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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9

COUNTY OF YOLO

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11 RECLAMATION DISTRICT 1600,
12 Plaintiff and Petitioner,
13 v.
14 CALIFORNIA DEPARTMENT OF WATER
RESOURCES; and DOES 1-20, inclusive,
15 Defendant and Respondent.
16
17 UNITED STATES BUREAU OF
RECLAMATION; and ROES 1-20, inclusive,
18 Real Parties in Interest.
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Case No.
**PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR DAMAGES**
[CALIFORNIA ENVIRONMENTAL
QUALITY ACT CASE]

DOWNEY BRAND LLP

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1 Petitioner and Plaintiff Reclamation District No. 1600 (Petitioner or District), by and
2 through its undersigned attorneys, upon knowledge as to itself and upon information and belief as
3 to all other matters, alleges for its petition and complaint against Respondent and Defendant
4 California Department of Water Resources (DWR) and Real Party in Interest United States Bureau
5 of Reclamation (Reclamation), as follows:

6 **SUMMARY OF THE ACTION**

7 1. Petitioner Reclamation District No. 1600 is a local flood control agency tasked with
8 providing flood control and drainage in the heart of the Central Valley flood control system.

9 2. The District provides drainage and levee maintenance for the approximately 7,000
10 acres of land north of Interstate 5, bounded by the Sacramento River to the east and Yolo Bypass
11 to the west. In times of historic flooding, the District becomes an island between these two
12 waterways. District infrastructure is essential to maintaining the health, safety, and well-being of
13 the people and businesses within its boundaries during those times.

14 3. The District is situated at the junction of the three main river systems in Northern
15 California – the Sacramento River, the Feather River and the American River. When a storm
16 system impacts the Sierras, the American River flow pushes the Sacramento River backwards into
17 the Fremont Weir. When flows in the Sacramento River rise to flood stages, water spills over the
18 Fremont Weir and onto the farms, habitats, and residences within the District.

19 4. Within this confluence of rivers, the District is responsible for maintaining the
20 system of canals, drains, and levees that balance the need for flood relief from impacted rivers
21 while protecting the diverse system of farms, residences, and habitat that makes up this portion of
22 the Elkhorn Hydrologic Basin.

23 5. The Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Project),
24 which is jointly funded by DWR and Reclamation, would modify the Fremont Weir in order to
25 implement a large-scale floodplain and habitat restoration project in the Yolo Bypass. In its
26 simplest terms the Project, proposes to increase the time and volume of flooding that would occur
27 in the bypass, in an effort to support fish populations and other environmental objectives.

28 6. From 2013 to 2019, DWR and Reclamation scoped, prepared, and circulated an

1 EIR/EIS for the Project. As evaluated and approved, the Project had a maximum design capacity
 2 of 6,000 cubic feet per second (cfs) of water, with flooding planned from November 1 through
 3 March 15 during ordinary operations.

4 7. The District provided extensive comments on the EIR/EIS, and ultimately entered
 5 into a Memorandum of Understanding (MOU) intended to address certain of the Districts'
 6 concerns regarding the impacts of the Project on its operations and flood control infrastructure.

7 8. In the spring of 2023, the District became aware that DWR was constructing a
 8 project that doubled in capacity from what was evaluated in the EIS/EIR, expanded the dates of
 9 potential flooding, and eliminated the cutoff walls. This expansion will increase the impacts on the
 10 District's facilities, which in turn will cause increased operational and maintenance costs for
 11 which there is currently no mitigation. It will also undoubtedly increase the significant
 12 environmental impacts identified and discussed in the EIS/EIR, and cause new significant impacts,
 13 creating the need for new and expanded mitigation.

14 9. DWR has failed to undertake any environmental review of the expanded Project,
 15 nor has DWR paid or agreed to pay for mitigation of the increased impacts. As such, DWR's
 16 expansion violated CEQA and is a breach of the terms of the MOU.

17 **PARTIES AND STANDING**

18 10. Petitioner Reclamation District 1600 is a political subdivision of the State of
 19 California. The District is vitally interested in the flood control system that it operates and
 20 maintains in the Yolo Bypass that would be affected by the Project changes. The District has no
 21 other adequate remedy at law, and it brings this action to protect its legal interests and those of its
 22 affected constituents.

23 11. The District also brings this action as a private attorney general pursuant to Code of
 24 Civil Procedure section 1021.5, and any other applicable legal theory to enforce important public
 25 rights affecting the public interest.

26 12. The District has standing to raise the CEQA claims herein because (1) it has a
 27 public interest in the impact of DWR's failure to comply with CEQA prior to approving the
 28 Project expansion and (2) has a direct and beneficial interest in DWR mitigating the impacts of

1 that expansion to the extent feasible, and otherwise complying with CEQA, due to the Project's
2 impacts to District facilities.

3 13. In addition, the District is harmed by DWR's failure to comply with the MOU,
4 which specifically preserves the District's right to bring claims regarding DWR's failure to
5 operate the Project as specified in Alternative 1 of the EIR.

6 14. Respondent and Defendant California Department of Water Resources is a state
7 agency headquartered in Sacramento, California. DWR was the lead agency under CEQA for the
8 Project.

