

## CONSULTATION AGREEMENT

for the

### REINITIATION OF CONSULTATION ON THE COORDINATED LONG-TERM OPERATION OF THE CENTRAL VALLEY PROJECT AND THE STATE WATER PROJECT

by and among

**THE UNITED STATES FISH AND WILDLIFE SERVICE  
THE NATIONAL MARINE FISHERIES SERVICE  
THE BUREAU OF RECLAMATION  
THE CALIFORNIA DEPARTMENT OF WATER RESOURCES  
AND  
THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE**

#### 1.0 PARTIES TO AGREEMENT

This Consultation Agreement (CA) sets forth the terms and understanding between the Parties, collectively deemed the United States Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), the Bureau of Reclamation (Reclamation), the California Department of Water Resources (DWR), and the California Department of Fish and Wildlife (CDFW), to undertake the Reinitiation of Consultation on the Coordinated Long-term Operation of the Central Valley Project and the State Water Project.

#### 2.0 RECITALS AND PURPOSES OF THE AGREEMENT

##### 2.1 Recitals

The Parties have entered into this CA in consideration of the following facts:

**2.1.1** Reclamation is a Federal agency within the United States Department of the Interior charged with the responsibility of operating and maintaining dams, powerplants, and canals in the 17 western states. Reclamation's Mid-Pacific Region operates and maintains the Central Valley Project (CVP), which was built to protect the region from flood waters and irrigate the semi-arid acreage of the Central Valley and later amended to include fish and wildlife purposes. The CVP is composed of 20 reservoirs with a combined storage capacity of more than 11 million acre-feet; over 11 hydroelectric power plants; and more than 500 miles of major canals and aqueducts.

**2.1.2** DWR is a State agency within the California Natural Resources Agency responsible for operating and maintaining State Water Project (SWP) water storage and conveyance facilities scattered throughout California, including pumping facilities located in the Sacramento-San Joaquin Delta. The SWP is

composed of 21 reservoirs and lakes and 11 other storage facilities, with a combined storage capacity of more than 4 million acre-feet; five hydroelectric power plants and four pumping-generated plants; and more than 700 miles of major canals and aqueducts.

- 2.1.3** USFWS is a federal agency within the United States Department of the Interior charged with the responsibility of administering the Federal Endangered Species Act (ESA) and providing for the conservation of federally-listed aquatic and terrestrial species and their habitat. USFWS is responsible for consulting with Federal action agencies under Section 7 of the ESA to address effects to federally-listed aquatic and terrestrial species and their designated critical habitat to assist the Federal action agency in ensuring that their Federal action doesn't jeopardize listed species or destroy or adversely modify critical habitat.
- 2.1.4** NMFS is a federal agency within the United States Department of Commerce charged with the responsibility of administering the Federal ESA and providing for the conservation of federally-listed anadromous and marine species and their habitat. NMFS is authorized to issue take permits and authorizations under Section 7 of the ESA for the incidental take of federally-listed anadromous and marine species.
- 2.1.5** CDFW is a State agency within the California Natural Resources Agency charged with the responsibility of administering the California Endangered Species Act (CESA). CDFW is authorized to issue take permits under Section 2835 of the Fish and Game Code to authorize the take of any species, whether or not it is listed as an endangered, threatened, candidate, or fully-protected species under State law.
- 2.1.6** Section 103 of Public Law 99-546 authorized and directed the Secretary of the Interior to execute and implement the "Agreement between the United States of America and the Department of Water Resources of the State of California for Coordinated Operation of the Central Valley Project and State Water Project" (Coordinated Operation Agreement or COA, May 20, 1985).
- 2.1.7** As conditions of the water right permits and licenses for the CVP and SWP, the State Water Resources Control Board (SWRCB) requires specific water quality objectives within the Delta and on tributaries to the Delta (e.g., D-1641, Water Rights Orders 90 and 95).
- 2.1.8** All federal agencies have a responsibility to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species, and to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat (ESA Sections 7(a)(1), 7(a)(2)).

- 2.1.9** Federal agencies must comply with the requirements of the National Environmental Policy Act (NEPA) when making decisions on major federal actions that affect the quality of the human environment.
- 2.1.10** Reclamation accepted and implemented the USFWS 2008 and NMFS 2009 Biological (BiOps) on the Coordinated Long-term Operation of the CVP and SWP including the Reasonable and Prudent Alternatives (RPAs) to avoid jeopardy of listed species and adverse modification of designated critical habitat.
- 2.1.11** On November 16, 2009, the District Court ruled that Reclamation violated NEPA by failing to conduct a NEPA review of the potential impacts to the quality of the human environment before provisionally accepting and implementing the 2008 USFWS BiOp, including the RPA. On March 13, 2014, the Appellate Court affirmed the judgment of the District Court with respect to the NEPA claims.
- 2.1.12** On March 5, 2010, the District Court ruled that Reclamation violated NEPA by failing to undertake a NEPA analysis of potential impacts to the quality of the human environment before provisionally accepting and implementing the 2009 NMFS BiOp and RPA.
- 2.1.13** Reclamation completed the court-ordered NEPA process on the Coordinated Long-term Operation of the CVP and SWP with issuance of a corresponding Record of Decision (ROD) on January 11, 2016.
- 2.1.14** On August 2, 2016, Reclamation and DWR jointly requested reinitiation of ESA Section 7 consultation with USFWS and NMFS on the Coordinated Long-term Operation of the CVP and SWP, based on the apparent decline in the status of listed species, new information related to multiple years of drought, and new information available and expected to become available as a result of ongoing work through collaborative science processes.

