

FIRST AMENDED

MEMORANDUM OF UNDERSTANDING [NMFS: There are multiple uses of “MOA.” Replace
with “MOU”]

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
THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE
AND
PUBLIC WATER AGENCIES**

1.0 PARTIES TO MEMORANDUM

This First Amended Memorandum of Understanding (Memorandum) 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), the California Department of Fish and Wildlife (CDFW), and those Public Water Agencies that sign below, to undertake the Reinitiation of Consultation on the Coordinated Long-term Operation of the Central Valley Project (CVP) and the State Water Project (SWP) pursuant to the Federal Endangered Species Act (ESA).

2.0 RECITALS AND PURPOSES OF THE MEMORANDUM

2.1 Recitals

The Parties have entered into this Memorandum 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, power plants,

and canals in the 17 western states. Reclamation's Mid-Pacific Region operates and maintains the 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 constructing, operating and maintaining the SWP water storage and conveyance facilities located 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 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 does not 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 responsible for consulting with Federal action agencies under Section 7 of the ESA to address effects to Federally-listed marine species and their designated critical habitat to assist the Federal action agency in ensuring that their Federal action does not jeopardize listed species under NMFS' jurisdiction or destroy or adversely modify designated critical habitat.
- 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 allow take of State-listed endangered or threatened, or candidate species through issuance of incidental take permits under California Fish and Game Code, section 2081(b), or through issuance of consistency determinations pursuant to California Fish and Game Code, section 2080.1
- 2.1.6** Each of the Public Water Agencies contracts for the delivery of water from the Central Valley Project or the State Water Project.

- 2.1.7** 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). Reclamation and DWR coordinate operations of the CVP and SWP as provided by the COA.
- 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 their involvement in major Federal actions that affect the quality of the human environment is sufficient to trigger NEPA responsibility under applicable law.
- 2.1.10** Reclamation accepted and implemented the USFWS 2008 and NMFS 2009 Biological Opinions (BiOps) on the Coordinated Long-term Operation of the CVP and SWP including the Reasonable and Prudent Alternatives to avoid jeopardy of listed species and adverse modification of designated critical habitat.
- 2.1.11** CESA establishes a prohibition against the take of any species that the California Fish and Game Commission has determined to be an endangered or threatened species or designated as a candidate species. (California Fish and Game Code §§ 2080, 2084). It is State policy for all State agencies, boards, and commissions to seek to conserve endangered and threatened species. (California Fish and Game Code §§ 2055).
- 2.1.12** The BiOps served as the basis for CDFW’s issuance of consistency determinations to DWR for operations of the SWP, pursuant to California Fish and Game Code, section 2080.1. CDFW has also issued an incidental take permit to DWR authorizing take of longfin smelt SWP operations in the Delta.
- 2.1.13** Reclamation completed the 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, as the Applicant, 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 new information related to multiple years of drought and recent data on Delta smelt and winter-run Chinook salmon population levels, and new information available and expected to become available as a result of ongoing work through collaborative science processes.

2.1.15 Each of the Public Water Agencies has requested, pursuant to Section 4004 of Water Infrastructure Improvements for the Nation (WIIN) Act, to participate in the reinitiation of consultation on Coordinated Long-term Operation of the CVP and SWP, as referenced in the subparagraph immediately above.

2.2 Purpose of Memorandum

The purposes of this Memorandum are to describe the expected tasks, processes (including schedule development), and participants for the reinitiation of consultation on the Coordinated Long-term Operation of the CVP and SWP.

This Memorandum supersedes the Memorandum of Understanding for the Reinitiation of Consultation on the Coordinated Long-term Operation of the Central Valley Project and State Water Project, executed by some of the Parties in December 2016.

3.0 AUTHORITIES

3.1 Bureau of 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 Department of Water Resources

DWR was authorized 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 to construct, operate, and maintain the SWP. As provided for by Federal ESA regulations, DWR is designated as an applicant for this consultation.

3.3 U.S. Fish and Wildlife Service

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 and CVPIA.