9 15. Real Party in Interest Reclamation is a federal agency, and was the lead federal
10 agency related to the Project under the National Environmental Protection Act (42 U.S.C. § 4321
11 *et seq.*).

12 16. The District does not know the true names or capacities of DOES 1 through 20,
13 inclusive, and therefore sues these Respondents and Defendants by fictitious names. The District
14 will amend this Petition and Complaint to set forth the true names and capacities of fictitiously
15 named Respondents and Defendants when such information has been ascertained. Each of the
16 Respondents and Defendants is the agent or employee of DWR and each performed acts on which
17 this action is based within the scope of such Respondents' and Defendants' agency or
18 employment.

19 17. The District does not know the true names or capacities of ROES 1 through 20,
20 inclusive, and therefore sues these Real Parties in Interest by fictitious names. The District will
21 amend this Petition and Complaint to set forth the true names and capacities of fictitiously named
22 Real Parties in Interest when such information has been ascertained. Each of the Real Parties in
23 Interest is the agent or employee of Reclamation and each performed acts on which this action is
24 based within the scope of such Real Parties in Interests' agency or employment.

25 **JURISDICTION AND VENUE**

26 18. This Court has jurisdiction over the matters raised in this Petition pursuant to Code
27 of Civil Procedure sections 526, 527, 1085 and 1094.5, and Public Resources Code section 21000
28 *et seq.*, including Public Resources Code sections 21167, 21168, and 21168.5.

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19. Venue is proper in Yolo County Superior Court in accordance with Code of Civil Procedure sections 392, 393, and 395 because the Project is located in Yolo County and its impacts will occur primarily within its geographic boundaries, and because the parties’ obligations under the MOU are to be performed in Yolo County.

FACTUAL BACKGROUND

Project History and Setting

20. The Yolo Bypass is a historical floodplain within the Sacramento River Basin, and is a part of California’s Adopted Plan of Flood Control as well as the Sacramento River Flood Control Project. It functions to moderate the flooding of farmlands and communities in the Sacramento region by diverting floodwaters from the Sacramento River at the Fremont Weir. These waters flow through the Yolo Bypass, which extends south for 41 miles.

21. The Tule Canal was created by the building of the Bypass levee. The landowners in the District own the land past the Tule Canal into the Bypass, and excess flows of water run from District canals through the Tule Canal in a gravity drain system, supplemented by two pump stations.

22. At the northern end of the Yolo Bypass is the Fremont Weir. The weir is a low concrete dam connected to the Sacramento River, designed to allow flow into the Yolo Bypass when the Sacramento River reaches heights above the weir’s crest elevation.

23. Much of the property within the Bypass itself is under private ownership and is used for agricultural purposes. Seepage and increased periods of inundation have meaningful and lasting impacts on these operations, often resulting in crop losses and impacts to agricultural operations. These impacts were observed most recently in 2006, 2017, and 2023.

24. From 2013 to 2019, DWR prepared and circulated the EIS/EIR for the Project.

25. The Project that DWR approved was evaluated in the EIS/EIR as “Alternative 1: East Side Gated Notch.” Alternative 1 “would connect the new gated notch to Tule Pond” as the “shortest and most direct access to the Tule Canal for migrating fish” and “would allow flows up to 6,000 cfs, depending on Sacramento River elevation” ES.6.3.

26. Likewise, Reclamation’s 2016 technical report ENV-2020-073 described the

1 modelling efforts for the Project as follows: “Previous modeling efforts by DWR concluded that
2 6,000 cfs was the preferred maximum flow amount used for floodplain inundation in coordination
3 with other programs such as Cal Waterfix.” Further, “the design maximum flow through the gate
4 structure is about 6,000 cfs; it occurs at an upstream stage of 27.844 ft.”

5 27. In the selected Alternative, “[w]ater would be able to flow through the notch from
6 November 1 through March 15 when the river elevations are not high enough to go over the
7 Fremont Weir.” ES.6.3. Appendix A of the EIS/EIR (“Alternative Formulation Process”) observed
8 that across the range of studied alternatives, “[l]arger gated notch facilities would have greater
9 depths of inundation at lower Sacramento River elevations, but the depths at higher river
10 elevations would be consistent across alternatives because the alternatives have a peak notch flow
11 of 6,000 cfs.”

12 28. Alternative 1 also includes a “subsurface cutoff wall” that would cut through an
13 existing clay blanket layer that currently prevents levee underseepage. (2 – Description of
14 Alternatives at PDF p. 83-84, 89 [showing cutoff wall as part of Alternative 1].) The cutoff wall
15 would be approximately 3,150 feet long and 30 feet deep, located at the toe of the levee and
16 entirely underground. (*Id.*)

17 ***Memorandum of Understanding***

18 29. From 2018 to 2020 the Districts and DWR were engaged in discussions regarding
19 the impact of the Project on the Districts’ facilities. These discussions centered around impacts to
20 District pump stations and pumping costs as a result of increased flows, maintenance of the Tule
21 canal, seepage, and drainage.

22 30. In December 2020 DWR proposed a methodology to quantify the impacts of the
23 Project described in the EIR/EIS, and proposing a financial settlement to the District. That
24 methodology was expressly premised on DWR’s description of a 6,000 cfs Project.