## **2.2 Purpose of Agreement**

The purposes of this CA are to outline the tasks, processes, and schedule needed to complete BiOps on the Coordinated Long-term Operation of the CVP and SWP.

## **3.0 AUTHORITIES**

### **3.1 Reclamation**

The Rivers and Harbors Act of August 30, 1935 provided the initial federal authority for the CVP. On Dec. 2, 1935, the president approved a finding of feasibility by the Secretary of the Interior, pursuant to the Reclamation Act of 1902. The Rivers and Harbors Act of August 26, 1937 brought the CVP under Reclamation Law and authorized the construction, operation and maintenance. On October 6, 1992, Section 3406(a) of the Central Valley Project Improvement

Act (CVPIA), Public Law 102-575, amended the project purposes of the CVP to include fish and wildlife purposes.

### **3.2 DWR**

The State Legislature appropriated funds to DWR to construct the SWP under the State Central Valley Project Act (Water Code section 11100 et seq.), Burns-Porter Act (California Water Resources Development Bond Act), State Contract Act (Public Contract Code section 10100 et seq.), Davis-Dolwig Act (Water Code sections 11900 – 11925), and other acts of the State Legislature and applicable laws of the State of California.

### **3.3 USFWS**

USFWS authority is pursuant to the federal ESA and its implementing regulations as well as the Fish and Wildlife Coordination Act and the Fish and Wildlife Act of 1956, as amended.

### **3.4 NMFS**

NMFS authority is pursuant to the federal ESA and its corresponding implementing regulations, as well as the Fish and Wildlife Coordination Act.

### **3.5 CDFW**

CDFW authority is pursuant to CESA.

## **4.0 DEFINITIONS**

(tbd)

## **5.0 CONSULTATION ON THE COORDINATED LONG-TERM OPERATION OF THE CVP AND SWP (Project)**

### **5.1 Project Goals and Objectives**

The overall Project goal is to achieve durable and sustainable BiOp(s) issued by the USFWS and NMFS that are coordinated and account for the updated status of the species, operation of new facilities constructed or expected to be constructed, and modifications to the operation of the CVP and SWP.

Specific objectives for this process include:

- Ensuring the Long Term Operations of the CVP and SWP do not jeopardize the continued existence of any listed species affected by the projects and that no designated critical habitat is adversely modified.
- “Fresh Look” Concepts
- Science-Based Adaptive Management Concepts
- Targeted Proposed Action to Work Towards Non-Jeopardy Opinion
- Integrated BiOp
- Open, Transparent, and Participatory Stakeholder Processes
- Peer Reviewed Products

- Close Agency Coordination for Timely Review

## 5.2 Project Tasks

In order to ensure that Project objectives are met, it will require participating State and Federal agencies to:

- Explore potential alternative approaches to operate the CVP and SWP for all Project purposes.
- Develop a Proposed Action that reflects current conditions, incorporates new planned facilities, and includes a suite of actions BIOpto meet the requirements of ESA Sections 7(a)(1) and 7(a)(2) ;
- Prepare a biological assessment (BA)using best available science, in a timely manner;
- Prepare coordinated BiOp(s), or a single integrated BiOpusing best available science, in a timely manner;
- Provide analyses regarding potential effects of the Proposed Action to federally-listed and certain proposed species and their designated or proposed critical habitats;
- Evaluate the Proposed Action and alternatives in compliance with the National Environmental Policy Act (NEPA) through preparation of an environmental impact statement (EIS).

## 5.3 Schedule

The Parties to this CA shall make a concerted effort to meet anticipated milestone dates. The dates provided here are caveated in the understanding that issues are swiftly resolved and that policy decisions are made quickly and efficiently.

- Proposed Action
- BA
- BiOp and Conference Opinion
- Draft and Final EIS

Green: ESA tasks; Blue: NEPA tasks

Date	Task
Oct. – Dec. 2016	Parties to develop a list of actions to potentially be analyzed in the alternatives development process; Development of a BA outline.
Dec. 2016	Meeting of participating agency directors to review BA outline.
TBD	Publication of Draft EIS
TBD	Preparation of Draft BA and submittal to USFWS and NMFS for review
TBD	Submit BA to USFWS and NMFS with formal consultation request
TBD	USFWS and NMFS preparation of Draft BiOp(s) and Conference Opinion
TBD	Publish Final EIS

TBD	USFWS and NMFS prepare and issue Final BiOp(s) and Conference Opinion
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#### 5.4 Roles and Responsibilities

Given the scope and magnitude of the Project, it is anticipated that extensive coordination will be required throughout the entirety of the process. This coordination will require each agency's dedication of technical experts, administrative support, directors, and other staff as required. A detailed Project Management Plan (PMP) will be developed by January 2017 which will assist in better defining agency roles and responsibilities and forthcoming expectations in detail.

