

SETTLEMENT AGREEMENT  
FOR THE RELICENSING OF THE CARMEN-SMITH HYDROELECTRIC PROJECT  
FERC PROJECT NO. 2242

AMONG

EUGENE WATER & ELECTRIC BOARD

NATIONAL MARINE FISHERIES SERVICE  
UNITED STATES FISH AND WILDLIFE SERVICE  
UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY  
OREGON DEPARTMENT OF FISH AND WILDLIFE  
OREGON PARKS AND RECREATION DEPARTMENT

CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON  
CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON  
CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

AMERICAN WHITEWATER  
CASCADIA WILDLANDS PROJECT  
OREGON HUNTERS ASSOCIATION  
OREGON WILD  
MCKENZIE FLYFISHERS  
ROCKY MOUNTAIN ELK FOUNDATION, INC.  
TROUT UNLIMITED

 2008



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### **Appendix**

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**CARMEN-SMITH HYDROELECTRIC PROJECT  
RELICENSING SETTLEMENT AGREEMENT**

This Settlement Agreement with attached Exhibits and Appendix incorporated and made a part of this Agreement (referred to collectively as the “Agreement”) is made as of       , 2008 (the “Effective Date”), by and among Eugene Water & Electric Board, an Oregon municipally-owned utility (“EWEB”); National Marine Fisheries Service (“NMFS”); the United States Fish and Wildlife Service (“USFWS”); United States Department of Agriculture Forest Service (“USDA Forest Service”); Oregon Department of Environmental Quality (“ODEQ”); Oregon Department of Fish and Wildlife (“ODFW”); Oregon Parks and Recreation Department (“OPRD”); Confederated Tribes of the Grand Ronde Community of Oregon (“CTGR”); Confederated Tribes of Siletz Indians of Oregon (“CTSI”); Confederated Tribes of the Warm Springs Reservation of Oregon (“CTWS”); American Whitewater; Cascadia Wildlands Project; Oregon Hunters Association; Oregon Wild; McKenzie Flyfishers; Rocky Mountain Elk Foundation, Inc. and Trout Unlimited; each of which, once having signed this Agreement, are referred to individually, as a “Party” and collectively, as the “Parties.” CTGR, CTSI, and CTWS may be referred to collectively as the “Tribes.” NMFS, USFWS, USDA Forest Service, ODEQ, ODFW and OPRD (but not EWEB or the Tribes who are also governmental entities) may be referred to collectively as the “Governmental Parties.” NMFS, USFWS, and USDA Forest Service may be referred to collectively as the “Federal Governmental Parties.” NMFS and USFWS may be referred to as the “Services.” ODEQ, ODFW and OPRD may be referred to collectively as the “State Governmental Parties.” NMFS, USFWS, and ODFW may be referred to individually as a “Fish Agency” and collectively as the “Fish Agencies.” American Whitewater, Cascadia Wildlands Project, Oregon Hunters Association, Oregon Wild, McKenzie Flyfishers, Rocky

Mountain Elk Foundation, Inc., and Trout Unlimited, may be referred to collectively as the “NGO Parties.”

### RECITALS

A. The Carmen-Smith Hydroelectric Project, Federal Energy Regulatory Commission (“FERC” or “Commission”) Project No. 2242, (“Carmen-Smith” or the “Project”), is owned and operated by EWEB. EWEB is a municipally-owned utility organized under the laws of the State of Oregon.

B. Carmen-Smith is located on the McKenzie River and Smith River approximately 70 miles east of the metropolitan area of Eugene and Springfield, Oregon. Carmen-Smith consists of two developments: the Carmen Development and the Trail Bridge Development.

C. The Carmen Development includes: Carmen Diversion Dam, Carmen Diversion Reservoir, and Carmen Diversion Tunnel; Smith River Dam (“Smith Dam”), Smith River Reservoir (“Smith Reservoir”) and Smith Power Tunnel; Surge Chamber, Penstock, Carmen Power Plant and Carmen Substation; and an office, a vehicle shop, a machine shop, storage buildings, staff homes, a potable water system and a radio/communication building. The Carmen Diversion Dam is the uppermost dam in the Carmen Development and creates Carmen Diversion Reservoir. McKenzie River water is impounded in this reservoir before being diverted into the Carmen Diversion Tunnel, which discharges at depth into the Smith Reservoir. The Smith Reservoir routes diverted flows from the Carmen Diversion Reservoir and inflows from the Smith River through the Smith Power Tunnel to the Carmen Power Plant.

D. The Carmen Diversion Dam is a 25-foot high dam with a crest length of 2,100 feet and a crest width of 10 feet. The Carmen Diversion Reservoir is approximately 1,600 feet long (east-west) and 650 feet wide (north-south), covers about 30 acres at a full pool elevation of

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2,625 feet and stores about 261 acre-feet of water. The Carmen Diversion Tunnel is 9.5 feet in diameter and 11,380 feet long. The tunnel discharges about 60 feet below the average water level of Smith Reservoir. The Smith Dam is a 235-foot high dam with a crest width of 15 feet and a crest length of 1,100 feet. The Smith Reservoir is approximately two miles long, covers about 78 acres at full pool (2,605 feet) and stores about 14,600 acre-feet of water. The Smith Power Tunnel is 13.8 feet in diameter and about 7,275 feet long. The Carmen Power Plant has two turbines/generators with a combined installed nameplate capacity of 104.50 megawatts (“MWs”). The Carmen Power Plant discharges water into Trail Bridge Reservoir.

E. The Trail Bridge Development includes: Trail Bridge Dam, Trail Bridge Reservoir, Trail Bridge Power Plant, and Spawning Channel; Trail Bridge day use area; project buildings; one-mile distribution line from the Trail Bridge Power Plant to the Carmen Substation and a 19-mile 115kV transmission line; and appurtenant roads. The Carmen Power Plant generation and resulting discharge to Trail Bridge Reservoir generally follow high hourly electrical load conditions. Releases of water into the Trail Bridge Reservoir are generally highest during on-peak times, morning until evening. Water is held and steadily released from the Trail Bridge Reservoir through the Trail Bridge Power Plant such that flows in the McKenzie River below Trail Bridge Dam vary little from natural conditions.

F. The Trail Bridge Dam spans the mainstream McKenzie River and creates Trail Bridge Reservoir. The Trail Bridge Reservoir has an average width of about 900 feet and a length about three times as long. The reservoir covers about 71 acres at a full pool elevation of 2,090 feet and stores about 2,060 acre-feet of water. The Trail Bridge Dam is about 100 feet high with a crest 1,800 feet long and 24 feet wide. The Trail Bridge Power Plant has one turbine/generator with an installed nameplate capacity of 9.975 MW.

G. Carmen-Smith is operated as a peaking and load-following facility, using the water stored in the reservoirs in different modes. The Carmen Power Plant operates in a peaking mode, while the Trail Bridge Power Plant operates as a re-regulating facility. The overall operational mode of Carmen-Smith is such that, on an average daily basis, inflow at the Carmen and Smith reservoirs approximates outflow at the Trail Bridge Power Plant tailrace.

H. The Project occupies a total of 619.81 acres, including approximately 59.75 acres located on private lands owned by nongovernmental entities and approximately 560.06 acres located on lands owned by the USDA Forest Service. Portions of the McKenzie River in the area of Carmen-Smith have been designated as a wild and scenic river under the Federal Omnibus Oregon Wild and Scenic Rivers Act of 1988 and as a scenic waterway under Oregon's Scenic Waterways Act.

I. The McKenzie River and its tributaries are used by bull trout, spring Chinook salmon, coastal cutthroat trout, Pacific lamprey, steelhead and rainbow trout, mountain whitefish, brook trout, and other fish species. The bull trout and spring Chinook salmon that use the McKenzie River and its tributaries have been listed as threatened species under the Federal Endangered Species Act of 1973, as amended ("ESA"). The Spawning Channel immediately downstream from Trail Bridge Dam was completed by EWEB in 1962 under an agreement with the Oregon State Game Commission and the Fish Commission of Oregon to provide spawning habitat to returning Chinook salmon. The channel is engineered to provide controlled, optimum flow and depth and gravel substrate for spawning and fry emergence. The channel is approximately 30 feet wide and 500 feet long, and operational flows are in the range of 100 cubic feet per second ("cfs") with an average water depth and velocity of 1.5 feet and 2.5 feet per second, respectively.

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J. EWEB as a non-federal designated representative for FERC initiated an ESA consultation to evaluate the effects of the continued operation of Carmen-Smith on bull trout and Upper Willamette River Chinook salmon under the existing Carmen-Smith license. As part of the consultation process, EWEB agreed to perform and subsequently performed mitigation and enhancement measures for the benefit of bull trout, Upper Willamette River Chinook salmon and other aquatic species. NMFS issued a no-jeopardy biological opinion in 2003 and an incidental take statement covering the Carmen-Smith effects on Upper Willamette River Chinook salmon and designated critical habitat. It is expected that the NMFS biological opinion will remain in effect until ESA consultation is completed on a new license, but no later than 2013. USFWS issued a no-jeopardy biological opinion in 2003 and an incidental take statement covering the Carmen-Smith effects on bull trout, bald eagle, northern spotted owl and designated critical habitat. It is expected that the USFWS biological opinion will remain in effect until ESA consultation is completed on a new license (expected to be issued in 2008), and USFWS may annually extend the effect of the biological opinion from 2008 through 2013 if issuance of a new license is delayed. ESA consultation has not yet been completed for issuance of a new license.

K. EWEB appropriates, diverts and uses water for power generation purposes at Carmen-Smith under the water rights listed below. Under Oregon Revised Statutes (“ORS”) 537.410(2) and ORS 540.610(2)(a) and (4), EWEB’s water rights are exempt from cancellation or forfeiture and are perpetual.

1. State of Oregon Certificate #80725 for the right to use 1,400 cfs of the waters of the McKenzie River and the waters stored in the Trail Bridge Reservoir for the purpose of power generation at the Trail Bridge Powerhouse, with a priority date of February 25, 1958.

2. State of Oregon Certificate #80987 for the right to use 1,900 cfs of the

waters of the McKenzie River and Smith River; being 1,400 cfs from the McKenzie River and 500 cfs from the Smith River, and the waters stored in the Smith Reservoir and Carmen Diversion Reservoir for the purpose of power generation at the Carmen Powerhouse, with a priority date of February 25, 1958.

3. State of Oregon Certificate #80730 for the right to use 950 cfs of the waters of the McKenzie River and Smith River; being 700 cfs from the McKenzie River and the stored waters of the Carmen Diversion Reservoir and 250 cfs from the Smith River and the waters stored in the Smith Reservoir, for the purpose of power generation at the Carmen Powerhouse, with a priority date of April 18, 1960.

4. State of Oregon Certificate #80781 for the right to use 380 cfs of the waters of the McKenzie River and the waters stored in the Trail Bridge Reservoir for the purpose of power generation at the Trail Bridge Powerhouse, with a priority date of April 18, 1960.