3.4 National Marine Fisheries Service

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

3.5 California Department of Fish and Wildlife

CDFW authority is pursuant to CESA and its role as the trustee for the State's fish and wildlife resources, set out in California Fish and Game Code, sections 711.7 and 1802.

3.6 Public Water Agencies

The Public Water Agencies have the ability to cooperate in the consultation based on the State laws pursuant to which they were formed, section 2(c)(2) of the Federal ESA, 50 C.F.R. pt. 402.08, and section 4004 of the WIIN Act.

4.0 DEFINITIONS

The following terms as used in this Memorandum will have the meanings set forth below. Terms specifically defined in statutes, including the ESA or NEPA, or the regulations and policies adopted under those statutes, shall have the same meaning when used in this Memorandum.

4.1 Biological objectives mean specific, measurable outcomes as a result of the implementation of a specific plan or project.

4.2 "CESA" means the California Endangered Species Act (California Fish and Game Code, §§2050-2115.5) and all regulations promulgated pursuant to that Act.

4.3 "Central Valley Project" or "CVP" means the Central Valley Project, as defined in 3404(d) of Title XXXIV of Public Law 102-575.

4.4 "Central Valley Project Improvement Act" or "CVPIA" means Title XXXIV of Public Law 102-575.

4.5 "Cooperating Agency" means any Federal agency, other than a lead agency, that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposed project or project alternative. A State or local agency of similar qualifications or a Native American tribe may, by agreement with the Federal lead agency, also become a cooperating agency.

4.6 "Coordinated Operations Agreement" means the Agreement between the United States of America and the State of California for the Coordinated Operation of the Central Valley Project and the State Water Project, dated November 24, 1986.

- 4.7** “Delta” or “Sacramento-San Joaquin Delta” means the Sacramento-San Joaquin Delta (including Suisun Marsh) as defined in Water Code §85058.
- 4.8** “California Department of Water Resources” or “DWR” means the California Department of Water Resources, a department of the California Natural Resources Agency.
- 4.9** “California Department of Fish and Wildlife” or “CDFW” means the California Department of Fish and Wildlife, a department of the California Natural Resources Agency.
- 4.10** “Designated Non-Federal Representative” means a non-Federal representative designated by a Federal agency to conduct informal consultation or prepare a biological assessment (BA) by giving written notice to the Director of USFWS and/or the Director of NMFS of such designation.
- 4.11** “Effective Date” means the date on which this Memorandum takes effect, described in Section 6.1.
- 4.12** “ESA” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C. §§ 1531-1544) and all rules, regulations, and guidelines promulgated pursuant to that Act.
- 4.13** “Executive Sponsor” means a person of senior-level management in the execution of project management.
- 4.14** “Federally Listed Species” means the species that are listed as threatened or endangered species under the Federal ESA. See 50 C.F.R. § 17.11.
- 4.15** “Memorandum” means this Memorandum of Understanding.
- 4.16** “National Marine Fisheries Service” or “NMFS” means the National Marine Fisheries Service, an agency of the Department of Commerce.
- 4.17** “NEPA” means the National Environmental Policy Act (42 U.S.C. §§ 432-4347) and all rules, regulations and guidelines promulgated pursuant to that Act.
- 4.18** “Project Management Plan” or “PMP” means a document prepared for the purposes of defining how the project is executed, monitored, and controlled.
- 4.19** “Project Manager” or “PM” means a person delegated with oversight of the implementation of the PMP.

4.20 “State Water Project” or “SWP” means the State Water Project as authorized by Water Code sections 12930 et seq. and Water Code sections 11100 et seq. and operated by DWR.

4.21 “Bureau of Reclamation” or “Reclamation” means the Bureau of Reclamation, an agency of the Department of the Interior.

4.22 “U.S. Fish and Wildlife Service” or “USFWS” means the United States Fish and Wildlife Service, an agency of the Department of the Interior.

4.23 “WIIN Act” means the Water Infrastructure Improvements for the Nation Act, Public Law No: 114-322.

