



## 2016 KLAMATH POWER AND FACILITIES AGREEMENT

### RECITALS

For over a decade, many parties including Parties to this 2016 Klamath Power and Facilities Agreement (Agreement) have worked collaboratively to find and implement means to address and promote their respective interests and the interests of other parties, and to discharge their responsibilities under law.

The efforts of the Parties and others resulted in, among other things, three agreements. Two of these – the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydroelectric Settlement Agreement (KHSa) – took effect on February 18, 2010. The third agreement, the Upper Klamath Basin Comprehensive Agreement (UKBCA), took effect on April 18, 2014.

Federal legislation authorizing all three agreements was proposed, but not enacted by the end of 2015. Under its terms, the KBRA expired due to the lack of timely Federal authorizing legislation. The States of Oregon and California, the United States, and PacifiCorp have subsequently pursued amendments to the KHSa that would provide for implementation in a different manner. The termination of the KBRA and lack of Federal authorizing legislation is a potential basis for termination of the UKBCA. However, the UKBCA contains provisions for parties to meet and confer in order to propose ways of addressing the termination of the KBRA.

In 2014 and 2015, parties to the UKBCA made progress in implementing the Water Use and Riparian Programs in the UKBCA; Parties to the UKBCA agree that such programs are essential for meeting the short and long term goals and purposes of the UKBCA, including water quality and the health of fisheries. Parties to UKBCA are continuing to implement the UKBCA to the extent there are appropriated funds to do so.

Components of the KBRA as related to agriculture in the Upper Klamath Basin included the cost of power for irrigated agriculture and the operation of facilities related to irrigated agriculture. State and Federal and other Parties are committed to realization of processes and benefits contemplated under the three agreements, recognizing that certain outcomes were not guaranteed or are more uncertain than others and recognizing also that certain measures have independent merit.

The Federal Agency Parties actively participated in the negotiation and drafting of the KBRA and UKBCA, but did not sign the KBRA or UKBCA based on their determination that authorizing legislation was necessary in order for the Federal Agency Parties to legally commit to certain terms. However, the Federal Agency Parties agree with other Parties that a broader approach to water- and resource-related issues, going well beyond the Amended KHSa, is called for, and this Agreement is appropriate as a step in the direction toward addressing the legitimate interests of irrigation-related parties, including in relation to the Amended KHSa and expiration of the KBRA. The Parties recognize that authorizations will still be needed for Federal Agency Parties to fully participate in

broad resources resolutions similar to the KBRA and UKBCA and for certain actions supported in this Agreement.

Under the circumstances presented, the Parties recognize the need to both re-affirm and re-orient their approach in certain respects while moving forward to continue to address important settlement implementation, negotiation, and/or dispute resolution appropriately.

NOW, THEREFORE, the Parties agree as follows.

## **I. GENERAL PROVISIONS**

### **A. Parties**

The Parties to this Agreement are:

1. The State of California; California Department of Fish and Wildlife; California Natural Resources Agency; The State of Oregon; Oregon Department of Environmental Quality; Oregon Department of Fish and Wildlife; Oregon Water Resources Department; Klamath Water Users Association (KWUA); American Rivers; California Trout; Trout Unlimited; National Marine Fisheries Service (NMFS); U.S. Department of the Interior; and Sustainable Northwest;

2. Any person or entity who: (i) was a signatory to the KBRA or to the UKBCA or is a Klamath Reclamation Project contractor; and (ii) on or before December 31, 2016, signs this Agreement and delivers their signed Agreement to the Director of the Oregon Water Resources Department in accordance with Section I.G; and

3. Any person or entity who becomes a Party pursuant to Section I.E.

### **B. Definitions and Acronyms**

**Amended KHSA** means the *Klamath Hydroelectric Settlement Agreement*, which was entered into by certain parties effective February 18, 2010, as amended effective April 6, 2016.