5. State of Oregon Certificate #80724 for the right to store 1,700 acre-feet of water from the McKenzie River and Smith River in the Trail Bridge Reservoir, with a priority date of February 25, 1958.

6. State of Oregon Certificate #80726 for the right to store 261 acre-feet of water from the McKenzie River in the Carmen Diversion Reservoir with a priority date of February 25, 1958.

7. State of Oregon Certificate #80727 for the right to store 14,000 acre-feet of water from the Smith River and the McKenzie River in the Smith River Reservoir, with a priority date of February 25, 1958.

8. State of Oregon Certificate #80729 for the right to store 563 acre-feet of water from the McKenzie River and Smith River in the Trail Bridge Reservoir, with a priority

date of April 18, 1960.

9. State of Oregon Certificate #80782 for the right to store 1,000 acre-feet of water from the Smith River in the Smith Reservoir, with a priority date of October 30, 1967.

L. Carmen-Smith was originally licensed to EWEB by the Federal Power Commission (“FERC”) in 1958 for 50 years. The license expires on November 30, 2008. Carmen-Smith provides power to Eugene and area residents and represents almost one-half of EWEB’s total generating capacity.

M. On November 24, 2006, EWEB filed an application for a new license for Carmen-Smith. This application was prepared using FERC’s traditional licensing procedures, 18 Code of Federal Regulations (“CFR”) 4.51.

N. In January 2007, EWEB initiated settlement discussions with the Parties. A facilitated Settlement Negotiation Group (“SNG”) of the Parties was formed and began meeting to negotiate a settlement agreement that would enable the Parties to resolve all outstanding issues associated with the relicensing of Carmen-Smith.

O. On December 5, 2006, FERC issued a “Notice of Application Tendered for Filing with the Commission, Soliciting Additional Study Requests, and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments,” which, among other things, established a schedule for the relicensing proceeding. On March 9, 2007, FERC issued a “Notice of Application Accepted for Filing and Soliciting Motions to Intervene and Protests,” which accepted EWEB’s application for a new license. NMFS, USFWS, USDA Forest Service, ODEQ, ODFW and OPRD filed notices of intervention. CTGR, CTSI, CTWS, American Whitewater, Cascadia Wildlands Project, Oregon Wild, McKenzie Flyfishers and Trout Unlimited filed motions to intervene.

P. On October 30, 2007, FERC by letter from Ann F. Miles, Director, Division of Hydropower Licensing revised the schedule for the relicensing proceeding.

Q. On April 10, 2008, FERC by letter from Ann F. Miles, Director, Division of Hydropower Licensing revised the schedule for the relicensing proceeding and indicated an expectation that this Agreement and the resource management plans would be received by FERC on September 1, 2008.

NOW, THEREFORE, in consideration of their mutual covenants in this Agreement, the Parties agree:

### **DEFINITIONS**

“Agreement” is this Settlement Agreement with attached Exhibits and Appendix.

“Appeal” is defined in Section 7.2.2.

“Biological Opinion” is defined in Section 6.2.1.

“Carmen-Smith” is the Carmen-Smith Hydroelectric Project.

“CFR” is Code of Federal Regulations.

“cfs” is cubic feet per second.

“Commission” is the Federal Energy Regulatory Commission.

“Consensus” means that any decision must be acceptable to, or not opposed by, all representatives of the Parties (defined below) involved.

“Corps” is the United States Army Corps of Engineers.

“CTGR” is the Confederated Tribes of the Grand Ronde Community of Oregon.

“CTSI” is the Confederated Tribes of Siletz Indians of Oregon.

“CTWS” is the Confederated Tribes of the Warm Springs Reservation of Oregon.

“CWA” is the Federal Clean Water Act, 13 USC 1251 to 1387.

“CWA Requirements” are set forth in Section 6.3.

“Effective Date” is established in the introductory paragraph of this Agreement.

“EFH” is defined in Section 6.4.1.

“ESA” is the Endangered Species Act of 1973, 16 USC 1531 to 1544.

“EWEB” is the Eugene Water & Electric Board or its successor.

“Federal Governmental Parties” are collectively NMFS, USFWS and USDA Forest Service.

“FERC” is the Federal Energy Regulatory Commission.

“FERC Filing” is defined in Section 2.1.

“Fish Agencies” are collectively NMFS, USFWS and ODFW to the extent of each of their legal authorities.

“Fish Agency” is individually NMFS, USFWS or ODFW to the extent of each of their legal authorities.

“Force Majeure” is defined in Section 8.6.1.

“FPA” is the Federal Power Act, 16 USC 791a to 828c.

“Governmental Parties” are collectively NMFS, USFWS, USDA Forest Service, ODEQ, ODFW and OPRD.

“Inconsistent or “Inconsistency” means one or more of the terms in the New License (defined below), Permits (defined below), or terms, conditions, recommendations, other measures or actions issued or taken by a court or an agency or a Party (defined below) materially, either individually or cumulatively, conflicts with, adds to, omits portions of, or prevents implementation of, the commitments made in this Agreement.

“Joint Explanatory Statement” is defined in Section 2.1.

“Magnuson-Stevens Act” is the Magnuson-Stevens Fishery Conservation and Management Act, 16 USC 1801 to 1883.

“MWs” is megawatts.

“New License” is defined in Section 1.1.

“New Material Information” is defined in Section 2.5.

“NGO Parties” are collectively American Whitewater, Cascadia Wildlands Project, Oregon Hunters Association, Oregon Wild, McKenzie Flyfishers, Rocky Mountain Elk Foundation, Inc. and Trout Unlimited.

“NMFS” is the National Marine Fisheries Service.

“OAR” is Oregon Administrative Rules.

“ODEQ” is the Oregon Department of Environmental Quality.

“ODFW” is the Oregon Department of Fish and Wildlife.

“OPRD” is the Oregon Parks and Recreation Department.

“ORS” is the Oregon Revised Statutes.

“Party” and “Parties” are defined in the introductory paragraph of this Agreement.

“Permits” is defined in Section 3.4.

“PME” is defined in Section 3.2.

“Policy Committee” is defined in Section 7.1.1.

“Proceeding” is defined in Section 3.4.

“Project” is the Carmen-Smith Hydroelectric Project.

“Proposed License Articles” is defined in Section 2.1.

“Section 10 Permit” is defined in Section 6.2.3.

“Section 401 Certification” is defined in Section 2.2.

“Section 404 Permit” is defined in Section 6.2.3.

“Services” are collectively NMFS and USFWS.

“Smith Dam” is Smith River Dam.

“Smith Reservoir” is Smith River Reservoir.

“SNG” is Settlement Negotiation Group.

“State Governmental Parties” are collectively ODEQ, ODFW and OPRD.

“Tribes” are collectively the CTGR, CTSI and CTWS.

“USC” is United State Code.

“USFWS” is the United States Fish and Wildlife Service.

“USDA Forest Service” is the United States Department of Agriculture Forest Service.

“Work Group” is defined in Section 4.2.

“Work Group Policy Committee” is defined in Section 7.1.2.

“WSRA” is the Wild and Scenic Rivers Act, 16 USC 1271 to 1287.

## **SECTION 1. PURPOSE AND EFFECT OF THIS AGREEMENT**

### **1.1 Purpose of Agreement.**

The Parties have entered into this Agreement for the purpose of resolving all issues that have or could have been raised by the Parties in connection with issuance of a FERC order or orders issuing a new final license authorizing the construction, operation and maintenance of Carmen-Smith (the “New License”), including protection, mitigation and enhancement measures, and in connection with EWEB’s implementation of the New License. Pursuant to the Parties’ various authorities under Sections 4(e), 10(a), 10(j), and 18 of the Federal Power Act (“FPA”), as well as other statutory and regulatory authorities, including the federal government’s tribal trust responsibilities, this Agreement establishes EWEB’s commitments for the protection, mitigation and enhancement of resources affected by Carmen-Smith under the New License. It also specifies procedures to be used among the Parties to ensure the implementation of the New License is consistent with this Agreement and with other legal and regulatory mandates. For these purposes, including offers of settlement under 18 CFR 385.602, the Parties agree that this Agreement is fair and reasonable and in the public interest. Except as specifically provided

below, each Governmental Party agrees that EWEB's performance of its commitments under this Agreement will be consistent with and is intended to fulfill EWEB's existing statutory and regulatory obligations as to that Governmental Party relating to the relicensing of Carmen-Smith.

### **1.2 Limitations.**

This Agreement establishes no principle or precedent with regard to any issue addressed in this Agreement, or with regard to any Party's participation, in any other pending or future licensing proceeding. Further, no Party to this Agreement shall be deemed to have approved, accepted, agreed to, or otherwise consented to any operation, management, valuation, or other principle underlying any of the matters covered by this Agreement, except as expressly provided in this Agreement. The Parties intend that this Agreement shall not be offered in evidence or cited as precedent by any Party to this Agreement in any judicial litigation, administrative proceeding, arbitration, or other adjudicative proceeding, except in a proceeding to establish the existence of, or to enforce, or to implement this Agreement or to define the action for which a governmental authorization is requested. Except as provided in the preceding sentence, by entering into this Agreement, no Party shall be deemed to have made any admission of fact or law that it did make or could have made in any administrative proceeding relating to the issuance of the New License. This Section 1.2 will survive any termination of this Agreement and will continue to apply to any Party that withdraws from this Agreement.

### **1.3 Representations Regarding Consistency and Compliance with Statutory Obligations.**

Except as specifically provided by this Agreement, the Governmental Parties represent that they believe the measures in this Agreement including Exhibits A through G satisfy the federal and state requirements of the Parties within the jurisdiction of FERC for the relicensing and continued construction, operation and maintenance of Carmen-Smith with respect to the

protection, mitigation, and enhancement of natural resources, water quality, recreation, and cultural and historic resources to be affected by Carmen-Smith. Except as specifically provided by this Agreement, the Governmental Parties also represent that they believe their statutory and other legal obligations and authorities are, or can be, met through implementation of this Agreement and development of any recommendations, conditions, prescriptions, determinations and certifications consistent with this Agreement that are submitted to FERC for inclusion in the New License. Nothing in this Agreement is intended or shall be construed to affect or limit any Governmental Party from complying with its obligations under applicable laws or from considering and responding to comments received in any environmental review or regulatory process related to Carmen-Smith. This Agreement will not predetermine the outcome of any environmental or administrative review or appeal process related to Carmen-Smith.

#### **1.4 Federal Water Rights.**

Nothing in this Agreement creates, expands, diminishes, impairs, predetermines, or otherwise affects any federal reserved or state-law-based water right that the United States may have in the McKenzie River or its tributaries. So long as EWEB faithfully implements the terms of this Agreement and the New License, the USDA Forest Service will not assert before FERC or in other proceedings that could affect the New License that EWEB's construction, operation and maintenance of Carmen-Smith under the New License should be modified to recognize any rights of the United States referenced in this Section 1.4.

