone permits, so that would work.

Re. Bullard - I don't remember seeing this project pinpointed on my Landsat maps. I'm being cautious here I know. It sounds like Jeff Jorgenson, my senior, has been involved?? I said I would get with him on Monday to see if we care about that one. Could do an HCP for all 3 if necessary. Have I already given you all a read on Bullard?? Without auxiliary memory units (staff I've been losing) I have a lot more to remember these days.

Talk to you soon.

Susan Jones, San Joaquin Valley Branch Chief  
U.S. Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, CA  
95825  
916/414-6600, fax 916/414-6713

"Heather Blair"

<HBlair@aspenerg.com>

om>

To

<Susan\_P\_Jones@fws.gov>

03/16/2007 01:57

cc

PM

<RYork@energy.state.ca.us>

Subject

RE: Panoche and Bullard

Conference

Call: Friday 3/16 at 9:30AM

Thanks again. The map you sent for Panoche and Starwood is great.

Please give me a call to discuss today's conference call between you and the Applicant when you get a chance.

Heather Blair  
Aspen Environmental Group  
(916) 379-0350 x17

-----Original Message-----

From: Susan\_P\_Jones@fws.gov [mailto:Susan\_P\_Jones@fws.gov]  
Sent: Friday, March 16, 2007 9:30 AM  
To: Heather Blair  
Cc: RYork@energy.state.ca.us  
Subject: RE: Panoche and Bullard Conference Call: Friday 3/16 at 9:30AM

I had asked Jeff to give me everything on the power plants, but maybe I said just the ones in western Fresno. I will need to work with my GIS department to make another map like the one I just sent. Jeff is out today. He is very swamped. I will try to assist him/you.

Susan Jones, San Joaquin Valley Branch Chief  
U.S. Fish and Wildlife Office, 2800 Cottage Way, W-2605, Sacramento, CA  
95825  
916/414-6600, fax 916/414-6713

"Heather Blair"  
<HBlair@aspenerg.com>  
To: <Susan\_P\_Jones@fws.gov>  
03/15/2007 08:36 AM  
cc: <RYork@energy.state.ca.us>  
Subject: RE: Panoche and Bullard  
Conference Call: Friday 3/16 at 9:30AM

Hi Susan,  
If you'd like to attend tomorrow's meeting in person, I've reserved a room at the CEC.

We received the data request responses from the Applicant for Bullard (URS). A ROC was provided which stated that Jeff Jorgenson would provide a response regarding potential impacts to SJKF from Bullard to URS by 3/16. I assume the response he referred to will be provided at our conference call tomorrow. Any preliminary thoughts?

Also, I'd like to get the map we discussed to include in the PSAs early next week (hopefully before Wednesday). Please let me know how I can help.

Thank you.

Heather Blair

From: Heather Blair  
Sent: Wed 3/14/2007 10:02 AM  
To: Heather Blair; Maggie\_Fitzgerald@URSCorp.com; davdjenk@gmail.com;  
Leonard\_Malo@URSCorp.com; Lincoln\_Hulse@URSCorp.com;  
Susan\_P\_Jones@fws.gov  
Cc: Rick York; James Reede; Mary Dyas; eallen@energy.state.ca.us;  
Deborah  
Dyer; Dratliff@energy.state.ca.us  
Subject: RE: Panoche and Bullard Conference Call: Friday 3/16 at 9:30AM

Call-in information is as follows:

877-290-1337  
code: 6482759

I have reserved conference room 4 south for those who will be participating from the Energy Commission.

Heather Blair  
Aspen Environmental Group  
(916) 379-0350 x17

From: Heather Blair  
Sent: Monday, March 12, 2007 3:22 PM  
To: Maggie\_Fitzgerald@URSCorp.com; davdjenk@gmail.com;  
Leonard\_Malo@URSCorp.com; Lincoln\_Hulse@URSCorp.com;  
Susan\_P\_Jones@fws.gov  
Cc: 'Rick York'; 'James Reede'; 'Mary Dyas';  
'eallen@energy.state.ca.us';  
'Deborah Dyer'; 'Dratliff@energy.state.ca.us'  
Subject: Panoche and Bullard Conference Call: Friday 3/16 at 9:30AM

It appears that a conference call at 9:30 AM on Friday March 16 works with everyone's schedule. Please make a note of this and I will follow-up with an agenda and call-in information.