**Applicable Law** means law which (i) exists outside of this Agreement, including a Constitution, statute, regulation, court decision, or common law and including any future amendments or enactments, and (ii) applies to obligations or activities of Parties contemplated by this Agreement. The use of this term is not intended to create a contractual obligation to comply with any law that would not otherwise apply.

**Consensus** means the absence of opposition by any Party to a proposal or recommendation.

**Covered Contractor** means: i) each Klamath Project Water User; and ii) each landowner who is a Klamath Reclamation Project contractor and receives water through transferred works of the Klamath Reclamation Project that are operated by a Klamath Project Water User.

**Effective Date** means the date stated in Section I.C.

**Federal Agency Party** means each of the Federal entities that are listed as Parties in Section I.A.1.

**KBRA** means the agreement titled *Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities*, which became effective on February 18, 2010, and, as amended, terminated on December 31, 2015.

**Keno Facility** means Keno Dam, lands underlying Keno Dam, appurtenant works and PacifiCorp-owned property described as Klamath County Map Tax Lot R-3907-03600-00200-000 located in Klamath County, Oregon.

**Klamath Project Water Users** or **KPWU** means each Klamath Reclamation Project contractor who is a Party.

**Landowner Entity** means the entity described in Section 8 of the UKBCA.

**Non-Federal Parties** means the Parties other than the Federal Agency Parties.

**Public Agency Party** means each tribe and each other Party which is a public agency established under Applicable Law, including Federal Agency Parties.

**Reclamation** means the U.S. Department of the Interior's Bureau of Reclamation.

**Secretaries** means the Secretary of the Interior or designee and the Secretary of Commerce or designee.

**Secretary** means the Secretary of the Interior.

**States** means Oregon and California.

**Timely** or **Timeliness** means performance of an obligation or act by the deadline established in the applicable provision, and otherwise in a manner reasonably calculated to achieve the bargained-for benefits of the Agreement.

**Upper Klamath Basin Comprehensive Agreement** or **UKBCA** means the agreement titled *Upper Klamath Basin Comprehensive Agreement*, which became effective on April 18, 2014.

**Upper Klamath River Basin** or **Upper Klamath Basin** means the lands tributary to the Klamath River above the current location of Iron Gate Dam, and including Lost River and Tule Lake Basins.

#### C. Effective Date

This Agreement shall become effective on April 6, 2016 (Effective Date).

#### D. Support and Defense of this Agreement

Subject to Section IV.A.3, each Party shall support and defend this Agreement and its objectives in each applicable venue or forum, including any administrative or judicial action, in which it participates. Each Party shall implement each of its obligations under this Agreement in good faith and with due diligence, and in cooperation with the other Parties. A Party shall not act in a manner that results in an action or requirement that is inconsistent with the Agreement unless necessary to

comply with statutory, regulatory, or other legal responsibilities; in which event, the Party shall provide Timely notice to other Parties to permit effort to resolve any related dispute collaboratively.

#### E. Amendment

##### 1. General

The Parties may amend this Agreement but only in writing and only by Consensus. Parties will in good faith entertain proposals for amendment, and Parties shall in good faith refrain from proposing amendments unless there is good cause.

##### 2. New Party

An entity not identified in Section I.A may, at any time after January 1, 2017, submit a written application to become a Party. If the application demonstrates to the satisfaction of each Party that the applicant will contribute to the effective implementation of this Agreement, the Parties will amend this Agreement to add the entity as a Party.

#### F. Severability

This Agreement is made on the understanding that each provision is a necessary part of the entire Agreement. However, if any provision of this Agreement is held to be invalid, illegal, or unenforceable by a regulatory agency or a court of competent jurisdiction: (i) the validity, legality, and enforceability of the remaining provisions of this Agreement are not affected or impaired in any way; and (ii) the Parties shall negotiate in good faith in an attempt to agree to another provision (instead of the provision held to be invalid, illegal, or unenforceable) that is valid, legal, and enforceable and carries out the Parties' intention to the greatest lawful extent under this Agreement.