#### **1.5 Reserved Tribal Rights.**

Nothing in this Agreement creates, expands, diminishes, impairs, predetermines, or otherwise affects any right of any of the Tribes reserved or established by or in any treaty, executive order, or statute. Further, nothing in this Agreement is intended to nor shall it create, expand, abrogate, diminish, or otherwise alter the responsibilities and obligations of the United States, including

FERC, toward the Tribes under any federal trust obligation, federal treaty, executive order or statute. The Project is not located upon Tribal reservation land.

### **1.6 Extent of Agency Authority.**

Nothing in this Agreement expands or diminishes any existing authority or regulatory jurisdiction under applicable federal or state law. The Parties recognize that each Governmental Party has separate and distinct statutory authorities and that no agency is deemed, by virtue of concurrent approvals, to be sharing its statutory authority with any other agency or to be conceding that the approval of any other agency is required for exercise of the first agency's authority.

## **SECTION 2. ACTIONS UPON EXECUTION OF THIS AGREEMENT**

### **2.1 FERC Filings by EWEB.**

Within 30 days after the Effective Date and subject to Section 2.5, EWEB will file with FERC an offer of settlement pursuant to FERC Rule 602 (18 CFR 385.602) consisting of an executed copy of this Agreement, including all Exhibits and Appendix to the Agreement, and an explanatory statement developed jointly by the Parties ("Joint Explanatory Statement"), (collectively, the "FERC Filing"). The offer of settlement will request that FERC incorporate the Proposed License Articles contained in Exhibit A to this Agreement ("Proposed License Articles") as enumerated articles of the New License. EWEB will use reasonable efforts to obtain a FERC order or orders approving this Agreement and issuing the New License consistent with this Agreement in a timely manner.

### **2.2 FERC and Other Filings by Governmental Parties.**

- a. The Governmental Parties agree with the Joint Explanatory Statement to be filed

with FERC in support of this Agreement. Subject to Section 2.5 below, the Governmental Parties agree that any of the below described actions will be consistent with this Agreement: (i) an individual Governmental Party's recommendations, conditions, prescriptions, and comments that may be filed with FERC pursuant to Sections 4(e), 10(a), 10(j), 18 and 33 of the FPA; (ii) any comments submitted by Governmental Parties (other than NMFS and USFWS for comments that are consistent with their biological opinions) to FERC related to the ESA Section 7 consultation process; (iii) any comments submitted by Governmental Parties to ODEQ or FERC related to the Federal Clean Water Act ("CWA") certification under Section 401 ("Section 401 Certification"), other than ODEQ comments that are consistent with its Section 401 Certification; (iv) any supplemental information, comments or responses to comments filed by the Governmental Parties with FERC in the context of this relicensing process; and (v) any supplemental information, comments or responses to comments filed by the Governmental Parties with FERC in the context of issuance of an annual license for Carmen-Smith subsequent to the existing license or subsequent to the New License. Subject to Section 2.5 below, the Governmental Parties further agree not to take any action Inconsistent with this Agreement and to use reasonable efforts to support, in all regulatory proceedings in which the Governmental Parties participate, regulatory actions consistent with this Agreement, including reasonable efforts to support obtaining a FERC order or orders approving this Agreement and issuing the New License consistent with this Agreement in a timely manner.

b. Any mandatory conditions or prescriptions or certifications filed with FERC pursuant to Sections 4(e) or 18 of the FPA, or Section 401 of the CWA, will not be considered to be Inconsistent with this Agreement if such conditions: (i) specify approval by a specific agency in place of "approval by the Fish Agencies" as the term "Fish Agency" is defined in this

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Agreement; and (ii) also provide as follows:

“The Licensee shall, prior to implementation or construction of any measure required pursuant to [conditioning agency’s] authority under Section [4(e) or 18 of the FPA, or 401 of the CWA, as applicable], provide evidence to [the conditioning agency] that it has received all required approvals and permits, including, but not limited to, approvals as set forth in the Settlement Agreement by “Fish Agencies” as defined in the Settlement Agreement.”

Notwithstanding an agency’s submission of mandatory conditions or prescriptions or certifications requiring approvals by a specific agency, instead of by the Fish Agencies, each Party commits to following the decision making and dispute resolution procedures in this Agreement.

c. Regarding any preliminary or other conditions and prescriptions filed with FERC pursuant to Sections 4(e) and 18 of the FPA, that are consistent with this Agreement, each Party waives any right it may have to an agency trial type hearing on issues of material fact under Sections 4(e) and 18 of the FPA and to propose alternatives under Section 33 of the FPA. The Parties will not support any trial-type hearing requested by any non-Party regarding any preliminary or other conditions and prescriptions filed with FERC that are consistent with this Agreement and will make reasonable efforts to support the Federal Governmental Parties, as appropriate, and may file a notice of intervention in support of the preliminary conditions and prescriptions challenged, if a trial-type hearing is requested by any non-Party.

### **2.3 FERC and Other Filings by Tribes.**

The Tribes agree with the Joint Explanatory Statement to be filed with FERC in support of this Agreement. Subject to Section 2.5 below and notwithstanding Section 1.5 above, the Tribes agree that any of the below described actions will be consistent with this Agreement: (i) any of the Tribe’s recommendations and comments that may be filed with FERC pursuant to Sections 4(e), 10(a), 18 and 33 of the FPA; (ii) any comments submitted by the Tribes to FERC related to

the ESA Section 7 consultation process; (iii) any comments submitted by the Tribes to ODEQ or FERC related to the Section 401 Certification; (iv) any supplemental information, comments or responses to comments filed by the Tribes with FERC in the context of this relicensing process; and (v) any supplemental information, comments or responses to comments filed by the Tribes with FERC in the context of issuance of an annual license for Carmen-Smith subsequent to the existing license or subsequent to the New License. Subject to Section 2.5 below and notwithstanding Section 1.5 above, the Tribes further agree not to take any action Inconsistent with this Agreement and to use reasonable efforts to support, in all relevant regulatory proceedings in which the Tribes participate, regulatory actions consistent with this Agreement, including reasonable efforts to support obtaining a FERC order or orders approving this Agreement and issuing the New License consistent with this Agreement in a timely manner.

#### **2.4 FERC and Other Filings by NGO Parties.**

The NGO Parties agree with the Joint Explanatory Statement to be filed with FERC in support of this Agreement. Subject to Section 2.5 below, NGO Parties agree that any of the below described actions will be consistent with this Agreement: (i) any of the NGO Party's recommendations and comments that may be filed with FERC pursuant to Sections 4(e), 10(a), 18 and 33 of the FPA; (ii) any comments submitted by the NGO Parties to FERC related to the ESA Section 7 consultation process; (iii) any comments submitted by the NGO Parties to ODEQ or FERC related to the Section 401 Certification; (iv) any supplemental information, comments or responses to comments filed by the NGO Parties with FERC in the context of this relicensing process; and (v) any supplemental information, comments or responses to comments filed by the NGO Parties with FERC in the context of issuance of an annual license for Carmen-Smith subsequent to the existing license or subsequent to the New License. Subject to Section 2.5 below, the NGO Parties further agree not to take any action Inconsistent with this Agreement and

to use reasonable efforts to support, in all regulatory proceedings in which the NGO Parties participate, regulatory actions consistent with this Agreement, including reasonable efforts to support obtaining a FERC order or orders approving this Agreement and issuing the New License consistent with this Agreement in a timely manner.

### **2.5 New Information.**

Notwithstanding Sections 2.1 through 2.4 and 6.3, and subject to the other Parties' rights under Section 7, a Party may file in any regulatory proceeding relating to issuance of the New License, including any annual license issued subsequent to the New License, recommendations, conditions, prescriptions, determinations and comments that may be Inconsistent with this Agreement; provided: (a) that any such recommendations, conditions, prescriptions, determinations and comments must be based on new material information that was not known and could not have reasonably been known on the Effective Date ("New Material Information"), and (b) prior to making the filing, the Party planning to file any such recommendations, conditions, prescriptions, determinations and comments has provided the other Parties with notice and, if reasonably possible, the opportunity to give notice to initiate and to complete dispute resolution under Section 7 of this Agreement.

### **2.6 Communications with FERC and Other Governmental Agencies.**

Subject to Sections 2.1 to 2.5, 6.3, and 7, as applicable, the Parties may make such comments and responses to comments as the Parties deem necessary to be filed with FERC, or any other agency in the context of the relicensing or Permit processes.

### **2.7 License Term.**

The Parties agree to recommend to FERC that the term of the New License be 50 years.

### **2.8 Additional Measures.**

Appendix A to this Agreement contains additional measures which will further the purposes of

this Agreement. The Parties do not intend the measures in Appendix A to be incorporated into the New License, however, if FERC does include the measures in Appendix A in the New License, that inclusion will not be Inconsistent with this Agreement. Upon issuance of the New License, EWEB and USDA Forest Service will implement Appendix A. If issuance of the New License is delayed, if the New License is stayed, if issuance of a Permit (as defined in Section 3.4 of this Agreement) necessary to carry out the measures in Appendix A is delayed, or if a necessary Permit is stayed, implementation of the measures in Appendix A will be delayed accordingly.

### **SECTION 3. IMPLEMENTATION OF NEW LICENSE**

#### **3.1 Duration of Agreement.**

This Agreement will take effect on the Effective Date and will remain in effect for the term of the New License and for any annual licenses issued subsequent thereto, unless this Agreement is sooner terminated as provided in Section 7.

#### **3.2 Proposed License Articles.**

The Parties agree that the commitments in this Agreement that are intended to be enforceable by FERC through the New License are set forth as Proposed License Articles in Exhibit A, incorporating the protection, mitigation, and enhancement (“PME”) measures of Exhibits B through G. Exhibits A through I and Appendix A are attached to and made a part of this Agreement. In the event of an Inconsistency between Exhibit A and Exhibits B through G, the terms of Exhibit A will control.

#### **3.3 Delay or Stay of New License.**

If issuance of the New License is delayed or if the New License or any part of the New License is stayed, the Parties agree that the related activities described in the Proposed License

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Articles will be delayed accordingly. Nothing contained in this Section 3.3 shall be construed to limit EWEB's right to implement activities described in the Proposed License Articles notwithstanding a delay or stay, provided that any such implementation will be consistent with this Agreement.

### **3.4 Permits.**

Upon issuance of the New License, EWEB will apply for and use reasonable efforts to obtain in a timely manner and in final form all necessary federal, state, regional, and local permits, licenses, authorizations, certifications, determinations, agreements and other governmental approvals for purposes of implementing this Agreement and the New License (collectively, "Permits"). Subject to Section 2.5, the applications for such Permits will be consistent with the terms of this Agreement. Pursuant to Sections 2.2, Section 2.3 and Section 2.4 of this Agreement, each Party, upon EWEB's request, will use reasonable efforts to support EWEB's applications for Permits and, subject to Section 2.5, will not file comments or recommend Permit conditions that are Inconsistent with this Agreement. EWEB will pay all fees required by law related to such Permits. Except as expressly provided in this Agreement, EWEB may, but will not be required to, implement a specific action (and any action that cannot be implemented until the specific action is implemented) required under this Agreement or the New License until all applicable Permits required for the specific action are obtained, are final and are no longer subject to appeal, provided that any Party may initiate dispute resolution regarding any delay it considers Inconsistent with this Agreement. EWEB may, but will be under no obligation to, apply for a Permit to implement any provision of the New License that has been stayed by FERC or court order. If a proceeding challenging any Permit required for a specific action has been commenced or the Permit has been delayed or stayed ("Proceeding"), EWEB may, but will be under no obligation to, implement the specific action (and any action that cannot be

implemented until the specific action is implemented) under this Agreement until any such Proceeding is terminated. The Parties will not oppose a request to FERC by EWEB requesting a reasonable extension of any deadline imposed by the New License to implement such specific action (and any action that cannot be implemented until the specific action is implemented). After conferring with and obtaining Consensus of the Parties, EWEB may include a statement in the request that the Parties do not oppose the request. In the event any Proceeding is commenced, the Parties will confer to evaluate the effect of such Proceeding on implementation of this Agreement. Nothing contained in this Section 3.4 shall be construed to limit EWEB's right to apply for a Permit before issuance of the New License, provided that any such application will be consistent with this Agreement.