Thank you for your cooperation,

Heather Blair  
Aspen Environmental Group  
8801 Folsom Blvd, Suite 290  
Sacramento, CA 95826  
p: (916) 379-0350 x17  
f: (916) 379-0357

(See attached file: Bullard .jpg)(See attached file: Bullard\_CNDDDB.DOC)(See attached file: Bullard laydown.jpg)





Memorandum of Understanding

Between

*(Applicant)*

and the U. S. Fish and Wildlife Service

for

the *(Name of)* project,

*(Name)* County, California

*(Month and Year)*

## PURPOSES AND RECITALS

### Purposes

The purposes of this Memorandum of Understanding (MOU) are to ensure implementation of each of the terms of this agreement by:

- (1) to describe remedies and recourse should any party fail to perform its obligations as set forth in this agreement; and
- (2) to provide assurances to (*applicant*) that as long as the terms of this MOU are performed, no additional mitigation will be required of them with respect to the (*name of species affected*), except as provided for in this agreement or required by law.

### Recitals

The parties have entered into this MOU in consideration of the following facts:

- (1) The (*Applicant's*) project site has been determined to provide habitat for the (*threatened or endangered*) (*common name or names*)(*scientific name or names*) (*acronyms*).
- (2) (*Applicant*) has developed a series of measures, described in this MOU, to minimize and mitigate to the maximum extent practicable the effects of incidental take of the (NAME OF SPECIES AFFECTED) that may occur during (*applicant*)'s construction activities at the (*Project Name*) project in Yolo County, California.

## PARTIES

The parties to this Memorandum of Understanding are (*applicant*) and the U.S. Fish and Wildlife Service.

## DEFINITIONS

The following terms as used in this agreement will have the meanings set forth below:

**Terms defined in Endangered Species Act.** Terms used in this agreement and specifically defined in the Endangered Species Act of 1973, as amended (15 U.S.C. § 1531 *et seq.*)(Act) or in regulations adopted by the USFWS under the Act have the same meaning as in the Act and those implementing regulations, unless this MOU expressly provides otherwise.

[(An example of biological term) "**Bushes**" or "**Shrubs**" means the elderberry (*Sambucus species*) plants at the Wild Wings project that will be transplanted by (*applicant*).]

"**Conservation Measures**" means the conservation measures for the impacts to the (NAME OF SPECIES AFFECTED) resulting from the (*Project Name*) project that will be implemented by (*applicant*), as described in this MOU.

“**Covered activities**” means certain activities carried out by (*applicant*) that may result in incidental take of the (NAME OF SPECIES AFFECTED).

“**Covered species**” means the (NAME OF SPECIES AFFECTED).

“(*Project Name*) **project**” means the approximately XXX acre project, as proposed by (*applicant*), located xx miles west of the City of XXX along Highway XX adjacent to XX in (*Name of County*) County, California.

“**Listed species**” means a species (including a subspecies or a distinct population segment of a vertebrate species) that is listed as endangered or threatened under the Act.

“**MOU**” means Memorandum of Understanding, in this case between (*applicant*) and USFWS.

“**Plan**” means the reported entitled *Low-Effect Habitat Conservation Plan for (NAME OF SPECIES) for the (Project Name) Project (County Name) County, California* dated XXXXXXXX,, that was prepared by (*biologist/consulting firm name*).

“**Take**” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed or unlisted covered species. Harm means an act that actually kills or injures a member of a covered species, including an act that causes significant habitat modification or degradation where it actually kills or injures a member of a covered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

“**USFWS**” means the U.S. Fish and Wildlife Service.

*Species acronym defined with common name.*

(*Acronym for applicant*) means (*applicant*).

## OBLIGATIONS OF THE PARTIES

**Obligations of (*applicant*).** (*applicant*) will fully and faithfully perform all obligations assigned to it under this MOU.