#### G. Delivery of Signed Agreement and Roster of Parties

Persons or entities who sign this Agreement shall deliver their signed Agreement to the Director of the Oregon Water Resources Department at the Director's principal address. The Director shall acknowledge receipt of the signed Agreement and notify other Parties when a new Party is added, not later than one month after the addition of the Party. The Director shall maintain a roster of Parties and contacts. Parties will update their contact information as appropriate.

#### H. Third Party Beneficiaries

This Agreement does not create any right in the public, or any member thereof, as a non-Party beneficiary. This Agreement does not authorize any non-Party to maintain an action at law or equity pursuant to or related to this Agreement.

#### I. Actions Against a Public Agency Party

A Party may bring an action against a Public Agency Party under this Agreement only to the extent and in the manner provided by Applicable Law. Nothing in this Agreement establishes any jurisdiction or remedy against a Public Agency Party if such jurisdiction or remedy does not otherwise exist under Applicable Law.

#### J. Successors and Assigns

This Agreement shall be binding on and inure to the benefit of the Parties and their successors and assigns, unless otherwise specified in this Agreement.

#### K. Joint Venture

Except as expressly provided, this Agreement does not and shall not be deemed to make any Party the agent for, partner of, or joint venture with, any other Party.

#### L. Elected Officials Not to Benefit

This Agreement shall not provide any benefit for any elected official, other than the benefits provided to all Parties.

#### M. Entire Understanding

This Agreement constitutes the entire understanding among the Parties concerning the subject matter of this Agreement. It supersedes all prior agreements and understandings, whether oral or written, concerning the subject matter hereof. Other than the Attachments to this Agreement, which are attached hereto and incorporated by reference, no other document, representation, agreement, understanding, or promise constitutes any part of this Agreement.

## II. PROVISIONS RELATED TO KLAMATH RECLAMATION PROJECT

### A. TERMS REGARDING CERTAIN FACILITIES

#### 1. Recitals

As of the Effective Date, PacifiCorp owns and operates the Keno Facility, and PacifiCorp operates Link River Dam, which is owned by the United States. PacifiCorp's operation of these facilities is subject to certain contracts with the United States and other parties and Applicable Law. The Parties anticipate that the United States may acquire title to the Keno Facility and place it under the jurisdiction of Reclamation. The Parties also anticipate the potential for changed operational responsibility for both of these facilities.

#### 2. Commitments of Non-Federal Parties

The Non-Federal Parties shall pursue and support legislation authorizing and directing Reclamation to comply with, and adhere to the terms and conditions of, Attachment A hereto.

#### 3. Commitments of Federal Parties

At this time, Reclamation has not determined that it has authority to comply or proceed consistent with the terms and conditions of Attachment A in full, and makes only the commitments in a-d immediately below. Any cost related issues not addressed in a-d below will be addressed consistent with Applicable Law.

a. Link River Dam

Upon assumption of operational responsibility for Link River Dam, Reclamation shall operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts between Klamath Reclamation Project contractors and Reclamation, and for flood control and subject to Applicable Law.

b. Keno Dam and Development

Following transfer of the Keno Facility from PacifiCorp pursuant to the Amended KHSA, Reclamation shall operate such facility to maintain water levels upstream of Keno Dam to provide for diversion and canal maintenance and flood control consistent with Contract No. 14 06-200-3579A executed on January 4, 1968, between Reclamation and PacifiCorp (then Copco) and historic practice and subject to Applicable Law. Covered Contractors shall not bear any costs associated with operation or maintenance of the Keno Facility.

c. Assignment

If Reclamation transfers or assigns responsibility for operation of Link River Dam or the Keno Dam or Keno Facility to a Party or non-Party, such assignment or transfer shall include assignment of the obligations and conditions under this Section II.A.3 of this Agreement.

d. Duration and Survival

The terms in in this Section II.A.3 of this Agreement shall remain in effect until modified by agreement of the Secretary and KPWU.