## **SECTION 4. COORDINATION AND DECISION MAKING**

### **4.1 Purpose and Function.**

The Parties agree to cooperate in implementing this Agreement and in EWEB's implementation of the New License. In addition to any periodic reporting obligations included in or imposed by FERC in the New License, EWEB will provide the Parties who are members of the relevant work group or work groups established under Section 4.2 with copies of all public filings made with FERC by EWEB in connection with implementation of the New License.

### **4.2 Work Groups.**

EWEB will convene the initial meeting of the following work groups (each a "Work Group") as provided in the applicable Exhibit(s): the Fisheries Work Group, Vegetation Management Plan Work Group, Wildlife Management Plan Work Group, Historic Properties Management Plan Work Group, Recreation and Aesthetics Management Plan Work Group, Roads, Waste Areas,

and Staging Areas Management Plan Work Group, Water Quality Management Plan Work Group, Transmission Line Management Plan Work Group, and Fire Response and Suppression Coordination Plan Work Group. EWEB may, with Consensus of the Parties, combine for a period of time one or more Work Groups into a larger Work Group. EWEB will coordinate the Work Groups in cooperation with the other Parties.

#### **4.2.1 Consensus Decision Making.**

The composition of each Work Group is specified in Exhibits B through G. Each Party will designate a representative and an alternate to each Work Group in which it participates. Thereafter, each Work Group will operate as described in this Agreement and the applicable Exhibit(s) to this Agreement. Each Work Group will conduct its business by Consensus of all representatives of the Parties participating in a particular Work Group. At the Consensus request of a Work Group, EWEB will fund and make available a mutually agreed-upon third party to assist the Work Group in reaching its decisions. Decisions of a Work Group will not limit or abrogate the approval authority of individual Parties specifically identified in this Agreement or in the New License as having approval authority regarding specific measures required by this Agreement, the New License, Permits, or Section 401 Certifications. The decisions and operation of the Work Group are subject to the dispute resolution provisions of Section 7 of this Agreement. A Party may at any time designate a different representative to a Work Group by giving notice as provided in Section 8.12 of this Agreement.

#### **4.2.2 Consultation Process.**

a. Unless a different time period is established under a provision of the New License or a plan approved in or filed pursuant to the New License or as directed by FERC, EWEB will, where consultation with a Work Group is required, allow a minimum of 30 days, which EWEB may reasonably extend upon request of a member of the Work Group if needed to facilitate

consultation, for the Work Group members to comment and to make recommendations before EWEB files any study, operating or implementation plan, report, or facility design with FERC. Where consultation regarding a study, operating or implementation plan, report, or facility design is required, EWEB will, where specified in a plan approved in or filed pursuant to the New License, consult with the Work Group in the development of the draft study, operating or implementation plan, report, or facility design. EWEB will provide the Work Group with a copy of the draft study, operating or implementation plan, report, or facility design and all data supporting that draft study, operating or implementation plan, report, or facility design. During the consultation period, EWEB will convene at least one meeting of such Work Group to discuss the draft study, operating or implementation plan, report, or facility design and reach Consensus and if Consensus cannot be reached proceed as described below. EWEB will provide to the Work Group members a final version of the study, operating or implementation plan, report, or facility design at the time that EWEB provides the final version of the document for approval pursuant to Section 4.2.3 below. If a member of a Work Group does not respond to a request for consultation within 30 days, or as such period may have been extended, that member is not considered for purposes of obtaining Consensus. If no members of the Work Group respond to the request for consultation within 30 days, or as such period may have been extended, EWEB may file the study, operating or implementation plan, report, or facility design with FERC.

b. When consultation is required under this Agreement and Consensus is not reached by the Work Group prior to the date EWEB is required to make a submission to FERC, EWEB will make the submission to FERC according to the schedule provided in the New License or a plan approved in or filed pursuant to the New License or as directed by FERC, and will describe to FERC how EWEB's submission accommodates any comments and recommendations of the

members of the Work Group. If EWEB's submission does not adopt a recommendation, the submission will include EWEB's reasons based on Project-specific information. EWEB will provide FERC with a copy of any comments and recommendations provided by the members of the Work Group during the consultation. Any member of the Work Group may seek to resolve the consultation disagreement in accordance with the dispute resolution process in Section 7. The members of the Work Group may submit their own comments to FERC. If applicable, once the dispute resolution process is completed and resolves the dispute, EWEB will file the resulting study, operating or implementation plan, report or facility design with FERC.

#### **4.2.3 Agency Approval Process.**

a. Where consultation with a Work Group and approval by one or more Governmental Parties is required by the New License, EWEB's submission of a study, operating or implementation plan, report, or facility design to the Work Group will also constitute submission to the appropriate Governmental Party for approval prior to filing with FERC. When approval of a Governmental Party is required, EWEB will provide to the Governmental Party a final version of the study, operating or implementation plan, report, or facility design on which approval is sought. Unless a different time period is established pursuant to the New License or a plan approved in or filed pursuant to the New License or is directed by FERC, EWEB will, where approval by a Governmental Party is required, allow a minimum of 30 days for the Governmental Party to provide its approval before EWEB files any study, operating or implementation plan, report, or facility design with FERC. If Consensus is achieved by the Work Group such approval will be deemed to have been obtained. Each Governmental Party with approval authority will document its approval in writing to EWEB, which approval or approvals EWEB will include in any filing with FERC. Unless otherwise directed by FERC or required by

the New License or a plan approved in or filed pursuant to the New License, EWEB will, if requested by any Governmental Party with approval authority, grant a 30-day extension for the completion of consultation. Such Governmental Party or Governmental Parties will endeavor to make approval decisions during consultation wherever possible. If a Governmental Party does not respond to a request for approval within 30 days, or as such period may have been extended, the obligation for obtaining approval from that Governmental Party will be deemed to have satisfied for purposes of meeting the requirements of the New License and this Agreement. If no Governmental Parties with approval authority respond to the request for approval within 30 days, or as such period may have been extended, EWEB may file the study, operating or implementation plan, report, or facility design with FERC.

b. When approval of a Governmental Party is required under this Agreement and approval has not been provided, EWEB or the Governmental Party may seek to resolve the lack of approval in accordance with the dispute resolution process in Section 7 of this Agreement. If the dispute has not been resolved after the dispute resolution process outlined in Sections 7.1, 7.1.1 and 7.1.2 of this Agreement or approval has not been provided prior to the date that EWEB is required to make a submission to FERC, EWEB will make the submission to FERC according to the schedule provided in the New License or a plan approved in or filed pursuant to the New License or as directed by FERC, and will describe to FERC why approval was not provided. In such instance, the Governmental Party whose approval was required may submit its own explanation as to why approval was not provided. EWEB or the Governmental Party may seek to resolve the lack of approval in accordance with the dispute resolution process in Section 7. If applicable, once the dispute resolution process is completed and resolves the dispute, EWEB will file the resulting study, operating or implementation plan, report or facility design with FERC. If

resolution was not achieved through dispute resolution, then the Governmental Party may submit its own explanation as to why resolution was not achieved.

#### **4.3 Expedited Consultation and Agency Approval Process**

When consultation under Section 4.2.2 above or Governmental Party approval under Section 4.2.3 above is required and the time provided for consultation in Section 4.2.2 or approval in Section 4.2.3 is not reasonably available because EWEB must implement an action under the New License within a shorter period of time due to extraordinary circumstances beyond EWEB's reasonable control, EWEB will provide notice to the Work Group and Governmental Party, as applicable, that: (a) an expedited consultation and approval process will occur within the time available, (b) the location, date and time for the process, (c) the subject for the process, and (d) why EWEB must take action within the shorter period of time. EWEB will complete as much of the consultation and approval process as can occur in the time reasonably available before EWEB must implement the action. If consultation is not completed or an approval is not obtained within the time available, EWEB may implement the action to the extent allowed by law, but the Parties may still require that the consultation process in Section 4.2.2 above and the approval process in Section 4.2.3 above, as applicable, be completed after EWEB has implemented the action.

#### **4.4 Inspection and Notice.**

EWEB will permit the Parties, at any reasonable time, access to, through, and across Project lands and works for the purpose of inspecting Project facilities and Project records pertaining to the operation of the Project and implementation of this Agreement and the New License. EWEB will allow such inspections only after the Party requesting the inspection provides EWEB reasonable notice of such inspections and agrees to follow EWEB's applicable safety and

security procedures when engaged in such inspections.

## **SECTION 5. COVENANTS**

### **5.1 Public Benefit from Relicensing of the Project.**

As further described in the Joint Explanatory Statement to be filed with FERC, the Parties agree that relicensing of Carmen-Smith in accordance with this Agreement (including the schedules and timelines in the Exhibits to this Agreement) serves the public interest and achieves a fair and reasonable resolution of issues posed by relicensing Carmen-Smith within the meaning of FERC Rule 602 governing offers of settlement.

### **5.2 Coordination of Information.**

The Parties agree to use reasonable efforts to coordinate information provided to public agencies and to the public regarding this Agreement, the FERC Filing, the New License, Permits, and Section 401 Certifications.

### **5.3 Settlement Negotiations Confidential.**

The Parties entered into the settlement negotiations and discussions leading to this Agreement with the agreement that, to the extent allowed by law, all discussions relating to the development of this Agreement were and would continue to be confidential. Positions advanced or discussed by the Parties during negotiation of this Agreement will not be used by any Party in any manner, including admission into evidence, in connection with this Agreement, or in any other proceedings related to the subject matter of this Agreement, except to the extent required by law. This Section 5.3 will survive any termination of this Agreement and will apply to any Party that withdraws from this Agreement.

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**SECTION 6. COMMITMENTS OF GOVERNMENTAL PARTIES UNDER RELATED STATUTORY AUTHORITIES****6.1 General Provisions.****6.1.1 Governmental Parties' Authority under the Federal Power Act.**

Except as otherwise specifically provided in this Agreement, the Governmental Parties intend that any recommendations, conditions, prescriptions, determinations, comments and other documents submitted to FERC by the Governmental Parties in connection with the Carmen-Smith relicensing process and issuance of the New License will be consistent with this Agreement. Any Inconsistency will be resolved in accordance with Section 7 of this Agreement.