Generally, the following actions are expected of each Party to this CA:

##### 5.4.1 All Parties

- Identify a Project Manager (PM) and confer powers to empower effective decision-making;
- Identify an Executive Sponsor with inherent super powers;
- Fulfill tasks defined in the PMP, further described below;
- Perform timely review of materials;
- Report on status and progress;
- Early identification of issues;
- Openly share information.

##### 5.4.2 Reclamation

- Reclamation shall assign a PM with responsibilities for managing the timely completion of tasks and review of materials as described in the PMP as well as coordinating the identification and resolution of potential issues.
- Reclamation's PM shall coordinate updates to the PMP, as necessary throughout the process.
- Reclamation shall identify an executive sponsor with authorities and responsibilities for...
- Reclamation shall be the Federal lead agency as it relates to its ESA Section 7 responsibilities.
- Reclamation shall secure a contractor and appropriate funding to help facilitate internal and external stakeholder outreach, technical analysis, alternatives development, preparation of an EIS, preparation of a BA, and the preparation of an administrative record documenting decision-making.
- Reclamation shall assume appropriate legal responsibilities under the issued final BiOp (s) from USFWS and NMFS.

##### 5.4.3 DWR

- DWR shall assign a Project Manager with responsibilities for...
- DWR shall identify an Executive Sponsor with authorities and responsibilities for...
- DWR shall be an applicant, as defined by ESA.
- DWR shall work with the other parties to this agreement to aid in the development of alternatives and resulting ESA and NEPA documentation.

- DWR shall participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- DWR shall provide requested technical support from SWP operations staff.
- DWR shall assume appropriate legal responsibilities under the issued BIOP(s) from USFWS and NMFS.

#### **5.4.4 NMFS**

- NMFS shall assign a Project Manager with responsibilities for...
- NMFS shall identify an Executive Sponsor with authorities and responsibilities for...
- NMFS shall provide input and direction to Reclamation related to the preparation of the BA.
- NMFS shall, within 30 days of receipt of a draft BA, submit a notification letter to Reclamation indicating whether the document contains the information necessary to initiate Section 7 consultation.
- NMFS shall prepare a draft and final BiOp, considering potential of a joint BiOp prepared in conjunction with USFWS.
- NMFS shall issue a draft BiOp for Reclamation's review. NMFS' final BiOp will include consideration and/or integration of comments received from the Reclamation review of the draft BiOp.
- NMFS shall present a draft BiOp to stakeholders and discuss the BiOp and rationale for decisions.
- NMFS shall peer review the BiOp prior to finalization.
- NMFS shall participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- NMFS shall identify the best available science with respect to NMFS species during the development of the Administrative Draft Biological Assessment

#### **5.4.5 USFWS**

- USFWS shall assign a Project Manager with responsibilities for ensuring the USFWS coordinates and collaborates in an effective manner and communicating status internally and to other agencies.
- USFWS shall identify an Executive Sponsor with authorities and responsibilities for...
- USFWS shall provide technical assistance to Reclamation related to the preparation of the BA.
- USFWS shall, within 30 days of receipt of a draft BA, submit a notification letter to Reclamation indicating whether the document contains the information necessary to initiate Section 7 consultation.
- USFWS shall prepare a draft and final BiOp, considering potential of a joint BiOp prepared in conjunction with NMFS.
- USFWS, in coordination with NMFS, shall issue a draft BiOp for Reclamation's review. USFWS' final BiOp will include consideration and/or integration of comments received from the Reclamation review of the draft BiOp.

- USFWS shall participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- USFWS shall identify the best available science with respect to USFWS species during the development of the Administrative Draft Biological Assessment

#### **5.4.6 CDFW**

- CDFW shall assign a Project Manager with responsibilities for...
- CDFW shall identify an Executive Sponsor with authorities and responsibilities for...
- CDFW shall provide input, specifically as it relates to species within its jurisdiction, related to the development of alternatives for NEPA and a Proposed Action for the BA.
- CDFW shall participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- CDFW will coordinate with DWR, USFWS, and NMFS to coordinate appropriate CESA compliance, if necessary.

### **6.0 MISCELLANEOUS PROVISIONS**

#### **6.1 Duration of CA**

This CA may be modified by mutual consent of authorized officials from Reclamation, DWR, USFWS, NMFS, and CDFW. This CA shall become effective upon signature by the authorized officials and will remain in effect until modified or terminated by any one of the partners by mutual consent, or by completion of the Project as described.