**Obligations of the USFWS.** Upon execution of this agreement by all parties, and satisfaction of all other applicable legal requirements, the USFWS will issue a biological opinion pursuant to section 7 of the Act that will analyse the effects of the (*project name*) project on the (NAME OF SPECIES AFFECTED).

If a new species that is not discussed in this MOU but that may be affected by activities covered by the MOU is listed under Federal Act, the project will be reevaluated by USFWS and the MOU covered activities may be modified, as necessary, to ensure that the activities covered under the MOU are not likely to jeopardize or result in take or in adverse modification of any designated critical habitat of the newly listed species. The (*applicant*) shall implement the modifications to the MOU covered activities identified by USFWS as necessary to avoid the likelihood of jeopardy to or take or adverse modification of the designated critical habitat of the newly listed species. (*applicant*) shall continue to implement such modifications until such time as (*applicant*) has applied for and USFWS has approved an amendment of the biological opinion.

## EFFECTIVE DATE

**Initial Term.** This MOU will become effective on the date that the USFWS issues its section 7 biological opinion on the MOU.

## PROJECT LOCATION AND SITE DESCRIPTION

*(applicant) is developing the (project name) project, a \_\_\_\_\_ development consisting of (for example, 50 single-family homes on XX acres, including a nine-hole golf course, on-site water treatment plant, natural gas line, and associated infrastructure. The project includes 17 acres of permanent open space. According to the Plan and other information available to the Service, most of the project site has been graded and developed with homes and associated infrastructure, and the remaining portions contain hay fields, non-native grasses, and riparian vegetation.)*

## NAME OF SPECIES AFFECTED

*The NAME OF SPECIES AFFECTED was listed as a (for example: threatened species pursuant to the Endangered Species Act on August 8, 1980 (Federal Register 45: 52803). Two areas along the American River in the Sacramento metropolitan area have been designated as critical habitat for the beetle. In addition, an area along Putah Creek, Solano County, and the area west of Nimbus Dam along the American River Parkway, Sacramento County, are considered essential habitat, according to the Valley Elderberry Longhorn Beetle Recovery Plan (USFWS 1984). These areas support large numbers of mature elderberry shrubs with extensive evidence of use by the beetle. The valley elderberry longhorn beetle is dependent on its host plant, elderberry, which is a common component of the remaining riparian forests of the Central Valley.*

*The beetle is dependent on its elderberry host plant, which is a common component of the remaining riparian forests and associated habitats of the Central Valley. Use of the plants by the beetle, a wood borer, is rarely apparent. Frequently, the only exterior evidence of beetle use of the shrub is an exit hole created by the larva just prior to the pupal stage. Field work along the Cosumnes River and in the Folsom Lake area indicates that larval galleries can be found in elderberries with no evidence of exit holes; the larvae either succumb prior to constructing an exit hole or are not far enough along in the developmental process to construct an exit hole. Larvae appear to be distributed in stems which are 1.0 inch or greater in diameter at ground level.*

*Adult beetles are active from March through June. They are uncommon and rarely observed despite their large size and conspicuous coloration. They mate at this time, but how they locate mates is unknown, although some other beetles in this family appear to use pheromones. The females lay their eggs on the bark of the elderberry shrubs. The larvae hatch in a few days and bore into the stem, where they remain, feeding on the pith until they complete their development. The larva then cuts an emergence hole, pupates inside the shrub, and finally emerges as an adult in approximately two weeks. The complete life cycle is thought to take one or two years. Adults die soon after reproducing.*

*Population densities of the beetle are probably naturally low (USFWS 1984); and it has been suggested, based on the spatial distribution of occupied shrubs (Barr 1991), that the beetle is a poor*

*disperser. Low density and limited dispersal capability may cause the beetle to be vulnerable to the negative effects of isolation of small subpopulations due to habitat fragmentation.*

*The beetle, though relatively wide-ranging, is in long-term decline due to human activities that have resulted in widespread alteration and fragmentation of riparian habitats, and to a lesser extent, upland habitats, that support the beetle. The primary threat to survival of the beetle continues to be loss and alteration of habitat, by agricultural conversion, levee construction, stream and river channelization, removal of riparian vegetation, rip-rapping of shoreline, urban, recreational, and industrial development, and grazing. Insecticide use and vegetation control in agricultural areas and along rights-of-way may be factors limiting the beetle's abundance and distribution.*