**6.1.2 Permits Under Other Statutory Authorities.**

If EWEB is required to obtain a Permit that is not specifically described in this Section 6 from a Governmental Party, such Governmental Party will, subject to Section 1.3 of this Agreement, use reasonable efforts to exercise its authority in a manner consistent with the intent, purpose and terms of this Agreement.

**6.1.3 Governmental Parties' Reservations of Authority.**

a. Each Governmental Party reserves its authority pursuant to the FPA in the event (i) this Agreement is not filed with FERC, (ii) the Governmental Party withdraws from this Agreement, (iii) EWEB fails to implement any material provision of this Agreement, or (iv) this Agreement is terminated for any reason whatsoever. In each instance, the Parties' rights will be governed by the applicable provisions of Section 7 of this Agreement.

b. This Agreement will not limit the ability of any Governmental Party to assert its authority under any statute other than the FPA in the event that (i) this Agreement is not filed with FERC, (ii) the Governmental Party withdraws from this Agreement, (iii) EWEB fails to implement any material provision of this Agreement, or (iv) this Agreement is terminated for any

reason whatsoever. In each instance, the Parties' rights will be governed by the applicable provisions of Section 7 of this Agreement.

c. In the event that any Governmental Party includes a reservation of authority under any statute in the modified or final conditions, prescriptions or recommendations that it submits to FERC, and the reservation of authority is included in the New License, the inclusion of such reservation will not be considered to be Inconsistent with this Agreement, provided that in exercising such reserved authority, any Governmental Party will comply with applicable requirements of Section 33 of the FPA and act in a manner consistent with this Agreement; and provided further that each Party will be deemed to have reserved whatever rights the Party possesses under Sections 4(e), 18, and 33 of the FPA including the implementing regulations in 7 CFR Part 1, 43 CFR Part 45 and 50 CFR Part 221 to (i) propose alternatives to the exercise of such reserved authority; (ii) obtain an agency trial-type hearing, on any disputed issue of material fact with respect to such exercise of reserved authority; and (iii) otherwise contest the exercise of such reserved authority at any time in the future. In addition to EWEB's rights regarding Sections 4(e), 18 and 33 of the FPA, EWEB reserves all rights concerning any reservation of authority, including the right to challenge the reservation of any such authority and the exercise of any reserved authority.

#### **6.1.4 FERC Reservation of Authority.**

FERC's reservation in the New License of the authority to modify plans filed by EWEB or to require EWEB to make a filing despite the failure or inability to complete a consultation, approval or dispute resolution procedure as provided in this Agreement shall not be considered to be Inconsistent with this Agreement.

### **6.2 Endangered Species Act.**

#### **6.2.1 Applicable FERC Procedures.**

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As required by Section 7 of the ESA, FERC may not issue the New License until it has completed consultation with the Services with respect to threatened and endangered species and designated critical habitat that would be affected by issuance of a New License. If FERC adopts the provisions of this Agreement as the federal action for which consultation is performed under the ESA, such federal action will be the basis for a Section 7 consultation between FERC and NMFS, and FERC and USFWS, and any biological opinion relating to relicensing Carmen-Smith (the “Biological Opinion”) will address and evaluate such provisions. EWEB will request that it be designated as FERC’s nonfederal representative for the purpose of preparing a biological evaluation or biological assessment, which will likely serve as FERC’s draft biological assessment. As of the Effective Date of this Agreement, ESA Section 7 consultation has not been completed.

#### **6.2.2 FERC ESA Consultation.**

a. EWEB and the Services have worked collaboratively to develop provisions in this Agreement to address specifically the needs of ESA listed species and designated critical habitat. By signing this Agreement, the Services do not formally bind themselves to make any specific recommendations or take any particular action with respect to ESA compliance.

b. The Services anticipate that the provisions in this Agreement will be adequate to avoid jeopardy to the continued existence of any federally listed threatened or endangered species, to avoid the destruction or adverse modification of any designated critical habitat and to minimize any incidental take occurring as a result of implementation of this Agreement and the New License for species presently listed as threatened or endangered and habitat presently designated as critical habitat.

c. Nothing in this Agreement is in any way intended to predetermine the outcome of any future ESA Section 7 consultation, and the Services expressly reserve the right, consistent  
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with federal law, to take such future actions as they may deem necessary to meet their obligations under the ESA with respect to consultation with FERC. If during consultation with FERC pursuant to Section 7 of the ESA, NMFS or USFWS includes any reasonable and prudent alternative in the biological opinion or any reasonable and prudent measure or term or condition in the incidental take statement that is Inconsistent with the terms of this Agreement, the provisions of Section 7 of this Agreement will apply. Nothing in this Agreement will limit or waive the authority of NMFS or USFWS to take whatever action each agency may deem necessary if the New License fails to satisfy fully the requirements of ESA Section 7, or if the New License fails to adopt as license conditions the terms and conditions contained in the Biological Opinions issued by the Services, provided that if such NMFS or USFWS action is Inconsistent with this Agreement, the Parties will address any such Inconsistency in accordance with Section 7 of this Agreement, as applicable.

### **6.2.3 Subsequent Section 404 Permit Applications.**

The Services will consider the effects of dredge and fill activities during their consultation with FERC to the extent these activities are included in the federal action for which consultation was performed pursuant to Section 7 of the ESA regarding the issuance of the New License. If consultation is required with the United States Army Corps of Engineers (“Corps”) regarding issuance of any permit under Section 404 of the CWA (“Section 404 Permit”) or Section 10 of the Rivers and Harbors Act (“Section 10 Permit”), the Services anticipate, subject to Section 6.2.2, that the analysis of the impacts of the Section 404 Permit and Section 10 Permit issuance will be consistent with the analysis of the federal action for which ESA consultation was performed in issuing the New License, unless the Corps proposes to issue a Section 404 Permit or Section 10 Permit that is materially different than the federal action or NMFS or USFWS becomes aware of New Material Information that is materially different than the information

contained in the Biological Opinions provided to FERC. The Services expressly reserve the right, consistent with federal law, to take such future actions as they may deem necessary to meet their obligations under the ESA with respect to consultation with the Corps.

### **6.3 Clean Water Act.**

Under Section 401 of the CWA, FERC may not issue a New License until a Section 401 Certification has been issued by the state agency responsible for certification, or the certification requirement is deemed waived. ODEQ is the entity in the State of Oregon statutorily authorized to issue Section 401 certifications under the CWA and state water quality laws. ODEQ may issue a Section 401 Certification if it determines that the relicensing of Carmen-Smith will comply with state water quality standards, provide for compliance with total maximum daily load allocations, protect beneficial uses, and be consistent with other applicable requirements of state law within the meaning of 33 United States Code (“USC”) 1341(d) (collectively, “CWA Requirements”). Based upon this Agreement, ODEQ anticipates that relicensing of Carmen-Smith consistent with this Agreement will satisfy the CWA Requirements. However, ODEQ does not intend to predetermine the outcome of its evaluation of EWEB’s Section 401 Certification application, and reserves its right to take all actions necessary to comply with the CWA and Oregon law.

#### **6.3.1 Section 401 Certification.**

a. If ODEQ preliminarily determines that the relicensing of the Project consistent with this Agreement will satisfy the CWA Requirements, ODEQ will provide public notice and opportunity to comment on a proposed Section 401 Certification decision consistent with this Agreement. With regard to any CWA Requirement issue, each Party will use reasonable efforts to support issuance of a Section 401 Certification consistent with this Agreement and, subject to Section 2.5 and ODEQ’s duties in Section 6.3 above, will not file comments or recommend

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conditions that are Inconsistent with this Agreement.

b. If ODEQ issues a proposed Section 401 Certification that a Party believes is Inconsistent with this Agreement, the Parties will, within 20 days of issuance of public notice of the proposed Section 401 Certification, meet to determine if the proposed Section 401 Certification is Inconsistent with this Agreement. If, after such meeting, any Party determines that the proposed Section 401 Certification is Inconsistent with this Agreement, the Parties will address any such Inconsistency in accordance with Section 7 of this Agreement, as applicable. Notwithstanding any invocation of dispute resolution among the Parties, ODEQ reserves the right, as a result of consideration of public comment and any New Material Information, to issue a final Section 401 Certification decision Inconsistent with this Agreement. ODEQ will not issue the final Section 401 Certification decision until the Parties have addressed any Inconsistency between the proposed Section 401 Certification and this Agreement in accordance with Section 7, unless (i) issuance of the certification decision before completion of any dispute resolution invoked pursuant to Section 7 is necessary to avoid certification being deemed waived under the CWA, (ii) EWEB has not withdrawn the then-pending certification application, and (iii) ODEQ has determined that it cannot deny without prejudice, EWEB's then-pending certification application. If ODEQ does issue a final Section 401 Certification decision that is Inconsistent with this Agreement, the Parties will address any such Inconsistency in accordance with Section 7 of this Agreement.

c. At any time prior to issuance of a final Section 401 Certification, Parties may submit to FERC copies of any comments, responses to comments, or supplemental information that they file with ODEQ in connection with EWEB's application for a Section 401 Certification.

### **6.3.2 Section 401 Certification for Other Federal Permits.**

Upon applying for a federal Permit or Permits, other than the relicensing by FERC, for activities  
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required by this Agreement or the New License that may result in a discharge to navigable waters of the United States, EWEB will submit to ODEQ an application for Section 401 certification, if direct application to ODEQ is required, or provide ODEQ written notice of its application for the federal permit and of any proposed changes in activities since the date of issuance of the Section 401 Certification pursuant to Section 6.3.1. ODEQ will evaluate and issue a Section 401 Certification determination for the federal Permit as expeditiously as possible, but pursuant to timelines and public involvement applicable to or commensurate with the activity being permitted. Subject to Section 2.5, ODEQ anticipates that its analysis of the activity proposed to be authorized by the federal Permit will not differ from the Section 401 Certification issued pursuant to Section 6.3.1 unless the activity proposed to be authorized by the federal Permit is materially different than the activity authorized by the New License. If ODEQ issues a Section 401 Certification determination that is Inconsistent with this Agreement, the Parties will address any such Inconsistency in accordance with Section 7 of this Agreement, as applicable.

#### **6.4 Magnuson-Stevens Fishery Conservation and Management Act.**

##### **6.4.1 Applicable Procedures.**

As required by Section 305 of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”), FERC must consult with NMFS if FERC’s action in issuing the New License may affect essential fish habitat (“EFH”). The relicensing of Carmen-Smith pursuant to this Agreement will form the action for which the Magnuson-Stevens Act consultation will be performed. FERC must provide an EFH assessment to NMFS to begin EFH consultation. NMFS will provide FERC with recommended EFH conservation measures to conserve and to enhance EFH. FERC must then respond within 30 days, including a description of the measures FERC will require EWEB to take to avoid or to mitigate the effects on EFH of

the action for which consultation is being performed. If FERC does not adopt the recommendations, it must provide a detailed explanation for its decision. NMFS will conduct the EFH consultation along with the ESA consultation in the interest of streamlining the consultation.