B. PROTECTION AGAINST REGULATORY IMPACTS REGARDING  
REINTRODUCTION AND RESTORATION ACTIVITIES

1. Context

The Parties anticipate substantial programs for introduction or reintroduction of species not currently present in the Upper Klamath Basin, and substantial habitat restoration activities or programs, resulting in unique circumstances that could have potential regulatory or other legal consequences for users of water and land in the Upper Klamath Basin under Applicable Law, including new or modified regulatory obligations that could affect the ability to divert or use or dispose of water or the ability to utilize land productively. Further, the Parties affirm that interests in the Upper Klamath Basin with potential exposure to regulatory obligations have in good faith over a period of time preceding this Agreement, and preceding the KBRA: played a substantial role in bringing about the circumstances that make reintroduction possible; and that the other Parties through such period have confirmed the need to provide such assurances; and, if there were to be adverse consequences for regulated parties due to reintroduction or restoration, it would undermine the general goal that regulated parties promote and facilitate environmental restoration. The Parties make the commitments in Section II.B.2 below with full awareness that portions of the Klamath River and its tributaries currently present certain conditions harmful to fish. These conditions include degraded riparian habitat and stream channels, passage barriers, diversions resulting in entrainment, adverse water quality conditions, adverse

hydraulic conditions, fluctuating water levels, and other impacts, known and unknown. Nothing in these commitments is intended to relieve pre-existing regulatory obligations.

## 2. Commitments

### a. Overall

The Parties commit to take every reasonable and legally permissible step to avoid or minimize any adverse impact, in the form of new regulation or other legal or funding obligation that might occur to users of water or land associated with the Klamath Reclamation Project from introduction or reintroduction of aquatic species to currently unoccupied habitats or areas, or from habitat restoration activities. At this time, the Parties have identified those measures in Sections II.B.2.b and c below to realize this commitment with respect to interests associated with the Klamath Reclamation Project. If unforeseen consequences to interests associated with the Klamath Reclamation Project result from reintroduction or restoration activities, the Parties agree to meet and confer in light of this commitment to determine any necessary future actions, including but not limited to, consideration of whether narrowly tailored regulations or legislation is necessary to ensure the realization of commitments in the first sentence of this Section II.B.2.a of this Agreement. With respect to the UKBCA, the Parties to UKBCA commit to seek regulatory assurances as provided in the UKBCA.

### b. Fish Entrainment Alleviation at Klamath Reclamation Project Diversions and Related Actions

#### i. Fish Entrainment Alleviation

One objective related to reintroduction of species in the Upper Klamath Basin should be to prevent to the greatest extent feasible entry of reintroduced salmon and other aquatic species into diversions associated with the Klamath Reclamation Project. Based on this objective, and in consultation with the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife, KWUA, and the affected Klamath Project related districts and water users, Reclamation shall evaluate appropriate methods, locations, priorities, and schedules to address entrainment at diversions associated with the Klamath Reclamation Project, including: (i) Lost River diversion channel or associated diversion points; (ii) North Canal; (iii) Ady Canal; and (iv) other diversions from Reclamation or Reclamation's contractor-owned facilities diverting water from the Klamath River/Lake Ewauna, prior to currently absent fish species becoming present or at minimum on a schedule consistent with the overall commitment in Section II.B.2.a. Subject to Section IV.A.3, the Non-Federal Parties shall support funding for such evaluations and design construction, replacement, additions, and extraordinary maintenance of entrainment reduction facilities at these diversions on a non-reimbursable basis to Klamath Reclamation Project contractors. Potential financial support under this section is not limited to Federal funds, and other sources of funding from State and private sources, may also be pursued and obtained to accomplish the purposes of this Section II.B.2.b of this Agreement. Upon receipt of such funding, and subject to Applicable Law, Reclamation shall construct entrainment alleviation facilities at these diversions, or contract with the relevant Klamath Reclamation Project contractor or contractors to accomplish such construction, in accordance with the results of these evaluations, subject to the condition that the contractors will not incur or reimburse costs for the evaluations, design, construction, replacement, additions, and extraordinary maintenance. Each appropriate irrigation district or other contractor entity or individual

as determined by Reclamation will be responsible for routine maintenance and cleaning of facilities at these diversions, to be specified under agreements with Reclamation.