*Extensive destruction of California's Central Valley riparian forests has occurred during the last 150 years due to agricultural and urban development (Katibah 1984; Thompson 1961). Based on a 1979 aerial survey, only about 102,000 acres out of an estimated 922,000 acres of Central Valley riparian forest remained at that time (Katibah et al. 1981). An analysis by Frayer et al. (1989), reported that approximately 85 percent of all wetland acreage in the Central Valley was lost before 1939; and that from 1939 to the mid-1980s, the acreage of wetlands dominated by forests and other woody vegetation declined from 65,400 acres to 34,600 acres. Differences in methodology may explain the differences between the studies. In any case, the historical loss of riparian habitat in the Central Valley strongly suggests that the range of the beetle has been reduced and its distribution greatly fragmented. Loss of non-riparian habitat where elderberry occurs (e.g., savanna and grassland adjacent to riparian habitat, oak woodland, mixed chaparral-woodland), and where the beetle has been recorded (Barr 1991), suggests further reduction of the beetle's range and increased fragmentation of its upland habitat.*

*The beetle's current distribution is patchy throughout the remaining habitat of the Central Valley from Redding to Bakersfield. Surveys conducted in 1991 (Barr 1991) found evidence of beetle activity at 28 percent of the 230 sites with elderberry shrubs visited. The beetle appears to be only locally common, i.e., found in population clusters which are not evenly distributed across available elderberry shrubs. Frequently, only particular clumps or trees in the study areas were found to harbor the beetle. Plants used by the beetle usually show evidence of repeated use over a period of several years, but sometimes only one or two exit holes are present. Similar observations on the clustered distribution of exit holes were made by Jones and Stokes (1987). Barr (1991) noted that elderberry shrubs and trees with many exit holes were most often large, mature plants; young stands were seldom occupied.*

*The valley elderberry longhorn beetle, though wide-ranging, is in long-term decline due to human activities which have resulted in widespread alteration and fragmentation of riparian habitats, and to a lesser extent, upland habitats, which support the species. Population densities of the beetle are probably naturally low (USFWS 1984); and it has been suggested, based on the spatial distribution of occupied shrubs (Barr 1991), that the beetle is a poor disperser. Low density and limited dispersal capability may cause the beetle to be vulnerable to the negative effects of isolation of small subpopulations due to habitat fragmentation.*

*Exit holes of the VELB have been observed in elderberry shrubs on the project site (Service letter to Live Oak Associates dated October, 2004, Service file 1-1-04-TA-2322). According to the Plan and other information available to the Service, suitable habitat is located on and adjacent to the project site. Therefore, given the recent records, the biology and ecology of the VELB, and the presence of suitable habitat, the Service believes it is reasonable to assume that the threatened valley longhorn beetle inhabits the three of the elderberry shrubs.*

#### **EFFECTS OF THE PROPOSED PROJECT ON THE (NAME OF AFFECTED SPECIES HERE)**

The (*Project Name*) project site was probably part of riparian-woodland-savannah habitat that historically existed in this region of the Sacramento Valley, however, the native habitat in this area currently is highly fragmented. Exit holes of the (NAME OF SPECIES AFFECTED) have been located in elderberry shrubs in the 17-acre Nature Trail on the proposed project site.

According to the Plan and other information available to the USFWS, there are (*quantity of habitat*) on the project site (*figure XX of the Biological Assessment*). The completion of the construction of the (*Project Name*) project would result in the removal of (*quantity of habitat*). (*Proposed compensation described here – buying credits in a Service-approved bank, etc.*)

Because the SPECIES NAME HERE are rarely encountered, it is not possible to quantify the exact number of individual animals that could be taken resulting from the removal of XX acres of habitat. Thus, it is anticipated that the removal of XX acres of habitat will result in incidental take of all of the (NAME OF SPECIES AFFECTED). Implementing the conservation measures will minimize impacts to this listed animal.