5.0 CONSULTATION ON THE COORDINATED LONG-TERM OPERATION OF THE CVP AND SWP

5.1 Goals and Objectives

The overall goal of the consultation on the coordinated long-term operation of the CVP and SWP is to achieve a durable and sustainable BiOp(s) issued by the USFWS and NMFS that accounts for the updated status of the species and species’ needs as developed through ongoing collaborative science processes and operation of CVP and SWP facilities. [NMFS: Not sure why the deletion, but isn’t inclusion of CWF key to the USFWS’ CWF BiOp, a necessary component of the environmental baseline, and key to future operations of the CVP and SWP?]

Specific objectives for this process include¹:

- Continue the operation of the CVP in coordination with operation of the SWP, for its authorized purposes, in a manner that is consistent with Federal Reclamation law; other Federal laws and regulations; Federal permits and licenses, State of California water rights, permits, and licenses; enables Reclamation and DWR to satisfy their contractual obligations to the fullest extent possible; and supports signing long-term water contracts.
- Ensuring the Coordinated Long-term Operation of the CVP and SWP is not likely to jeopardize the continued existence of any federally-listed species and is not likely to adversely modify their designated critical habitat.
- Utilizing concepts that may consider existing and alternative ways of complying with section 7(a)(2) of the ESA while operating the CVP and SWP. This may include using a revised approach to the functionality of operations; assessing potential impacts of the operation of the CVP and SWP, including appurtenant facilities; and

¹ These are further defined in Section 5.4 below.

assessing operations to account for new science, including but not limited to changing climate, hydrology, ecosystem changes, and other information.

- Preparing a fully integrated operational and biological analysis of all CVP and SWP Divisions, including, but not limited to the potential assessment of Trinity and Friant Divisions, and Oroville operations.
- Utilizing science-based adaptive management concepts.
- Reclamation shall cooperate with DWR and the Public Water Agencies, through the informal and formal [NMFS: Definitely need to discuss and clarify. If the formal phase of consultation begins with the issuance of a final BA and request to initiate formal section 7 consultation, then this bullet seems to pertain to USFWS and NMFS, but we're not named in the first line.] phases of consultation to propose an Action that will target a non-jeopardy BiOp.
- Preparing a joint BiOp issued by USFWS and NMFS [NMFS: Should reject the deletion, specifically, to add back in the text, “, or two closely coordinated BiOps issued separately by USFWS and NMFS”].
- Preparing a BA and NEPA document through an open, transparent, and participatory stakeholder process that allows for feedback, dialog, and incorporation of ideas and information beyond agency-only staff.
- Relying on peer reviewed products and/or best available scientific and commercially available data for the BA analysis whenever possible, and committing to peer-review of environmental compliance documentation developed under this Memorandum, as appropriate.
- Conducting timely reviews due to close coordination among the Parties.
- Coordinating ESA and NEPA processes with CESA authorization for the SWP.
- Ensure compliance and consultation for Essential Fish Habitat as provided for in the Magnuson-Stevens Fishery Conservation and Management Act.

5.2 Tasks

Ensuring that objectives of the consultation on the coordinated long-term operation of the CVP and SWP are met, will require the Parties² to:

- Explore potential alternative approaches to operate the CVP and SWP for all Project purposes.

² These are further defined in Section 5.4 below.

- Develop a Proposed Action that reflects current conditions, fully integrated operations of all CVP and SWP Divisions, and includes a suite of actions to meet the requirements of ESA Sections 7(a)(1) and 7(a)(2), ensure compliance with the Magnuson-Stevens Fishery Conservation and Management Act, and facilitate requests for CESA authorization.
- Prepare a BA using peer-reviewed, and/or best available scientific and commercial data, in a timely manner;
- Prepare a single joint BiOp or closely coordinated BiOps using peer-reviewed and/or best available scientific and commercial data, in a timely manner.
- Provide analyses regarding potential effects of the Proposed Action to federally-listed species and certain proposed species and their designated or proposed critical habitats.
- Evaluate the Proposed Action and alternatives in compliance with NEPA through preparation of an environmental impact statement (EIS).