25 31. The District accepted this offer, but experienced significant delays in obtaining a
26 final, signed agreement from DWR.

27 32. Finally, on May 26, 2022, DWR and the District entered into a Memorandum of
28 Understanding (MOU) setting out the terms of that settlement. A true and correct copy of the

1 MOU is attached hereto as Exhibit A.

2 33. Through the MOU, DWR agreed to pay a sum of \$675,520 to “mitigate the impacts
3 of prospective future Project operations on the Districts’ pump system and pipes, and increased
4 annual costs related thereto,” of which \$335,074 was intended to mitigate for wear and tear on the
5 pump system, and \$340,446 was intended to mitigate for increased operational costs over the 30-
6 year term of the MOU.

7 34. The MOU specifically did not address or settle any potential District claims for
8 impacts due to future operational changes to the Project, and was “not intended to address nor settle
9 any existing or potential claims the District may have related to other concerns raised in the District’s
10 prior related communications.”

11 35. However, mere months before, DWR had issued findings that there was a
12 “reasonable probability” that adaptive management would be employed in the near term; that this
13 adaptive management could result in a doubling of the Project’s flows; and that any such change
14 to operations would be subject to further environmental review.

15 ***Subsequent Project Expansion***

16 36. On February 24, 2022, DWR issued an addendum to the EIS/EIR, analyzing the
17 impacts of change in the construction timeline for the Project. That Addendum again emphasized
18 that the Project “allow flows up to approximately 6,000 cfs, depending on Sacramento River
19 elevation, through the gated notch to provide open channel flow for adult fish passage, juvenile
20 emigration, and floodplain inundation.” No changes to the Project’s capacity or operations were
21 disclosed in the Addendum.

22 37. Less than two weeks later, DWR filed a Notice of Exemption (NOE) for “Flowage
23 Easement Acquisitions for Potential Future Adaptive Management” for the Project under Public
24 Resources Code section 21080.28.

25 38. The NOE disclosed that “[t]he adaptive management flowage easements would
26 allow for Project operations to increase flows up to 12,000 cfs from November 1 through
27 March 15 annually and 1,000 cfs through May 1. If future Project operations utilize such
28 easements, between approximately 3,000 – 5,000 acres of the areas inundated by operations under

1 the Project EIS/EIR would be inundated post-March 15 in the Yolo Bypass, with depths, duration
2 and last day wet differing for individual parcels and dependent upon the Sacramento River
3 hydrology each year.”

4 39. Section 21080.28’s limited exemption for transfers of interest in land by public
5 agencies is contingent on the requirement that the environmental review otherwise required by
6 CEQA be carried about “before any project approval that would authorize physical changes being
7 made to that land.” DWR maintained that it had not authorized such changes at the time it issued
8 the 2022 NOE.

9 40. The flow parameters identified in the March 2022 NOE have never been analyzed
10 under CEQA. The Project’s Adaptive Management Plan, included in the EIR/EIS as Appendix B,
11 does not disclose or analyze any scenario in which Project flows would exceed 6,000 cfs. The
12 Adaptive Management Plan and the EIR/EIS likewise do not include any scenario in which lands
13 would be inundated post-March 15.

14 41. Still, DWR appears to have made the determination that it would in fact implement
15 a much larger project than the one described in the EIS/EIR.

16 42. The 2022 NOE hinted that “several potential management responses are possible if
17 specific intervention thresholds are met during monitoring, one of which is consideration of
18 modifying Project operations. DWR has determined that there *is a reasonable probability that*
19 *adaptive management of the Project will be required* within a reasonable period of time after
20 Project operations commence.” (Emphasis added).

21 43. As the 2022 NOE acknowledges, Public Resources Code section 21080.28 still
22 requires the agency to evaluate the environmental impacts of activities that fall within its scope. It
23 simply allows that analysis to be deferred. The agency must still undertake the analysis mandated
24 by CEQA “before any project approval that would authorize physical changes” to the area.

25 *The Project Continues to Evolve*

26 44. In late 2022 and early 2023, DWR began filing eminent domain lawsuits in support
27 of the Project. These complaints in eminent domain described a Project that would “allow flows
28 up to *6,000 cfs* in a portion of the Yolo Bypass when water surface elevations in the Sacramento

1 River are high enough for fish passage,” and “when operating, would be able to flow water
2 through the notch from *November 1 through March 15*,” consistent with the parameters of the
3 EIS/EIR.

4 45. In June 2023, DWR began to file amended complaints in related eminent domain
5 actions supporting the Project. Rather than the clear limiting language found in the original
6 complaint, that amended complaint disclosed that “[t]he easement to be acquired will allow DWR
7 additional water flows over [the Parcel] when the conditions of the Sacramento River allow. Waters
8 resulting from additional flows may reach up to *12,000* cubic feet per second through the notch in the
9 Fremont Weir from *late-fall to late-spring*, annually, for fish rearing habitat and fish passage
10 purposes.” (Emphasis added.)

11 46. In a meeting between DWR staff and District representatives on June 15, 2023,
12 DWR staff confirmed that the cutoff wall, which was designed to protect the East levee along Tule
13 Canal at the Fremont Weir, was no longer part of the project design.

14 47. In the same meeting DWR staff confirmed that the Project would be constructed to
15 accommodate 12,000 cfs flows, rather than the 6,000 cfs originally disclosed and analyzed.