ii. Related Actions

Reclamation shall also evaluate whether measures may be necessary to prevent adverse effects to reintroduced salmon and other fish that may enter into Klamath Straits Drain. As appropriate, based on the results of this evaluation, the Non-Federal Parties shall support, and subject to Section IV.A.3, Reclamation shall seek funding for construction, replacement, additions, and extraordinary maintenance of facilities to prevent any such adverse effects from entry into Klamath Straits Drain on a non-reimbursable basis to the Klamath Reclamation Project contractors. Upon receipt of such funding, and subject to Applicable Law, Federal Agency Parties not including NMFS shall construct such facilities. Reclamation and affected contractors will agree on responsibility for routine maintenance and cleaning of such facilities.

c. Geographic Focus

The Parties agree that reintroduction activities shall not seek to establish or introduce populations of salmon, steelhead, or Pacific lamprey in the Lost River or its tributaries or the Tule Lake Basin, and any management objectives for such species shall exclude such areas.

C. SUPPORT FOR AUTHORIZATIONS AFFECTING OTHER SPECIFIC ISSUES

The Non-Federal Parties will support certain authorizations, and implementation of activities pursuant to such authorizations, as follows.

1. The Parties are aware of amendment S. Amdt. 3288, filed on February 4, 2016, as a proposed amendment to amendment SA 2953 proposed to S. 2012. The Non-Federal Parties support and will support S. Amdt. 3288 (copy attached as Attachment B) and, should the amendment not become law, the Non-Federal Parties will support authorizations and directives consistent with those of S. Amdt. 3288 in other legislative measures whenever and however the opportunity may arise; provided that nothing in this Agreement is intended or shall be construed to require a Party to support a legislative measure that includes authorizations or terms unrelated to those provided in S. Amdt. 3288. Further, the Non-Federal Parties shall support actions and appropriations to implement S. Amdt. 3288 or comparable provisions. For purposes of this Section II.C.1 only, “support” as to the obligations of the States means that the States will support or will refrain from taking any action or making any statement in opposition to S. Amdt. 3288 or comparable provisions.

2. The Parties commit to consider in good faith the support of other legislative measures or other initiatives that relate to the interests of one or more of the Parties.



### **III. COMMITMENTS TO ADDRESS OTHER WATER, FISHERIES, LAND, AGRICULTURE, REFUGE, AND ECONOMIC SUSTAINABILITY ISSUES IN THE KLAMATH BASIN**

#### **A. Operations of the Klamath Reclamation Project and Related Matters**

With respect to issues pertaining to water use, fisheries, and other resource-related matters, Parties will work collaboratively to minimize conflict consistent with their interests and obligations, and support the use of authorities that exist or may become available to serve that end.

#### **B. Water Quality and Habitat**

The Parties will support appropriate studies and collaborative actions to address: (i) coarse sediment management in the Klamath River between Keno Dam and the Shasta River confluence; and (ii) management and reduction of organic and nutrient loads in and above Keno Reservoir and in the Klamath River downstream. These studies and collaborative actions will focus on high-priority projects that benefit existing and potential future fisheries resources.

#### **C. Cooperatively-Developed Settlement and Programs for the Benefit of Basin Communities and Resources**

The Parties commit to work in good faith, and collaboratively with others, to develop and complete an agreement or agreements to address issues affecting their interests and resolving resources conflicts and related issues. The Parties contemplate: (i) that the involved programs will include a fisheries program, a water resources program, a regulatory assurances program, a tribal program, and a counties program, each to be developed primarily by parties (or entities' representatives of parties) with direct interests and stake in the relevant activities; (ii) that the agreement or agreements will include measures for dispute resolution and commitments of parties to seek to preserve bargained-for-benefits of each of the parties; (iii) that the agreement or agreements will provide for binding permanent settlement of disputed matters including pertaining to water rights; (iv) that all parties to the process will commit to making maximum use of work and agreements previously completed; and (v) that the parties will tailor their agreement or agreements to promote and allow for implementation of measures under existing authority as possible, and to limit new authorizations that may be required for effectiveness or implementation to only those actually needed. Such agreement or agreements may, where agreed by the parties, restate, expand upon, or modify terms provided in this Agreement. The parties will consider how water storage may assist in their efforts and objectives. The Parties intend to conclude the agreement or agreements within the next year.