5.3 Schedule

The Parties to this Memorandum will work collaboratively to develop a schedule for completion of major tasks including development of the Proposed Action, BA, BiOp(s), Draft EIS, and Final EIS. The Parties shall make a concerted effort to meet anticipated milestone dates with the understanding that regular and ongoing meetings will be established with Parties to this Memorandum. [NMFS: Perhaps leave “, including stakeholders as identified” in since other stakeholders will be met with?] Further, the Parties to this Memorandum agree that issues shall be swiftly resolved and that policy decisions shall be made quickly and efficiently. In the near-term, Parties to this Memorandum will develop a list of actions to potentially be analyzed in the alternatives development process, and draft an outline for the BA that will be reviewed by the agency directors and managers for the Public Water Agencies.

The Parties will work to develop a Proposed Action for the BA and will work to solicit comments from each agency prior to submittal of a BA and a request for formal consultation. After receipt of a BA that is deemed sufficient for the purpose of formal consultation by NMFS and USFWS, a draft BiOp will be provided to Reclamation, DWR, and the Public Water Agencies for review and comment.

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 Parties' dedication of technical experts, administrative support, directors, and other staff as required. A detailed Project Management Plan (PMP) has been developed by

Reclamation which will assist in better defining Parties roles and responsibilities and forthcoming expectations in detail.

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

5.4.1 All Parties

- Identify a Project Manager (PM) from each Party with sufficient authority to enable efficient and effective decision-making.
- Identify an Executive Sponsor with final decision-making authority for the agency.
- Fulfill tasks defined in the PMP, further described below.
- Perform timely review of materials.
- Report on status and progress.
- Identify issues as early in the process as possible.
- Openly share information.

5.4.2 Bureau of Reclamation

- Reclamation will 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.
- The PM will be responsible for coordinating ESA, NEPA, and other necessary compliance required for the Project.
- Reclamation's PM will coordinate updates to the PMP, as necessary throughout the process.
- Reclamation will identify an executive sponsor with authorities and responsibilities for addressing policy-level issues as appropriate, coordinating with the Parties to this Memorandum as needed to complete tasks described in this Memorandum, and to identify and resolve issues.
- Reclamation will be the Federal action agency as it relates to its ESA Section 7 responsibilities.

- Provide analyses regarding potential effects of the Proposed Action to federally-listed species and certain proposed species and their designated or proposed critical habitats.
- Explore potential alternative approaches to operate the CVP and SWP for all Project purposes.
- Evaluate the Proposed Action and alternatives in compliance with NEPA through preparation of an EIS.
- Develop a Proposed Action that reflects current conditions, incorporates new planned facilities, and includes a suite of actions to meet the requirements of ESA Sections 7(a)(1) and 7(a)(2).
- Reclamation will secure a contractor and appropriate funding to help facilitate outreach, technical analysis, alternatives development, preparation of an EIS, preparation of a BA, and the preparation of an administrative record documenting decision-making.
- Reclamation will assume appropriate legal responsibilities under the issued final BiOp(s) from USFWS and NMFS.
- Reclamation will facilitate coordination with CVP contractors who are not included as Parties to this MOA and stakeholders.

5.4.3 Department of Water Resources

- DWR will assign a PM with responsibilities for coordinating and managing a team of technical, administrative, and other DWR and contracted staff, managing timely completion of tasks and review of materials as described in the PMP. The PM will closely coordinate with Reclamation's PM on the identification and resolution of issues and will ensure policy-level issues are elevated in a timely manner.
- DWR will identify an Executive Sponsor with authorities and responsibilities for addressing policy-level issues as appropriate, coordinating with the Parties to this Memorandum as needed to complete tasks described in this Memorandum and to identify and resolve issues.
- DWR will be an Applicant, as defined by ESA.
- DWR will work with the other Parties to aid in the development of alternatives and resulting ESA and NEPA documentation.
- DWR will participate as a NEPA cooperating agency during Reclamation's development of an EIS.

- DWR will explore potential alternative approaches to operate the CVP and SWP for all Project purposes.
- DWR will provide requested technical support from appropriate staff.
- DWR will facilitate coordination with SWP contractors who are not included as Parties to this MOA.