#### **6.4.2 Consultation.**

EWEB and NMFS have worked collaboratively to develop provisions in this Agreement which would conserve EFH. By signing this Agreement, NMFS does not formally bind itself to make any specific recommendations or take any particular action with respect to Magnuson-Stevens Act EFH consultation. NMFS anticipates that implementation of this Agreement will be adequate to conserve and to enhance EFH. NMFS reserves the right, consistent with federal law, to take such future actions as it may deem necessary to meet its obligations under the Magnuson-Stevens Act. If during consultation with FERC pursuant to Section 305 of the Magnuson-Stevens Act, NMFS recommends any EFH conservation measure that is Inconsistent with this Agreement, the provisions of Section 7 of this Agreement, as applicable, will apply. Nothing in this Agreement will limit or waive the authority of NMFS to take whatever action it may deem necessary if FERC fails to adopt as New License conditions the EFH recommendations attached to the Biological Opinion issued by NMFS; provided that, if such NMFS' action is Inconsistent with this Agreement, the Parties will address any such inconsistency in accordance with Section 7 of this Agreement, as applicable.

#### **6.5 State Fish Passage Law**

Without admission by EWEB, ODFW has determined that the measures required by this Agreement include fish passage within the meaning of ORS 509.585 at the Trail Bridge Dam and Carmen Diversion Dam approved by ODFW under Oregon Administrative Rules (“OAR”) 635-412-0020, and alternative mitigation in lieu of fish passage at the Smith Dam approved by the

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Oregon Fish and Wildlife Commission under OAR 635-412-0025. In the event the criteria are not met for construction of a ladder at the Carmen Diversion Dam as described in Section 4.3.1.2.5) of the Aquatics Management Plan, Exhibit B to this Agreement, the Carmen Diversion Dam is exempted from fish passage requirements in accordance with OAR 635-412-0025, which exemption is effective upon ODFW's approval that criteria are not met. Solely for purposes of Oregon law including the ODFW determinations regarding the application of Oregon law in the previous sentences, EWEB and ODFW reserve their respective rights regarding fish passage at Trail Bridge Dam, Carmen Diversion Dam and Smith Dam, including but not limited to rights under the agreement referenced in Recital I of this Agreement.

#### **6.6 Wild and Scenic Rivers Act.**

Congress designated certain segments of the McKenzie River in the vicinity of the Project as a recreational wild and scenic river under the Wild and Scenic Rivers Act ("WSRA"). The Project predates this designation. The Project, as authorized under the New License, must comply with the WSRA. The USDA Forest Service will make a determination under Section 7(a) of the WSRA whether the Project, as it will be authorized under the New License, will "invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values" present in the segments of the river at the date of their designation. The USDA Forest Service anticipates that this Agreement and the Final Terms and Conditions under Section 4(e) of the FPA, developed consistently with this Agreement, will allow a determination to be made that the Project, as it will be authorized under the New License, does not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values in any designated segment. By signing this agreement, the USDA Forest Service does not formally bind itself to make any specific determination. The USDA Forest Service expressly reserves the right, consistent with federal law, to take such future actions as it may deem necessary to meet its obligations under the

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WSRA. The USDA Forest Service will provide draft and final section 7(a) determinations in accordance with FERC's licensing process. If the USDA Forest Service determination under Section 7(a) is Inconsistent with this Agreement, including a finding that the Project, as it will be authorized under the New License, will invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values in any designated segment, the Parties will address any such Inconsistency in accordance with Section 7 of this Agreement.

## **SECTION 7. DISPUTE RESOLUTION, WITHDRAWAL, TERMINATION AND REMEDIES**

### **7.1 Dispute Resolution.**

All disputes among the Parties regarding this Agreement or the commitments of one or more Parties under this Agreement will, at the request of any Party, be subject to dispute resolution under this Section 7, except where dispute resolution is expressly not authorized by another provision of this Agreement. The Parties intend that disputes under this Agreement be resolved as informally and expeditiously as possible. Each Party having an interest in a dispute will cooperate in good faith promptly to schedule, to attend, and to participate in each dispute resolution initiated under this Agreement. Each Party will implement promptly any final agreement reached through dispute resolution, consistent with the Party's applicable statutory and regulatory responsibilities. Nothing in this Section 7 is intended or will be construed to affect or to limit the authority of FERC, the Governmental Parties or any other agency or any court with jurisdiction over Carmen-Smith to resolve a dispute brought before it in accordance with its own authorities and procedures, or to alter the statute of limitations or other requirements for administrative or judicial review or appeal of any action.

#### **7.1.1 Dispute Resolution Procedures.**

Except as provided in Section 7.1.2, any dispute among the Parties will first be addressed among the Parties' representatives designated pursuant to Section 8.12, and thereafter, if necessary, be referred to the Policy Committee. Each Party's representative to the Policy Committee will be an upper-level management person having authority to bind the Party and will be the person designated in Exhibit H unless and until the Party has provided notice of a different representative as provided in Section 8.12. To initiate dispute resolution, a Party claiming a dispute will give notice of the dispute to the other Parties within 30 days of such Party's knowledge of the act, event, or omission that gives rise to the dispute, unless this Agreement provides otherwise. Within 20 days after such notice of a dispute, EWEB will convene at least one meeting of the Parties to attempt to resolve the dispute. If the dispute is not resolved within 15 days after the meeting, a Party may notify the other Parties that resolution of the dispute has failed, in which case EWEB will refer the dispute to the Policy Committee acting as a dispute resolution body. Within 20 days after referral of a dispute, EWEB will schedule a meeting or conference call of the Policy Committee. If the Policy Committee is unable to resolve the dispute, the Policy Committee may, by unanimous agreement of the Policy Committee members participating in the dispute resolution process, attempt to resolve the dispute using a neutral mediator selected by the participating Policy Committee members. The mediator will mediate the dispute in accordance with instructions and the schedule provided to the mediator by the Policy Committee. Any of these time periods may be extended or shortened by agreement of the Parties, or as necessary to conform to the authority and procedure of an agency or court with jurisdiction over the dispute. Unless otherwise agreed among the Parties, each Party will bear its costs for its own participation in a dispute resolution process. Pending resolution of any dispute under this Section 7, and subject to the authority of FERC or other agency with jurisdiction to

order otherwise and the Parties' reservation of remedies, EWEB may continue operating Carmen-Smith in the manner of its operation immediately before the time when the dispute arose.

### **7.1.2 Resolution of Disputes for Work Groups**

Any dispute among the members of a Work Group will first be addressed at the level of the Work Group, and thereafter, if necessary, be referred to the members of the Policy Committee that represent the members of the Work Group. To initiate dispute resolution, a Work Group member claiming a dispute will give notice of the dispute to the other Work Group members within 30 days of such member's knowledge of the act, event, or omission that gives rise to the dispute, unless this Agreement provides otherwise. Within 20 days after such notice of a dispute, EWEB will convene at least one meeting of the Work Group to attempt to resolve the dispute. If the dispute is not resolved within 15 days after the meeting, a Work Group member may notify the other Work Group members that resolution of the dispute has failed, in which case EWEB will refer the dispute to the Policy Committee members representing members of the Work Group, and those Policy Committee members will act as a dispute resolution body ("Work Group Policy Committee"). EWEB will also provide notice of the referral to those Policy Committee members who do not represent members of the Work Group who participated in the dispute resolution. Within 20 days after referral of a dispute, EWEB will schedule a meeting or conference call of the Work Group Policy Committee members. If the Work Group Policy Committee members are unable to resolve the dispute, the Work Group Policy Committee members may, by unanimous agreement of the Work Group Policy Committee members participating in the dispute resolution process, attempt to resolve the dispute using a neutral mediator selected by the participating Work Group Policy Committee members. The mediator will mediate the dispute in accordance with instructions and the schedule provided to the

mediator by the Work Group Policy Committee members. Any of these time periods may be extended or shortened by agreement of the Work Group members, or as necessary to conform to the authority and procedure of an agency or court with jurisdiction over the dispute. Unless otherwise agreed among the Work Group members, each Work Group member will bear its costs for its own participation in a dispute resolution process. Pending resolution of any dispute under this Section 7, and subject to the authority of FERC or other agency with jurisdiction to order otherwise and the Work Group members' reservation of remedies, EWEB may continue operating Carmen-Smith in the manner of its operation immediately before the time when the dispute arose.

#### **7.1.3 Enforcement of Agreement After Dispute Resolution.**

To the extent allowed under this Agreement, if dispute resolution under this Section 7 does not resolve a dispute, any Party may seek specific performance of this Agreement by any other Party at FERC or in a court of competent jurisdiction, or, to the extent allowed by applicable law, may seek other remedies.

#### **7.1.4 FERC Filings After Disputes.**

If the Parties are unable to resolve a dispute as provided in this Section 7, the matter in dispute may be filed with FERC. If the matter in dispute is not resolved by the Work Group, or by the Work Group Policy Committee after completion of dispute resolution, and if EWEB does not adopt a recommendation or receive a required approval, EWEB's filing with FERC shall include EWEB's reasons, based on project-specific information, for not adopting such recommendation or for seeking FERC approval without such Governmental Party approval. Any other Party may, without further notice to the other Parties, make such filing with and seek such relief from FERC as it, in its sole discretion, deems appropriate under the circumstances, and may seek a modification of any schedule affected by the matter in dispute. Any Party aggrieved by FERC's

action may (a) seek rehearing and judicial appeal, (b) withdraw from the Agreement; or (c) exercise any remedy available under applicable law (except specific performance); provided, each other Party reserves all claims and defenses regarding any of these actions. If any Party aggrieved by FERC's action seeks rehearing or rehearing and judicial appeal, the aggrieved Party will not withdraw from the Agreement or exercise any remedy available under applicable law until the rehearing or rehearing and appeal is concluded.

## **7.2 Resolution of Disputes Before Issuance of New License.**

If, after the Effective Date of this Agreement, any of the following events occurs before FERC issues the New License, the Parties will seek to resolve any disputes regarding such events as provided in this Section 7.2.

### **7.2.1 Actions Before Making FERC Filing.**

If any Party other than EWEB takes an action Inconsistent with this Agreement before EWEB makes the FERC Filing pursuant to Section 2.1, EWEB may, in its sole discretion after undertaking dispute resolution under Section 7 if the dispute resolution process did not resolve the dispute, determine not to make the FERC Filing, in which case this Agreement terminates. If EWEB takes an action Inconsistent with this Agreement before EWEB makes the FERC Filing, any other Party may, in its sole discretion after undertaking dispute resolution under Section 7 withdraw from this Agreement if the dispute resolution process did not resolve the dispute.