16 48. Construction of the Project is underway, and DWR has confirmed that the scope of
17 that Project has changed. However, it has not undertaken environmental review of those changes.
18 Nor has DWR provided mitigation for the impacts of the changes, even though they now represent
19 the prospective future Project operations.

20 EXHAUSTION OF ADMINISTRATIVE REMEDIES

21 49. The District has repeatedly worked with DWR to resolve the issues related to the
22 Project described herein, including to address potential impacts to the Districts’ infrastructure
23 from the Project. These discussions previously resulted in the MOU. In addition, the District’s
24 concerns were also brought to DWR’s attention by other parties’ comment letters, including those
25 submitted by the County.

26 50. However, DWR provided no opportunity for the public to present comment prior to
27 authorizing the physical changes described herein, or advance notice that it would be authorizing
28 those changes. Therefore, the District had no opportunity to express its objections.

1 51. In the alternative, exhausting administrative remedies was futile, as DWR has
2 demonstrated that it intended to approve these changes regardless of the potential of opposition.

3 52. Regarding damages, the District is exempt from procedures under the Government
4 Claims Act as the District is a public entity, pursuant to Government Code section 905,
5 subdivision (i).

6 **NOTICE OF COMMENCEMENT OF CEQA PROCEEDING AND NOTICE TO**
7 **ATTORNEY GENERAL**

8 53. The District has complied with Public Resources Code section 21167.5 by prior
9 service of a notice upon DWR indicating its intention to file this Petition. Proof of Service of this
10 notification is attached as Exhibit B. Pursuant to Code of Civil Procedure section 388 and Public
11 Resources Code section 21167.7, the District will provide the California Attorney General with a
12 copy of this Petition.

13 **REQUEST TO PREPARE ADMINISTRATIVE RECORD**

14 54. Pursuant to Public Resources Code section 21167.6(b)(2), the District elects to
15 prepare the administrative record in this action.

16 **STATUTE OF LIMITATIONS**

17 55. CEQA’s statute of limitations begins to run upon filing of a notice of determination
18 or notice of exemption. However, those limitations periods do not bar a lawsuit challenging
19 Project changes approved after the filing of the applicable notice.

20 56. Here, DWR failed to file any notice of determination or notice of exemption prior
21 to authorizing the physical changes as part of the Project described herein. The notice of
22 exemption filed by DWR filed on March 7, 2022 states that the Project would only be modified to
23 use the easements described in the notice after future completion of further CEQA review. This
24 Petition alleges that DWR subsequently and unlawfully did authorize those activities without
25 undertaking environmental review. Therefore, the 2022 NOE did not trigger the applicable statute
26 of limitations.

27 57. The District filed this lawsuit within 180 days of when it was aware or should have
28 been aware that DWR had approved the Project changes, and also within 180 days of when DWR

1 committed itself to the changed project in a manner that would authorize the physical changes.

2 **FIRST CAUSE OF ACTION**

3 **(Petition for Writ of Mandate for Violation of CEQA – Expansion of Conveyance Capacity)**

4 58. The District incorporates by reference paragraphs 1 through 73 above as if set forth
5 in full herein.

6 59. When a project approved pursuant to an EIR changes after its approval, the agency
7 must determine whether the changes warrant a subsequent or supplemental EIR. If the changes
8 would substantially increase significant environmental impacts or cause new significant
9 environmental impacts then it must prepare a subsequent or supplemental EIR before approving
10 the changes.

11 60. When it issued the 2022 NOE showing that Project conveyance capacity had
12 increased 12,000 cfs and that the dates of operation had been extended, DWR claimed that it
13 would only approve project modifications to utilize the easement rights described therein after
14 completing environmental review. This is also required by the exemption relied upon by DWR,
15 Public Resources Code section 21080.28, which requires environmental review prior to any
16 approval authorizing the physical changes of activities falling within its scope.

17 61. DWR has now committed itself to Project changes, authorizing physical changes
18 and approving them under CEQA. However, it failed to undertake environmental review before
19 doing so.

20 62. The Project changes will cause new significant and unavoidable environmental
21 impacts, and will increase the severity of the significant impacts already identified in the EIS/EIR.

22 63. These new and increased impacts include but are not limited to impacts to
23 agricultural resources, flood control, water quality, groundwater, biological resources, cultural and
24 tribal cultural resources, geology and soils, recreation, cumulative impacts, and growth-inducing
25 impacts.

26 64. As such, DWR was required to prepare and certify a subsequent or supplemental
27 environmental impact report addressing these project changes and providing feasible mitigation
28 for the new and increased significant environmental impacts. CEQA requires this to have occurred

1 prior to approval of the physical changes. However, despite having approved the changes, DWR
2 has not certified a supplemental or subsequent EIR or provided mitigation for the impacts of the
3 changes.

4 65. Therefore, DWR has failed to comply with CEQA and has prejudicially abused its
5 discretion.

6 SECOND CAUSE OF ACTION

7 (Petition for Writ of Mandate for Violation of CEQA – Elimination of Cutoff Walls)

8 66. The District incorporates by reference paragraphs 1 through 74 above as if set forth
9 in full herein.