5.4.4 National Marine Fisheries Service

- NMFS will assign a PM with responsibilities for ensuring the NMFS coordinates and collaborates in an effective manner and communicates status internally and to other agencies.
- NMFS will identify an Executive Sponsor with authorities and responsibilities for addressing policy-level issues as appropriate, coordinating with the Parties to this Memorandum as needed to complete tasks described in this Memorandum and to identify and resolve issues.
- NMFS will provide technical assistance to Reclamation related to the preparation of the BA.
- NMFS will, within 30 days of receipt of a BA formally submitted by Reclamation along with a consultation request, submit a notification letter to Reclamation indicating whether the document contains the information necessary to initiate Section 7 consultation.
- NMFS will prepare a draft and final BiOp, considering the potential of a joint BiOp prepared in conjunction with USFWS.
- NMFS, in coordination with USFWS, will issue a draft BiOp for review by Reclamation, DWR, and the Public Water Agencies. NMFS's final BiOp and/or Administrative Record will include consideration and/or integration of comments received from the foregoing review of the draft BiOp.
- NMFS will participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- NMFS will provide input to Reclamation during the development of the draft BA to assist Reclamation in its responsibility to provide the best available scientific and commercial data with respect to NMFS species as required by 50 C.F.R. 402.14(d).

5.4.5 U.S. Fish and Wildlife Service

- USFWS will assign a PM with responsibilities for ensuring the USFWS coordinates and collaborates in an effective manner and communicates status internally and to other agencies.
- USFWS will identify an Executive Sponsor with authorities and responsibilities for addressing policy-level issues as appropriate, coordinating with the Parties to this Memorandum as needed to complete tasks described in this Memorandum and to identify and resolve issues.
- USFWS will provide technical assistance to Reclamation related to the preparation of the BA.
- USFWS will, within 30 days of receipt of a BA formally submitted by Reclamation along with a consultation request, submit a notification letter to Reclamation indicating whether the document contains the information necessary to initiate Section 7 consultation.
- USFWS will prepare a draft and final BiOp, considering the potential of a joint BiOp prepared in conjunction with NMFS.
- USFWS, in coordination with NMFS, will issue a draft BiOp for review by Reclamation, DWR, and the Public Water Agencies. USFWS's final BiOp and/or Administrative Record will include consideration and/or integration of comments received from the foregoing review of the draft BiOp.
- USFWS will participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- USFWS will provide input to Reclamation during the development of the draft BA to assist Reclamation in its responsibility to provide the best scientific and commercial data available with respect to USFWS species as required by 50 C.F.R 402.14(d).

5.4.6 California Department of Fish and Wildlife

- CDFW will assign a PM with responsibilities for ensuring CDFW coordinates and collaborates in an effective manner and communicates status internally and with other agencies.
- CDFW will identify an Executive Sponsor with authorities and responsibilities for addressing policy-level issues as appropriate, coordinating with the Parties to this Memorandum as needed to complete tasks described in this Memorandum and to identify and resolve issues.

- CDFW will 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 will participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- CDFW will work with the Public Water Agencies, DWR, USFWS, and NMFS to coordinate CESA authorization for the SWP.

5.4.7 Public Water Agencies

- Each Public Water Agency will assign a PM with responsibilities for coordinating and managing a team of technical, administrative, and other staff, managing timely completion of tasks and review of materials as described in the PMP. Each of the Public Water Agencies' PM will closely coordinate with Reclamation's PM and DWR's PM on the identification and resolution of issues and will ensure policy-level issues are elevated in a timely manner.
- Each Public Water Agency will identify an Executive Sponsor with authorities and responsibilities for addressing policy-level issues as appropriate, coordinating with the Parties to this Memorandum as needed to complete tasks described in this Memorandum and to identify and resolve issues.
- Each Public Water Agency will work with the other Parties to this Memorandum to aid in the development of alternatives and resulting ESA and NEPA documentation.
- Each Public Water Agency that qualifies will participate as a NEPA cooperating agency during Reclamation's development of an EIS.
- If CEQA compliance is required, each Public Water Agency will participate as a CEQA responsible agency during DWR's development of an EIR.
- The Public Water Agencies will explore potential alternative approaches to operate the CVP and SWP for all Project purposes.
- Each Public Water Agency will provide requested technical support from appropriate staff.
- In addition to the rights and responsibilities afforded to the parties by this MOA [NMFS: agrees with the comment from Reclamation. Replace "In addition to the rights and responsibilities afforded to the parties by this MOA" with "In addition to the roles and responsibilities of the Parties described by this MOU"], and as required by section 4004 of the WINN [NMFS: Replace