### **7.2.2 Actions After Making FERC Filing.**

If, after EWEB makes the FERC Filing, any Section 401 Certification, ESA Biological Opinion and incidental take statement, WSRA Section 7(a) determination, or other Permit is denied or issued with any provision, reasonable and prudent alternative, reasonable and prudent measure, or term or condition Inconsistent with this Agreement, or if any Party takes an action Inconsistent with this Agreement (including submitting any Inconsistent recommendation,

condition, prescription, or comment in any proceeding related to issuance of the New License), then any Party may initiate dispute resolution under Section 7. Any other Parties may participate in the dispute resolution, and those Parties may withdraw from the Agreement if dispute resolution does not resolve the dispute. In addition to the dispute resolution process, a Party may pursue rehearing, administrative or judicial petition or appeal, or other formal agency adjudication (collectively, “Appeal”) of such action as provided in Section 7.4 below.

### **7.2.3 No Party Initiates Dispute Resolution.**

If none of the Parties initiates dispute resolution as provided in Section 7 of this Agreement after a final, non-appealable denial or issuance of any Section 401 Certification, ESA Biological Opinion and incidental take statement, or other Permit that includes any provision, reasonable and prudent alternative, reasonable and prudent measure, or term and condition Inconsistent with this Agreement, this Agreement shall be deemed modified to reflect or to include any such provision, reasonable and prudent alternative, reasonable and prudent measure, or term or condition.

## **7.3 Resolution of Disputes After New License Issues.**

### **7.3.1 New License Inconsistent with Agreement.**

If the New License, either as initially issued by FERC or following conclusion of any Appeal, is Inconsistent with this Agreement, this Agreement shall be deemed modified to conform to the Inconsistency unless a Party provides notice to the other Parties that it objects to the Inconsistency and initiates dispute resolution as provided in Section 7 of this Agreement within 20 days after the date of FERC issuance of the New License or conclusion of any Appeals, as appropriate. The disputing Party or Parties may, in addition, pursue an Appeal of the New License. If the New License, as initially approved by FERC and following conclusion of any Appeals, remains Inconsistent with this Agreement, any Party who participated in dispute

resolution may: (a) withdraw from this Agreement; or (b) pursue any remedy available under applicable law (except specific performance); provided, each other Party reserves all claims and defenses regarding any of these actions, including but not limited to the affirmative defense that the New License conflicts with or prevents implementation of the commitments made in this Agreement.

### **7.3.2 Reopeners and Modifications.**

During the term of the New License and any annual license issued subsequent to the New License, the Parties may not seek to modify or to add to the obligations of EWEB under the New License or any Permit, except: (a) as expressly provided for otherwise in this Agreement; (b) as required by any statute or regulation enacted or amended after issuance of the New License; or (c) if New Material Information reasonably demonstrates that the Agreement does not continue to satisfy EWEB's material obligations under the laws addressed by this Agreement, or any subsequently enacted or amended statute or regulation. Prior to a Party seeking to modify, to amend or to add to the obligations of EWEB under the New License or any Permit, the Party will provide each other Party with at least 90 days' notice about the Party's position. A Party will not be required to comply with this 90-day notice provision, but will provide such notice as is reasonable under the circumstances, if it reasonably believes an emergency exists or if providing such notice would prevent it from meeting its responsibilities under any statute or regulation. If obligations under the New License or any Permit are modified, amended or added to in a manner Inconsistent with this Agreement, any other Party may provide notice that the Party objects and initiate dispute resolution under Section 7 and, if applicable, may pursue an Appeal as described in Section 7.4 of this Agreement. If, after conclusion of dispute resolution and conclusion of any Appeals, the obligation disputed remains Inconsistent with this Agreement, or as modified, amended or added to remains Inconsistent with this Agreement, and the Parties cannot reach

agreement on a resolution to the Inconsistency, any Party who participated in dispute resolution may: (a) withdraw from this Agreement; or (b) pursue any remedy available under applicable law (except specific performance); provided, each other Party reserves all claims and defenses regarding any of these actions, including but not limited to the affirmative defense that the modified, amended or added to New License or Permit obligation conflicts with or prevents implementation of the commitments made in this Agreement.

### **7.3.3 Third Party Actions.**

If, after issuance of the New License, any action by a third party not a Party to this Agreement (including FERC, another agency or a court) results in the imposition of any commitment that any Party believes is Inconsistent with this Agreement, then that Party may provide notice that it objects and may initiate dispute resolution as provided in Section 7 and, if applicable, may pursue an Appeal as described in Section 7.4 of this Agreement. If, after conclusion of dispute resolution and conclusion of any Appeals, the commitment remains Inconsistent with this Agreement, or as modified remains Inconsistent with this Agreement, and the Parties cannot reach agreement on a resolution to the Inconsistency, any Party who participated in dispute resolution may: (a) withdraw from this Agreement; or (b) pursue any remedy available under applicable law (except specific performance); provided, each other Party reserves all claims and defenses regarding any of these actions, including but not limited to the affirmative defense that the new commitment conflicts with or prevents implementation of the commitments made in this Agreement.

### **7.3.4 If EWEB Fails to Comply with Agreement Provisions in New License.**

If EWEB fails to perform any of the provisions of this Agreement that are included in the New License, and is not otherwise excused from such performance as provided in this Agreement,

including Sections 3.3, 3.4 and 8.6, a Party may give EWEB notice and an opportunity to cure within 90 days of such notice. If EWEB fails to cure the lack of performance within that period, if such failure is not curable within 90 days and EWEB has not commenced a cure within that period and is not diligently pursuing such cure, or the failure to perform is not capable of cure, any Party who objects to such failure to perform (a) must give notice to the other Parties and initiate dispute resolution, and (b) after completion of dispute resolution, may petition FERC to enforce such provision and, if unsuccessful, pursue an Appeal or, if and as appropriate, seek specific performance. A Party will not be required to comply with this 90-day notice provision, but will provide such notice as is reasonable under the circumstances, if it reasonably believes an emergency exists or if providing such notice would prevent it from meeting its responsibilities under any statute or regulation. If after dispute resolution and any Appeals regarding FERC action have been concluded, FERC does not enforce the applicable provision of this Agreement included in the New License and EWEB fails to perform the applicable provision included in the New License, any Party that participated in dispute resolution may withdraw from this Agreement, may seek specific performance of any provision of this Agreement that is included in the New License in a court of competent jurisdiction, or pursue any remedy available under applicable law.

**7.3.5 If EWEB Fails to Comply with Commitments in Agreement Not Included in New License.**

If EWEB fails to perform any of the provisions of this Agreement that are not included in the New License, and is not otherwise excused from such performance as provided in this Agreement, including Sections 3.3, 3.4, 7.3.1 and 8.6, a Party may give EWEB notice and an opportunity to cure within 90 days of such notice. If EWEB fails to cure the lack of performance within that period, if such failure is not curable within 90 days and EWEB has not commenced a

cure within that period and is not diligently pursuing such cure, or the failure to perform is not capable of cure, any Party who objects to such failure to perform (a) must give notice to the other Parties and initiate dispute resolution and (b) after completion of dispute resolution, may seek specific performance of this Agreement. If after dispute resolution has been completed, EWEB's performance of the provision is not obtained and EWEB's failure is Inconsistent with the terms of this Agreement, any Party that participated in dispute resolution may withdraw from this Agreement, may seek specific performance of any provision of this Agreement that is not included in the New License in a court of competent jurisdiction, or pursue any remedy available under applicable law.

**7.3.6 If a Party Other Than EWEB Fails to Comply with Commitments in the Agreement.**

If a Party other than EWEB fails to perform any of the provisions of this Agreement and is not otherwise excused from such performance as provided in this Agreement, including Sections 3.3, 3.4, 7.3.1 and 8.6, a Party may give the non-performing Party notice and an opportunity to cure within 90 days of such notice. If the non-performing Party fails to cure the lack of performance within that period, if such failure is not curable within 90 days and the non-performing Party has not commenced a cure within that period and is not diligently pursuing such cure, or the failure to perform is not capable of cure, any Party who objects to such failure to perform (a) must give notice to the other Parties and initiate dispute resolution and (b) after completion of dispute resolution, may seek specific performance of this Agreement. If after dispute resolution has been completed, the non-performing Party's performance of the provision is not obtained and the non-performing Party's failure is Inconsistent with the terms of this Agreement, any Party that participated in dispute resolution may withdraw from this Agreement, may seek specific performance of any provision of this Agreement in a court of competent jurisdiction, or may

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pursue any remedy available under applicable law.

### **7.3.7 New ESA Listings or Critical Habitat Designations.**

If any species or critical habitat that may be affected by operation of Carmen-Smith under the New License is listed or designated during the term of the New License and any annual license issued subsequent to the New License, and if consultation under ESA Section 7 is required and results in the imposition of any reasonable and prudent alternative, reasonable and prudent measure or term or condition that is Inconsistent with this Agreement, any Party may provide notice that it objects to such Inconsistency and initiate dispute resolution. Whether or not dispute resolution is initiated, the same Party may pursue an Appeal regarding the Inconsistency. If the Parties complete dispute resolution and any Appeal is concluded, and an additional alternative, measure, term or condition remains Inconsistent with this Agreement, any Party who participated in dispute resolution may: (a) withdraw from this Agreement; or (b) pursue any remedy available under applicable law (except specific performance); provided, each other Party reserves all claims and defenses regarding any of these actions, including but not limited to the affirmative defense that the new alternative, measure, term, or condition conflicts with or prevents implementation of the commitments made in this Agreement.

### **7.4 Review of Other Agency Actions**

To the extent provided by applicable law, any Party may pursue an Appeal of any action by any agency that is Inconsistent with this Agreement. The dispute resolution procedures do not preclude any Party from timely filing and pursuing an Appeal under any applicable statutes, regulations and rules for any such action that is Inconsistent with this Agreement. However, the Parties will follow the dispute resolution procedures while any such Appeal of an Inconsistency is pursued. If a Party has initiated an Appeal of any Inconsistent action and the Parties participating in the Appeal withdraw the Appeal, then this Agreement shall be deemed modified

to conform to the Inconsistent action unless dispute resolution resolves the dispute.

## **7.5 Withdrawal from Agreement.**

### **7.5.1 Withdrawal of Party from Agreement.**

A Party may withdraw from this Agreement only as expressly provided in this Section 7. A Party intending to withdraw as allowed by this Section 7 must provide 60 days' advance written notice of its intent to withdraw and the reasons therefore. In addition, when a Party ceases to exist and has no successors or assigns, it will be deemed to have withdrawn from this Agreement, but such withdrawal will not give any other Party the right to withdraw. If a Party withdraws as allowed by this Agreement, that Party will not be bound by this Agreement or have any rights under this Agreement following such withdrawal (including membership on any Work Group), other than as provided in Sections 1.2 and 5.3 of this Agreement, or except as might otherwise be established by law.

### **7.5.2 Continuity After Withdrawal.**

The withdrawal of a Party other than EWEB or one of the Governmental Parties having authority under FPA Sections 4(e), 10(j) or 18 or CWA Section 401 does not terminate this Agreement for the remaining Parties or give any other Party the right to withdraw. However, if one of the Governmental Parties having authority under FPA Sections 4(e), 10(j) or 18 or CWA Section 401 withdraws from this Agreement, any other Party may elect to withdraw without initiating dispute resolution after providing notice within 60 days of the withdrawal of the Governmental Party. The withdrawal of EWEB under Section 7 of this Agreement will terminate this Agreement, except as provided in Section 1.2 and 5.3 of this Agreement.