10 67. When a project approved pursuant to an EIR changes after its approval, the agency
11 must determine whether the changes warrant a subsequent or supplemental EIR. If the changes
12 would substantially increase significant environmental impacts or cause new significant
13 environmental impacts then it must prepare a subsequent or supplemental EIR before approving
14 the changes.

15 68. Since certifying the EIS/EIR DWR has approved removal of the cutoff walls. This
16 is a significant change in the Project that will cause new significant and unavoidable
17 environmental impacts, and will increase the severity of the significant impacts already identified
18 in the EIS/EIR.

19 69. These new and increased impacts include but are not limited to impacts to
20 agricultural resources, flood control, water quality, groundwater, biological resources, cultural and
21 tribal cultural resources, geology and soils, recreation, cumulative impacts, and growth-inducing
22 impacts.

23 70. As such, DWR was required to prepare and certify a subsequent or supplemental
24 environmental impact report addressing these project changes and providing feasible mitigation
25 for the new and increased significant environmental impacts. CEQA requires this to have occurred
26 prior to approval of the physical changes. However, despite having approved the changes, DWR
27 has not certified a supplemental or subsequent EIR or provided mitigation for the impacts of the
28 changes.

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FOURTH CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith and Fair Dealing)

82. The District incorporates by reference paragraphs 1 through 90 above as if set forth in full herein.

83. Every contract or agreement in California contains an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of the other party to receive the benefits of the contract or agreement.

84. The District and DWR entered in a MOU, a valid and enforceable contract supported by adequate consideration.

85. The District performed all or substantially all the terms of the MOU in the manner specified by the MOU, or has otherwise been excused from performing those terms.

86. All of the conditions required by the MOU for DWR’s performance occurred.

87. DWR breached its obligation to act fairly and in good faith towards the District by misleading and inducing the District to sign the MOU with knowledge that the District was under the impression that the Project was at that time still accurately described by the EIS/EIR. At this time, DWR had already changed the Project as described above. DWR concealed these facts from the District. Because of this concealment, the District entered into a contract that provided the District with much less than full mitigation, resulting in the District not obtaining the benefits of the agreement. DWR knew this would be the result of the concealment, and thereby acted in bad faith.

88. As a direct and proximate result of DWR’s breach of the implied covenant of good faith and fair dealing, the District has suffered damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

(Negligent Misrepresentation)

89. The District incorporates by reference paragraphs 1 through 97 above as if set forth in full herein.

90. Before the District and DWR entered into the MOU, DWR materially misrepresented the extent of the Project by concealing the changes made.

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in an amount to be proven at trial;

4. On all Causes of Action: award the District its fees and costs in this action, including reasonable attorneys' fees pursuant to Code of Civil Procedure § 1021.5 and any other applicable provisions of law; and

5. On all Causes of Action: grant such other relief as the Court deems just and proper.

DATED: August 10, 2023

DOWNEY BRAND LLP

By:



REBECCA R.A. SMITH

Attorneys for RECLAMATION DISTRICT 1600

EXHIBIT A

MEMORANDUM OF UNDERSTANDING BETWEEN RECLAMATION DISTRICT 1600 AND THE CALIFORNIA DEPARTMENT OF WATER RESOURCES REGARDING THE YOLO BYPASS SALMONID HABITAT RESTORATION AND FISH PASSAGE PROJECT

This Memorandum of Understanding (the “MOU” or “Agreement”) is entered into and effective as of the date of execution by the last signing party (the “Effective Date”) by and between Reclamation District 1600 (“District”) and the California Department of Water Resources (“DWR”) (collectively, the “Parties”).

RECITALS

WHEREAS, on July 19, 2019, DWR approved the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (the “Project”) and certified the Final Environmental Impact Report (“EIR”) in connection therewith; and

WHEREAS, Reasonable and Prudent Alternatives (RPA) I.6.1 and I.7 of the 2009 National Marine Fisheries Service *Biological Opinion and Conference opinion on the Long-Term Operations of the Central Valley Project and State Water Project* (2009 NMFS BO), require DWR and the United States Bureau of Reclamation (USBR) to enhance floodplain rearing habitat and fish passage in the Yolo Bypass or other suitable areas of the lower Sacramento River; and

WHEREAS, RPA actions I.6.1 and I.7 were carried forward as baseline conditions in the *Biological Opinion on Long Term Operation of the Central Valley Project and the State Water Project* issued by NMFS on October 21, 2019 (2019 NMFS BO), which also included a new Reasonable and Prudent Measure (RPM) 1(g) requiring USBR to “complete construction of the Fremont Weir component of the [Project] by 2022”; and

WHEREAS, Section 9.2.2 of the Incidental Take Permit for Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta (2081-2019-066-00) (2020 LTO ITP), issued March 31, 2020, by the California Department of Fish and Wildlife, requires implementation of the Project, “as described in Alternative 1 of the [Project] Final EIR/EIS” within 6 years of the 2020 LTO ITP effective date; and

WHEREAS, on August 22, 2018, the District sent a letter to DWR detailing its concerns related to the Project and its prospective operation in the Yolo Bypass, including, but not limited to, concerns related to drainage from the District facilities into the Tule Canal during wet hydrologic conditions and the resulting impacts to, and increased annual operational costs of, the District’s pump system and pipes; and

