

***DRAFT – For Discussion Purposes Only***

***Upper Sacramento River Insert to the 2019 NMFS Biological Opinion  
Incidental Take Statement***

The proposed implementation of Reclamation and DWR's exercise of discretion in operational decision making for the CVP and SWP, including how to comply with the terms of their respective existing water supply and settlement contracts and other legal obligations, is expected to result in the incidental take of listed winter and spring run Chinook salmon. Reclamation's operation of Shasta Dam is anticipated to result in an expected mortality of approximately \_\_\_\_ of winter run in Tier 3 years and \_\_\_\_ in Tier 4 years.

As in 2009, the proposed action under consultation involves the discretionary long-term operation of the CVP and SWP to meet multiple discretionary and non-discretionary project purposes and obligations, including the performance of the Sacramento River Settlement Contracts. This incidental take statement is therefore coextensive with Reclamation and DWR's proposed action, including the discretionary operation of the CVP to meet Reclamation's non-discretionary legal obligations, including contractual obligations to release water for diversions in accordance with the terms of the Sacramento River Settlement (SRS) Contracts, exchange contracts and refuge contracts.

NMFS is not excluding or otherwise limiting incidental take coverage for the delivery of non-discretionary quantities of water to any contractor. Although Reclamation does not retain discretion to modify the quantity of water required to be supplied under the SRS Contracts (*see Nat. Res. Def. Council v. Norton*, 236 F. Supp. 3d 1198, 1225 (E.D. Cal. 2017)), the Sacramento River Settlement Contracts require a 25% reduction in contract quantities during Shasta Critical Years as defined by the contracts. In addition, Reclamation retains discretion with respect to operational decision-making to meet its obligations under the SRS Contracts and other non-discretionary legal obligations and project purposes. For example, Reclamation's discretionary operation of the Shasta TCD permits CVP operations to achieve different habitat conservation goals while still releasing similar quantities of water. Reclamation also has discretion to adjust other aspects of its operation of the CVP for multiple beneficial uses when appropriate and feasible. Moreover, Reclamation's proposed action commits to coordinating with DWR to develop a voluntary toolkit to be exercised at the discretion of Reclamation, DWR, other agencies, participating water users, and/or others for the operation of Shasta Reservoir during critical hydrologic year types. In this regard, during Tier 3 and Tier 4 years, Reclamation agrees to meet and confer with the SRS Contractors, NMFS and other appropriate agencies to determine if there is any voluntary role for the SRS Contractors in connection with Reclamation's operational decision-making for Shasta Reservoir annual operations in those years. Reclamation's commitment to exercising its discretion in this way justifies NMFS' decision to provide incidental take coverage that necessarily includes Reclamation's discretionary operations to meet its non-discretionary legal and contractual obligations.