## **7.6 Termination of Agreement.**

This Agreement may be terminated by unanimous written agreement among the Parties, by withdrawal of EWEB, or by withdrawal of all Parties under Section 7.5 of this Agreement.

Upon termination of this Agreement, each of the Work Groups will cease to exist unless the entities participating in a particular Work Group agree to continue that Work Group.

## **SECTION 8. GENERAL PROVISIONS**

### **8.1 Entire Agreement.**

Except for any intergovernmental or other agreement between EWEB and USDA Forest Service involving Carmen-Smith occupation of National Forest System Land and the Fish Passage Waiver Agreement between EWEB and the Oregon Fish and Wildlife Commission, this Agreement, together with the Exhibits and Appendix attached to and made a part of this Agreement, is the entire agreement of the Parties with regard to the relicensing and construction, operation and maintenance of Carmen-Smith. This Agreement is made on the understanding that each term is in consideration and support of every other term, and that each term is a necessary part of the entire Agreement.

### **8.2 Amendments.**

This Agreement may be amended by unanimous written consent of the Parties still in existence. Any Party may request all other Parties to commence negotiations for a period of up to 90 days to amend this Agreement in whole or in part. Any such amendment that renders the Agreement Inconsistent with terms and conditions of the New License or other regulatory approvals then in effect will be subject to approval by FERC or other permitting agency, if applicable, except that the Parties may agree to implement on an interim basis, pending approval, any amendment not requiring prior regulatory approval. If requested by EWEB or as appropriate, the Parties will submit a statement to FERC in support of any amendment.

### **8.3 Signatory Authority.**

Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to bind the Party he or she represents legally, and each Party represents that such Party will be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.

#### **8.4 No Third-Party Beneficiaries.**

Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement does not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement, and does not authorize any non-Party to maintain a suit at law or in equity pursuant to this Agreement. The duties, obligations, and responsibilities of the Parties with respect to third parties will remain as imposed under applicable law.

#### **8.5 Successors, Transferees and Assigns.**

This Agreement will apply to and be binding on the Parties and their successors, transferees, and assigns, to the extent allowed by law. Upon completion of a succession, transfer, or assignment and notice provided to all Parties under Section 8.12, the initial Party will no longer be a Party to this Agreement. No change in ownership of Carmen-Smith or transfer of the New License by EWEB will in any way modify or otherwise affect any other Party's interests, rights, responsibilities, or commitments under this Agreement. A transferring or assigning party will provide notice to the other Parties at least 60 days before completing such transfer or assignment.

#### **8.6 Failure To Perform Due to Force Majeure.**

##### **8.6.1 Declaration of Force Majeure.**

No Party will be liable to any other Party for breach of this Agreement as a result of a failure to perform or for a delay in performance of any provision of this Agreement if such performance is delayed or prevented by Force Majeure. The term "Force Majeure" means any cause reasonably beyond the performing Party's control which could not be avoided with the exercise of due care,

whether unforeseen, foreseen, foreseeable, or unforeseeable, and which occurs without the fault or negligence of the Party whose performance is affected by Force Majeure. Increased cost for the performance of any action required by this Agreement will not be deemed to constitute Force Majeure. The Party whose performance is affected by Force Majeure will notify the other Parties in writing within seven days after becoming aware of any event that such performing Party contends constitutes Force Majeure. Such notice will identify the event causing the delay or anticipated delay, estimate the anticipated length of delay, state the measures taken or to be taken to minimize the delay, and estimate the timetable for implementation of the measures. The performing Party will make reasonable efforts to resume performance of this Agreement promptly and, when able, to resume performance of its commitments and give the other Parties written notice to that effect. If an event of Force Majeure prevents performance of one or more PME measures for a prolonged period, the Parties recognize that reinitiation of consultation under the ESA may be required.

#### **8.6.2 Duration of Force Majeure.**

If EWEB's inability to perform any PME measure pursuant to this Agreement due to Force Majeure materially reduces the benefit of this Agreement, any Party other than EWEB may withdraw from this Agreement after first initiating and completing dispute resolution under Section 7 of this Agreement toward eliminating the reason for the withdrawal, or may pursue any other right or authority or seek any remedy available under applicable law. If any Party withdraws from this Agreement pursuant to this Section 8.6.2, EWEB may oppose the assertion of such other right, authority, or remedy that Party seeks to assert under any applicable law or notify FERC that EWEB has withdrawn from this Agreement and seek such further FERC action as EWEB deems appropriate.

#### **8.7 Section References.**

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Any reference to another section of this Agreement includes all subsections of the section referred to.

**8.8 No Consent to Jurisdiction.**

By executing this Agreement, no Party is consenting to the jurisdiction of any state, federal, or tribal court.

**8.9 Elected Officials Not To Benefit.**

No member of or delegate to Congress is entitled to any share or part of this Agreement or to any benefit that may arise from it.

**8.10 No Partnership.**

Nothing in this Agreement will be construed to constitute the Parties as principal and agent, employer and employee, partners, joint venturers, co-owners, or otherwise as participants in a joint undertaking. No Party has the right or authority to assume or to create any obligation or responsibility for or on behalf of another Party except as specifically provided in this Agreement.

**8.11 Reference to Statutes or Regulations.**

Any reference in this Agreement to any federal or state statute or regulation will be deemed to be a reference to such statute or regulation or any successor statute or regulation in existence as of the date of action taken pursuant to this Agreement.

**8.12 Notice.**

Except as otherwise provided in this Section 8.12, any notice required by this Agreement will be written and will be sent by first-class mail or comparable method of distribution (including e-mail) to all Parties still in existence or their successors and will be filed with FERC if required by this Agreement. For the purpose of this Agreement, a notice will be effective seven days after the date on which it is mailed or otherwise distributed. When this Agreement requires notice in less than seven days, notice will be provided by telephone, facsimile, or electronic mail and will be

effective when provided. For the purpose of notice, the list of authorized representatives of the Parties as of the Effective Date is attached as Exhibit I. The Parties will provide notice as provided in this Section 8.12 of any change in the authorized representatives designated in Exhibit I, and EWEB will maintain the current distribution list of such representatives.

### **8.13 Section Titles for Convenience Only.**

The titles for the sections and paragraphs of this Agreement are used only for convenience of reference and organization, and will not be used to modify, explain, or interpret any of the provisions of this Agreement or the intentions of the Parties.

### **8.14 Signing in Counterparts.**

This Agreement may be executed in any number of counterparts, and each executed counterpart will 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 instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures, and may be attached to another counterpart of this Agreement identical in form having attached to it one or more signature pages.

### **8.15 Waiver.**

Waiver by any Party of the strict performance of any term or covenant of this Agreement, or of any right under this Agreement, is not a continuing waiver, and must be in writing.

### **8.16 Responsibility for Costs.**

EWEB will be solely responsible for payment of costs of actions required of EWEB by this Agreement. EWEB has no obligation to reimburse or otherwise to pay any other Party for its assistance, participation, or cooperation in any activities pursuant to this Agreement, the New License, Permits, or Section 401 Certification, except as expressly stated in this Agreement, the Permits, or Section 401 Certification, or in intergovernmental or other agreements among EWEB

and Governmental Parties, or as otherwise required by law.

**8.17 Availability of Funds.**

Implementation of this Agreement for a Federal Governmental Party is subject to the requirements of the Anti-Deficiency Act, 31 USC 1341-1519, and the availability of appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Federal Governmental Parties are not required under this Agreement to expend any federal agency's appropriated funds unless and until an authorized official of each such agency affirmatively acts to commit such expenditures, as evidenced in writing. Any obligation of any State Governmental Party to make any payment or expend any funds under this Agreement attributable to commitments performed under this Agreement after the last day of the current biennium is contingent upon the State Governmental Parties receiving from the Oregon Legislative Assembly (including but not limited to its Emergency Board) appropriations, limitations, or other expenditure authority sufficient to allow the State Governmental Parties, in the exercise of their reasonable administrative discretion, to continue the commitments contemplated by this Agreement. Implementation of this Agreement for a Tribal Party is subject to the availability of authorized and appropriated funds. Nothing in this Agreement is intended or shall be construed to require the obligation, appropriation, or expenditure of any money from any Tribal Party.

IN WITNESS WHEREOF the Parties have entered into this Agreement as of the date first above written.

**EUGENE WATER & ELECTRIC BOARD**

**NATIONAL MARINE FISHERIES  
SERVICE**

**By:** \_\_\_\_\_  
Randy Berggren  
General Manager

**By:** \_\_\_\_\_  
Robert Lohn  
Regional Administrator

**UNITED STATES FISH AND WILDLIFE  
SERVICE**

**UNITED STATES DEPARTMENT OF  
AGRICULTURE FOREST SERVICE**

**By:** \_\_\_\_\_  
Ren Lohofner  
Regional Director, Region 1

**By:** \_\_\_\_\_  
Mary Wagner  
Regional Forester, Pacific Northwest  
Region

**OREGON DEPARTMENT OF  
ENVIRONMENTAL QUALITY**

**OREGON DEPARTMENT OF FISH AND  
WILDLIFE**

**By:** \_\_\_\_\_  
Dick Pedersen  
Director

**By:** \_\_\_\_\_  
Roy Elicker  
Director

**OREGON PARKS AND RECREATION  
DEPARTMENT**

**CONFEDERATED TRIBES OF THE  
GRAND RONDE COMMUNITY OF  
OREGON**

**By:** \_\_\_\_\_  
Tim Wood  
Director

**By:** \_\_\_\_\_  
Cheryle A. Kennedy  
Tribal Council Chairwoman

**CONFEDERATED TRIBES OF SILETZ  
INDIANS OF OREGON**

**By:** \_\_\_\_\_  
Delores Pigsley  
Tribal Council Chairman

**CONFEDERATED TRIBES OF THE  
WARM SPRINGS RESERVATION OF  
OREGON**

**By:** \_\_\_\_\_  
Ron Suppah, Sr.  
Tribal Council Chairman

**AMERICAN WHITEWATER**

**By:** \_\_\_\_\_  
Thomas O'Keefe  
Pacific Northwest Stewardship Director

**CASCADIA WILDLANDS PROJECT**

**By:** \_\_\_\_\_  
Josh Laughlin  
Executive Director

**OREGON HUNTERS ASSOCIATION**

**By:** \_\_\_\_\_  
John Nagy  
Regional President & Wildlife Habitat  
Project Chair

**OREGON WILD**

**By:** \_\_\_\_\_  
Doug Heiken  
Conservation and Restoration  
Coordinator

**MCKENZIE FLYFISHERS**

**By:** \_\_\_\_\_  
Robert Bumstead  
Conservation Committee Chair

**ROCKY MOUNTAIN ELK  
FOUNDATION, INC.**

**By:** \_\_\_\_\_  
Rod Triepke  
Chief Operating Officer

**TROUT UNLIMITED**

**By:** \_\_\_\_\_

Kate Miller  
Legal Analyst