**D.** Notwithstanding the generality of the foregoing, the parties to the UKBCA intend to work under the meet and confer provisions of the UKBCA to resolve outstanding issues concerning the implementation of that agreement. Those issues include: (i) continued funding for implementation of the agreement; (ii) the form of riparian management agreements; and (iii) the determination of the quantities of water use reduction resulting from the agreements. In the meantime, the Federal Agency Parties and the State of Oregon agree to use their best efforts to continue funding implementation of the UKBCA, as described in the UKBCA.

## IV. MISCELLANEOUS PROVISIONS

### A. Legal Responsibilities, Reservation of Rights, and Precedents

#### 1. Compliance With Legal Responsibilities

Except as otherwise expressly provided, by executing this Agreement, each Party represents that it believes that this Agreement is consistent with its statutory, regulatory, or other legal obligations and authorities. In the implementation of this Agreement, Public Agency Parties shall comply with all applicable legal authorities, including National Environmental Policy Act, Endangered Species Act, Clean Water Act, and other Applicable Law.

#### 2. Amended KHSA

The States, Federal Parties, and other entities are concurrently entering into an amendment to the KHSA. Each Party shall support and defend the Amended KHSA and its objectives in each applicable venue or forum, including any administrative or judicial action, in which it participates. For purposes of this Section IV.A.2 only, the term “support and defend” means that the Party will advocate for the Amended KHSA or refrain from taking any action or making any statement in opposition to the Amended KHSA. More broadly, and as described in Section III.C of this Agreement, the Parties are committed to engage in good faith efforts to develop and enter into a subsequent agreement or agreements pertaining to other water, fisheries, land, agriculture, refuge and economic sustainability issues in the Klamath Basin with the goal to complete such agreement or agreements within the next year.

#### 3. Reservation of Rights

##### a. Generally

Nothing in this Agreement is intended or shall be construed to affect or limit the authority or obligation of any Party to fulfill its constitutional, statutory, and regulatory responsibilities, or comply with any judicial decision. Nothing in this Agreement shall be interpreted to require any Federal Agency Party, a State, or any other Public Agency Party to implement any action which is not authorized by Applicable Law or where sufficient funds have not been appropriated for that purpose by Congress or the States. The Parties expressly reserve all rights not granted, recognized, or relinquished in this Agreement.

##### b. Reservations Regarding Federal Appropriations

All actions required of any Federal Agency Party in implementing this Agreement are subject to appropriations by Congress. Nothing in this Agreement shall be interpreted as or constitute a commitment or requirement that any Federal Agency Party obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. section 1341, or other Applicable Law. Nothing in this Agreement is intended or shall be construed to commit a Federal official to expend Federal funds not appropriated for that purpose by Congress. Nothing in this Agreement is intended to or shall be construed to require any official of the executive branch to seek or request appropriations from Congress to implement any provision of this Agreement. To the extent that the expenditure or advance of any money or the performance of any obligation of the United States, the Secretaries, or a Federal Agency Party under

this Agreement, is to be funded by appropriation of funds by Congress, the expenditure, advance, or performance shall be contingent upon the appropriation of funds by Congress that are available for this purpose and the apportionment of such funds by the Office of Management and Budget. No breach of this Agreement shall result and no liability shall accrue to the United States, the Secretaries, or Federal Agency Party in the event such funds are not appropriated or apportioned.

c. Availability of Public Funds

Funding by any Public Agency Party under this Agreement is subject to the requirements of Applicable Law. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, reprogramming, or expenditure of any funds by the States or other Public Agency Party except as otherwise permitted by Applicable Law.