#### **CONSERVATION MEASURES**

To compensate for the impacts to the (NAME OF SPECIES AFFECTED) inhabiting the XXX acres of affected habitat, (*applicant*) will buy YYY credits, where one credit equals one acre, at a Service-approved compensation bank that includes the (*project name*) in it's service area.

*(Avoidance and minimization measures specific to the species to be added here)*

#### **REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION**

**In general.** Except as set forth below, each party shall have all remedies otherwise available to enforce the terms of this MOU.

**Injunctive and temporary relief.** The parties acknowledge that the (NAME OF SPECIES AFFECTED) is a (*threatened/endangered*) species and that its 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 this agreement.

**Enforcement authority of the United States.** Nothing contained in this agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the Act or other applicable law.

**Dispute resolution.** The parties recognize that disputes concerning implementation of, compliance with, or termination of this MOU and the permit may arise from time to time. The parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this section, or such other procedures upon which the parties may later agree. However, if at any time any party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution.

**Informal dispute resolution process.** Unless the parties agree upon another dispute resolution process, or unless an aggrieved party has initiated administrative proceedings or suit in federal court as provided in this section, the parties may use the following process to attempt to resolve disputes:

- (a) The aggrieved party will notify the other parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.
- (b) The party alleged to be in violation will have thirty (30) days, or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.
- (c) Within thirty (30) days after such response was provided or was due, representatives of the parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all parties, or will establish a specific process and timetable to seek such a solution.
- (d) If any issues cannot be resolved through such negotiations, the parties will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

### **MISCELLANEOUS PROVISIONS**

**No partnership.** This MOU shall not make or be deemed to make any party to this agreement the agent for or the partner of any other party.

**Notices.** Any notice permitted or required by this agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Assistant Field Supervisor  
Endangered Species Program

United States Fish and Wildlife Service  
2800 Cottage Way Room W-2605.  
Sacramento, California 95825  
telephone 916/414-6600

*(applicant contact information)*

**Entire agreement.** This MOU constitutes the entire agreement among the parties. It supersedes any and all other agreements, either oral or in writing, among the parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other party or anyone acting on behalf of any other party that is not embodied herein.

**Elected officials not to benefit.** No member of or delegate to Congress shall be entitled to any share or part of this agreement, or to any benefit that may arise from it.

**Availability of funds.** Implementation of this MOU by the USFWS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this agreement will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The parties acknowledge that the USFWS 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.

**Duplicate originals.** This agreement may be executed in any number of duplicate originals. A complete original of this agreement shall be maintained in the official records of each of the parties hereto.

**No third-party beneficiaries.** Without limiting the applicability of rights granted to the public pursuant to the Act or other federal law, this agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a party to this agreement to maintain a suit for personal injuries or damages 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 law.

**Relationship to the Act and other authorities.** The terms of this agreement shall be governed by and construed in accordance with the Act and applicable federal law. In particular, nothing in this agreement is intended to limit the authority of the Services to seek penalties or otherwise fulfill their responsibilities under the Act. Moreover, nothing in this agreement is intended to limit or diminish the legal obligations and responsibilities of the Services as agencies of the Federal government. Nothing in this agreement will limit the right or obligation of any Federal agency to engage in consultation required under Section 7 of the Act or other Federal law; however, it is intended that the rights and obligations of *(applicant)* under this MOU will be considered in any consultation affecting *(applicant)*'s use of the covered lands.

**References to regulations.** Any reference in this MOU to any regulation or rule of the Services shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.



**Applicable laws.** All activities undertaken pursuant to this MOU must be in compliance with all applicable State and Federal laws and regulations.

**Successors and assigns.** This agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the parties and their respective successors and assigns. Assignment or other transfer of the permit shall be governed by the Services' regulations in force at the time.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum of Understanding to be in effect as of the date that the Services issue the biological opinion.

BY \_\_\_\_\_ Date \_\_\_\_\_  
Acting Field Supervisor  
Sacramento Fish and Wildlife Office  
United States Fish and Wildlife Service  
Sacramento, California

BY \_\_\_\_\_ Date \_\_\_\_\_  
*(Name of applicant's representative  
(applicant)*

## Literature Cited

### *For example:*

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