WHEREAS, on May 15, 2020, via letter, the District reiterated to DWR its concerns and then positions on Project operational impacts in the Yolo Bypass, including impacts to the District’s pump system and pipes; and

WHEREAS, on December 22, 2020, DWR responded to the District’s letter of May 15, 2020, in part, with a proposed methodology to quantify the impacts of anticipated future Project operations to the District’s pump system and pipes; and

WHEREAS, the Parties have successfully conferred regarding the District's concerns and have agreed upon a calculation methodology and sums derived therefrom intended to mitigate for Project impacts to the District's pump system and pipes, and increased operational costs thereof, for the current scheduled life of the Project (30 years); and

WHEREAS, the Parties have agreed upon sedimentation monitoring in the Tule Canal and groundwater monitoring in the District's service area as further specified herein below; and

WHEREAS, this MOU is intended to provide for sediment monitoring in the Tule Canal, and potential mitigation pending the results thereof, and otherwise settle only the District's potential existing and future claims related to wear and tear impacts to its pump system and pipes, and increased annual operational costs thereof, caused by prospective Project operations over a 30 year period; it is not intended to address nor settle any existing or potential claims the District may have related to other concerns raised in the District's prior related communications, including the letters specified herein above.

NOW, THEREFORE, the Parties hereby agree as follows:

AGREEMENT

1. Impacts to District Pump System and Pipes and Annual Operational Costs. DWR and the District have agreed upon the sum of \$675,520 to mitigate for the impacts of prospective future Project operations on the District's pump system and pipes, and increase annual operational costs related thereto, reflecting the following:
 - A. Pump system and pipes, wear and tear: \$335,074.
 - B. Increased annual operational costs, including electricity: \$340,446.
2. Payment timing. Upon full execution of this MOU, DWR shall immediately take all necessary steps to timely issue and transfer \$675,520 to the District.
3. Settlement Period. The sums specified in paragraph 1 are intended to fully settle existing and potential future District claims related to, or arising from, impacts to its pump system and pipes, and increased annual operational costs related thereto, from Project operations for the scheduled life of the Project; e.g., a period of thirty (30) years. The 30-year period shall commence after Project implementation and upon the first operation of the gated notch in the Fremont Weir triggered by hydrologic conditions in the Sacramento River, as described in Alternative 1 of the EIR.
4. Groundwater Monitoring. DWR shall monitor the groundwater within the District to capture data on any increased seepage and drainage into the District from the operation of the Project. Results of that monitoring will be provided annually to the District. Such monitoring shall only be required until sufficient data is collected to allow DWR to validate a groundwater model of Project operational effects within the District.

Prior to termination of groundwater monitoring, DWR will do the following: (1) provide the District the opportunity to review the model and related data and assumptions; and (2) meet and confer with the District regarding any perceived deficiencies in the model. For the period DWR operates the Project, if the model or other information made known to DWR demonstrates that the Project operations have caused a measurable increase in groundwater levels, then DWR will take corrective action, as necessary.

5. Tule Canal Sedimentation Monitoring. DWR believes, and asserts, based on its Yolo Bypass Sedimentation Analysis, that Project operations will not cause increased sedimentation in the Yolo Bypass in a manner that will impact the District. However, in response to District concerns, DWR has agreed to the following:

A. Tule Canal Sedimentation Monitoring:

- i. For a period of five (5) years commencing with Project operations, DWR will perform annual field surveys within the Tule Canal at the outlet of the District gravity drain and at or around latitude 38.723930 and longitude -121.634049, the previously degraded Agricultural Road Crossing 3 site. The surveying will occur after the cessation of Project operations on March 15th.
- ii. DWR may choose to conduct additional surveys each year at its discretion.
- iii. DWR will perform field surveys in 2022 and 2023 prior to the commencement of Project operations, to determine baseline survey elevations.
- iv. The District will provide access to its property and facilities as reasonably necessary for survey purposes.
- v. The surveys will be conducted by either a California State licensed Professional Land Surveyor or registered Professional Engineer qualified to conduct surveys pursuant to a survey plan prepared by DWR and approved by the District, which approval shall not be unreasonably withheld. All surveys conducted pursuant to this agreement shall be completed in accordance with the survey plan, which plan may be modified by the parties upon mutual agreement.

B. Meet and Confer:

- i. DWR will provide the District with the results of all surveys conducted pursuant to section 5(A) no later than June 1 of the fifth year of monitoring.
- ii. The parties will meet and confer no later than October 1 of the fifth year of monitoring.
- iii. The meet and confer will include consideration of the following:
 1. All collected sediment survey data and water year history during the monitoring period.
 2. The accuracy of the survey methodology.
 3. Whether the survey data shows a clear trend. Any trend is anticipated to be influenced by the following factors:

- a. The number of years where the Project was operated and the Fremont Weir did not overtop, and the duration of such operations.
- b. The frequency of the Fremont Weir overtopping over the monitoring period.
- c. The duration of each overtopping event.
4. Unanticipated or Force Majeure events that occur during the monitoring period.
- iv. If both parties agree that the cumulative survey data is sufficient to determine the impacts of Project operations on sedimentation and the data shows:
 1. A de minimis or no increase in sedimentation, then no additional monitoring or mitigation will be required.
 2. A non-de minimis increase in sediment that is caused by Project operations, DWR and the District will discuss a range of actions that could be taken to mitigate the accumulation of sediment and the impact on the District's gravity drain.
- v. If either or both parties assert that the cumulative survey data at year five (5) is insufficient to determine the impacts of Project operations on sedimentation, including due to insufficient Project operational data or because of frequent or prolonged Fremont Weir overtopping events (that may be a source of siltation), then:
 1. DWR will perform additional field surveys pursuant to subsection 5(A) at years seven (7) and ten (10) following commencement of Project operations, and other more frequent surveys agreeable to both DWR and the District.
 2. In year ten (10), the parties will meet and confer pursuant to the process set forth in subsections 5(B)(i) through 5(B)(iv). For purposes of this meet and confer, if the survey accuracy is 0.3 ft or less, then a sedimentation increase of 0.3 ft or less shall be considered de minimis.
 3. If either or both parties do not agree that the cumulative data at year ten (10) is sufficient to determine the impacts of Project operations on sedimentation, the parties will meet and confer in a good faith effort to arrive at a mutual agreement on whether additional surveys or some other actions are warranted using the best available science and data. Any such agreement will be documented in writing.

6. Future Project Operational Changes. This MOU does not address, nor settle, any potential District claims for impacts to its pump system and pipes, and increased annual operational costs thereof, related to, or arising from, future operational changes to the Project that would require new or supplemental California Environmental Quality Act (CEQA) or National Environmental Policy Act compliance, or additional permit coverage from non-Party state or federal agencies. Provided, however, that for the Settlement Period any future District claims for wear and tear to its pump system and

pipes and/or increased annual operating costs thereof shall be limited to only incremental increases caused by the future operational changes.

7. District Drainage System Modifications. DWR shall have no liability to the District for any increased capital, wear and tear, or annual operations, maintenance, repair, modification or replacement costs related to the District pump system and pipes, and annual operating costs thereof, caused by any future District changes to or modifications, upgrades or redesigns of its pump system and pipes or changes to its existing drainage methodologies and practices.

8. DWR CEQA Compliance. DWR and the District both recognize that present legal cases exist challenging DWR's July 19, 2019, certification of the EIR and its related Project approval. DWR contends that, in all relevant respects, the Project approvals and the EIR meet the requirements of all applicable laws. In the event any future court order, decision or judgment requires DWR to take additional action to comply with CEQA prior to completing Project implementation and operation as provided in the EIR, the District shall not legally challenge any future DWR EIR certification or Project approval unless both of the following conditions are met:

- A. The cause of action under CEQA is not one which the District could have brought arising from, or related to, DWR's certification of the Project EIR and approval of the Project on July 19, 2019; and
- B. The additional steps DWR takes for future CEQA compliance are anticipated to cause impacts to the District's facilities, property and/or existing rights and entitlements that were not known and could not reasonably be anticipated as of the effective date of this MOU.

9. Release and Waiver.

- A. Paragraph 9.B shall not act as a release and waiver for the litigation, Oroville Dam Cases, Sacramento Superior Court Case Number JCCP 4947, in which the District is a Plaintiff and DWR is a Defendant.
- B. Save and except for the litigation, Oroville Dam Cases, Sacramento Superior Court Case Number JCCP 4947:
 - i. For the Settlement Period, the District voluntarily and knowingly waives, releases, and discharges forever DWR and each of its officers, directors, employees, agents, attorneys, and representatives (collectively, "the Released Parties") from any and all claims, charges, complaints, damages, liabilities, actions, causes of action in law or equity, suits, attorneys' fees, costs, losses, penalties, liens, debts, interest or expenses (collectively, "Claims") of any nature whatsoever, whether known or unknown, whether suspected or unsuspected, against the Released Parties, which arise out of, or relate in any manner to, wear and tear impacts to the District's pump

system and pipes, and increased operational costs thereof, caused by Project operations, as described in Alternative 1 of the EIR. Each and all of the aforesaid claims are hereby fully and finally settled, compromised, and released for the Settlement Period; and

- ii. The District expressly waives and relinquishes any and all rights and benefits which it may have or may acquire under Section 1542 of the Civil Code of California, which provides:

“A general release does not extend to claims which the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”

- C. Nothing herein shall constitute a waiver by the District of any claims or rights that may arise from DWR’s failure to comply with the terms of this MOU or to operate the Project as specified in Alternative 1 of the EIR.

10. No Third Party Beneficiaries. This Agreement is intended solely for the benefit of the Parties and shall not be construed to create any rights in any other person or entity.

11. Amendments. Subsequent modifications of this Agreement, including but not limited to an extension or amendment of this Agreement, shall not be valid or effective unless set forth in writing and signed by the Parties.

12. Notice. Notices under this Agreement shall be given as follows:

- A. To the District, notice shall be given to the President of the District Board of Trustees, the attorney representing the District at the time of notice, and the District Engineer at the District mailing address specified on the District’s website: <https://www.rd1600.org/>.