d. Reservations Regarding Legislative Proposals

Nothing in this Agreement shall be deemed to limit the authority of the executive branch of the United States Government to make recommendations to Congress on any particular proposed legislation. Nothing in this Agreement shall be deemed to limit the authority of the executive branch of the States to make recommendations to their respective state Legislatures on any particular proposed legislation.

e. Reservations Regarding Regulations

Nothing in this Agreement is intended or shall be construed to deprive any Public Agency Party of the authority to revise, amend, or promulgate regulations.

f. No Pre-decisional Commitment

Nothing in this Agreement is intended or shall be construed to be a pre-decisional commitment of funds or resources by a Public Agency Party. Nothing in this Agreement is intended or shall be construed to predetermine the outcome of any regulatory approval or other action by a Public Agency Party necessary under Applicable Law in order to implement this Agreement.

g. No Alteration of Environmental Review

Nothing in this Agreement is intended or shall be construed to modify the application of the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), or other Applicable Law to the environmental review of any program, plan, policy, or action (or project) under this Agreement. The use of the word “final” with reference to development or adoption of any program, plan, policy, or action (i) describes the schedule for such development or adoption and (ii) does not modify the application of NEPA, CEQA, or other Applicable Law to such development or adoption.

i. Nothing in this Agreement shall be interpreted to limit the discretion under Applicable Law of any Public Agency Party to alter any program, plan, policy, or action of such Party in response to information and considerations developed during the environmental review process.

ii. Nothing in Section IV.A.3.j shall be construed to prevent an action which has independent utility from proceeding before environmental review is complete on any program or plan described in this Agreement, provided that such action itself has been subject to environmental review to the extent required by Applicable Law.

h. Enforceability

Nothing in this Agreement is intended to be, or shall be construed as, a waiver of sovereign immunity by the United States, the State of California, the State of Oregon, any tribe, or any other Public Agency Party. This Agreement does not obligate the United States or any Federal Agency Party to affirmatively support this Agreement in any State or local legislative, administrative, or judicial action before a State administrative agency or court.

i. No Argument, Admission, or Precedent

Nothing in this Agreement or any of the attachments thereto shall be offered for or against a Party, including any Federal Agency Party, as argument, admission, admission of wrongdoing, liability, or precedent regarding any issue of fact or law in any mediation, arbitration, litigation, or other administrative or legal proceeding, except that this Agreement may be used in any future proceeding to interpret or enforce the terms of this Agreement, consistent with Applicable Law. This Agreement may also be used by any Party, including any Federal Agency Party, in litigation by or against non-Parties to implement or defend this Agreement. Subject to terms of the KBRA that remain in effect, nothing in this Agreement precludes any Party, including any Federal Agency Party, from continuing to assert their previously asserted legal positions in the Klamath Basin Adjudication. This section shall survive any termination of this Agreement.

j. Protection of Interests

Each Party may, in a manner consistent with this Agreement, protect, defend, and discharge its interests and duties in any administrative, regulatory, legislative, or judicial proceeding.

k. No Effect on Water Rights

Nothing in this Agreement is a determination of rights to water or modifies any water right or fishing right.

l. Executive Order on Tribal Consultation

The implementation of this Agreement by Federal Agency Parties shall, as applicable, be subject to: Executive Order 13175, "Consultation and Coordination with Tribal Governments"; and adopted policies of Federal Agency Parties with respect to consultation with Indian Tribes.

B. COMMITMENTS REGARDING PROVISIONS OF TITLE II OF PUBLIC LAW 97-293

The Secretary agrees that this Agreement is not a "contract" as defined in Section 202(a) of Public Law 97-293 (43 U.S.C. § 390bb(1)), and shall adhere to that agreement.

## V. EXECUTION OF AGREEMENT: EFFECT

### A. Authority

#### 1. General

Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents.

#### 2. Counterparts

This Agreement may be executed in counterparts. Each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same document.

### IN WITNESS THEREOF,

The Parties, through their duly authorized representatives, have caused this Agreement to be executed as of the date set forth in this Agreement.

#### United States Department of the Interior

\_\_\_\_\_  
Sally Jewell  
Secretary of the Interior

Date: \_\_\_\_\_

#### United States Department of Commerce's National Marine Fisheries Service

\_\_\_\_\_  
Dr. Kathryn D. Sullivan  
Under Secretary of Commerce for  
Oceans and Atmosphere

Date: \_\_\_\_\_

#### State of California

\_\_\_\_\_  
Edmund G. Brown, Jr.  
Governor

Date: \_\_\_\_\_

**State of Oregon**

---

Kate Brown  
Governor

Date: 

---

**California Natural Resources Agency**

---

Director

Date: 

---

**California Department of Fish and Wildlife**

---

Chuck Bonham  
Director

Date: 

---

**Oregon Department of Environmental Quality**

---

Joni Hammond  
Interim Director

Date: 

---

**Oregon Department of Fish and Wildlife**

---

Curt Melcher  
Director

Date: 

---

**Oregon Water Resources Department**

---

Thomas Byler  
Director

Date: 

---

**Klamath Water Users Association**

---

Brad Kirby  
President

Date: 

---

**American Rivers**

---

W. Robert Irvin  
President

Date: 

---

**California Trout**

---

Curtis Knight  
Executive Director

Date: 

---

**Trout Unlimited**

---

Chris Wood  
Chief Executive Officer

Date: 

---

**Sustainable Northwest**

---

Greg Block  
President

Date: 

---

**ADDITIONAL PARTIES**

---

[Name of Party]

---

(signature)

Date: \_\_\_\_\_

By: \_\_\_\_\_  
[name]

Its: \_\_\_\_\_  
[title]



ATTACHMENT A  
TERMS AND CONDITIONS OF LEGISLATION CONCERNING LINK RIVER AND KENO  
DAMS TO BE SUPPORTED BY NON-FEDERAL PARTIES

The United States Bureau of Reclamation (Reclamation) shall comply with the following provisions related to Link River Dam on Upper Klamath Lake and Keno Dam and Keno development. For purposes of these provisions, the terms “Covered Contractors” and “Klamath Project Water Users” shall have the meaning assigned to those terms on the 2016 Power and Facilities Agreement.

1. Link River Dam

Upon assumption of operational responsibility for Link River Dam, Reclamation shall operate Link River Dam to provide water for diversion for the Klamath Reclamation Project, and consistent with existing contracts between Klamath Reclamation Project contractors and Reclamation and for flood control and subject to Applicable Law. Notwithstanding any existing contract, Covered Contractors shall not bear any cost associated with Link River Dam or any related lands or facilities or dikes or levees around Upper Klamath Lake, whether cost of construction, operation, maintenance, rehabilitation, betterment, liabilities of any kind, or otherwise.

2. Keno Dam and Development

Following transfer of the Keno Facility from PacifiCorp pursuant to the Amended Klamath Hydroelectric Settlement Agreement, Reclamation shall operate such facility to maintain water levels upstream of Keno Dam to provide for diversion and canal maintenance and flood control consistent with Contract No. 14 06-200-3579A executed on January 4, 1968, between Reclamation and PacifiCorp (then Copco) and historic practice and subject to Applicable Law. Covered Contractors shall not bear any cost associated with the Keno Facility, including any responsibilities to landowners upstream of Keno Dam, whether cost of construction, operations, maintenance, rehabilitation, betterment, liabilities of any kind, or otherwise.

3. Assignment

If Reclamation transfers or assigns responsibility for operation of Link River Dam or the Keno Dam or Keno Facility to any other person or entity, such assignment or transfer shall include assignment of the obligations and conditions under paragraphs 1 and 2 above.

4. Duration and Survival

The terms in paragraphs 1 through 3 shall remain in effect until modified by agreement of the Secretary of the Interior and Klamath Project Water Users.