- B. To DWR, notice shall be given as follows:

Ted Craddock
Deputy Director
Department of Water Resources
715 P Street, 7th Floor
Sacramento, CA 95814-0001
ted.craddock@water.ca.gov

David Steffenson
Attorney IV
Department of Water Resources
Post Office Box 899
Sacramento, CA 95812-0899
david.steffenson@water.ca.gov

13. Effectiveness. The parties agree that this Agreement shall be effective as of the date of execution by the last signing party.

14. Authority to Bind. Each of the undersigned hereby represents and warrants that he or she is authorized to execute this Agreement on behalf of the respective Parties to the Agreement and bind said Parties to the terms and conditions set forth herein.

15. Rules of Construction. The Parties acknowledge that each party and its counsel have reviewed this Agreement and that no rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall be employed in the interpretation of this Agreement.

16. Counterparts. This Agreement may be executed in counterparts, including facsimile or other electronic counterparts, each of which shall be considered an original and all of which together shall be deemed to constitute one document.

17. Entire Agreement. This Agreement constitutes the entire understanding of the Parties with respect to the matters set forth herein. Any prior understandings, promises, negotiations, or representations between the Parties not expressly stated in this document are not binding.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates specified in the signature block below.

RECLAMATION DISTRICT 1600

DEPARTMENT OF WATER RESOURCES

Date: 5/26/2022

Date: 5/26/2022

By: Michelle Clark
President, RD 1600 Board of Trustees

By: Ted Craddock
Ted Craddock, Deputy Director

APPROVED AS TO FORM

Date: 5/26/2022

Date: 5/25/2022

By: Jim Nolan
Jim Nolan, District Counsel

By: David Steffenson
David Steffenson, Attorney IV

EXHIBIT B

1 DOWNEY BRAND LLP
REBECCA R.A. SMITH (Bar No. 275461)
2 rsmith@downeybrand.com
BRIAN E. HAMILTON (Bar No. 295994)
3 bhamilton@downeybrand.com
621 Capitol Mall, 18th Floor
4 Sacramento, California 95814
Telephone: 916.444.1000
5 Facsimile: 916.444.2100

6 Attorneys for Reclamation District 1600

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF YOLO

11 RECLAMATION DISTRICT 1600,
12 Plaintiff and Petitioner,
13 v.
14 CALIFORNIA DEPARTMENT OF WATER
RESOURCES; and DOES 1-20, inclusive,
15 Defendant and Respondent.

Case No.
**PETITIONER’S NOTICE OF INTENT TO
FILE CEQA ACTION**
(Pub. Res. Code § 21167.5)
California Environmental Quality Act (CEQA)
Case

17 UNITED STATES BUREAU OF
RECLAMATION; and ROES 1-20, inclusive,
18 Real Parties in Interest.
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21 PLEASE TAKE NOTICE, under Public Resources Code section 21167.5 and Code of
22 Civil Procedure section 388, that on or about August 11, 2023, Reclamation District No. 1600 will
23 file a petition for writ of mandate against the California Department of Water Resources (DWR) in
24 Yolo County Superior Court.

25 The petition will present causes of action arising in connection with the Yolo Bypass
26 Salmonid Habitat Restoration and Fish Passage Project. The causes of action included in the
27 Petition address the following matters:

28 (1) DWR’s failure to disclose, analyze, or properly approve the 12,000 cubic foot per

DOWNEY BRAND LLP

1 second (cfs) capacity of the headworks facility under construction, which was described as having
2 a design capacity of 6,000 cfs in Alternative 1 in the Environmental Impact
3 Statement/Environmental Impact Report (EIS/EIR) and in approvals signed by Director Nemeth
4 on July 19, 2019; and

5 (2) DWR’s failure to disclose or analyze the post-approval elimination of cutoff walls in
6 the east levee of the Yolo Bypass that were expressly included as a component of Alternative 1 in
7 the EIS/EIR and the July 19, 2019 approval documents.


8 (3) DWR’s failure to disclose, analyze, or properly approve the broadened scope of its
9 adaptive management plan for the Project, including contemplated flooding beyond the March 15
10 cut-off date disclosed in the EIR/EIS and the July 19, 2019 approval documents.

11 The District contends that DWR violated CEQA in each of the foregoing ways. The
12 District additionally contends that DWR violated the terms of the May 2022 Memorandum of
13 Understanding between the District and DWR related to the Project and improperly expanded the
14 scope of the Project without appropriately mitigating for the impacts of that change on the
15 District’s operations.

16 The petition will seek various forms of relief for these violations, including preliminary
17 and permanent injunctive relief to halt ongoing work in furtherance of the project unless and until
18 DWR full complies with CEQA. A copy of the petition is attached to this notice.

19 DATED: August 10, 2023

DOWNEY BRAND LLP

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21 By: 
22 REBECCA R.A. SMITH
23 Attorneys for RECLAMATION DISTRICT 1600
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On August 10, 2023, I served true copies of the following document(s) described as **PETITIONER’S NOTICE OF INTENT TO FILE CEQA ACTION** on the interested parties in this action as follows:

Karla Nemeth, Director
Thomas Gibson, General Counsel
California Department of Water Resources
715 P Street
Sacramento, CA 95814
karla.nemeth@water.ca.gov
thomas.gibson@water.ca.gov

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address lruiz@downeybrand.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 10, 2023, at Sacramento, California.

Lucia Ruiz