“WINN” with “WIIN.”] Act [NMFS reviewed the bullets below for consistency with the WIIN Act and flagged any substantive deviations. NMFS *did not* flag minor deviations, for example: the use of acronyms spelled out in the WIIN Act; the use of “Reclamation” rather than “the action agency”; the use of “USFWS or NMFS” rather than “the consulting agency”]. each Public Water Agency that qualifies under section 4004 of the WIIN Act will:

- Have routine and continuing opportunities to discuss and submit information to Reclamation for consideration during the development of the BA;
- Be informed by Reclamation of the schedule for preparation of the BA;
- Be informed by USFWS or NMFS, of the schedule for preparation of the BiOp at such time as the BA is submitted to USFWS or NMFS by Reclamation;
- Receive a copy of any draft BiOp and have the opportunity to review that document and provide comments to USFWS or NMFS [NMFS: insert “through the action agency” to match WIIN Act text], which comments will be afforded due consideration during the consultation;
- Have the opportunity to confer with Reclamation and DWR about reasonable and prudent alternatives, prior to Reclamation or DWR identifying one or more reasonable and prudent alternatives for consideration by USFWS or NMFS;
- Where USFWS or NMFS suggests a reasonable and prudent alternative, be informed:
 - (1) how each component of the alternative will contribute to avoiding jeopardy or adverse modification of critical habitat and the scientific data or information that supports each component of the alternative; and
 - (2) why other proposed alternative actions that would have fewer adverse water supply and economic impacts are inadequate to avoid jeopardy or adverse modification of critical habitat.

[NMFS: NMFS does not support adding another bullet that is not in the WIIN Act.] 6.0
MISCELLANEOUS PROVISIONS

6.1 Good Faith

The parties hereto covenant [NMFS comment: Replace “the parties hereto covenant” with “All parties expect”] to deal with each other fairly and in good faith. All parties will work in good faith to complete the reinitiation of consultation.

6.2 Duration of this Memorandum

This Memorandum may be modified by mutual consent of authorized officials from each of the Parties. This Memorandum will become effective upon signature by the authorized officials and will remain in effect until modified or terminated by any one of the Parties by mutual consent, or by completion of the Project as described.

6.3 Final Decisions

After careful consideration of input from the Public Water Agencies, USFWS, NMFS, CDFW, and others through the outreach and NEPA process, Reclamation and DWR retain the final decision on the Proposed Action. [NMFS: Insert “Similarly, NMFS and USFWS retain the final decision on all BiOp content and conclusions.”]

6.4 Specialized Stakeholder Engagement

6.4.1 Cooperating Agencies

Sections 40 C.F.R. 1501.6 and 40 C.F.R. 1508.5 of the Council on Environmental Quality Regulations address cooperating agencies, which are Federal agencies other than a lead agency which have jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal or reasonable alternative. These regulations implement NEPA and mandate that Federal agencies prepare NEPA analyses and documentation “in cooperation with State and local governments” and other agencies with jurisdiction by law or special expertise [42 U.S.C. §§ 4331(a) and 42 U.S.C. §§ 4332(2)].

In accordance with these regulations, Reclamation will engage with other Federal agencies with special expertise or jurisdiction by law via a request to become a cooperating agency under NEPA. These Federal agencies may include, but are not limited to, agencies such as NMFS, USFWS, U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, Western Area Power Administration, and other entities, as appropriate. Reclamation may also request State and local governments to become cooperating agencies for the NEPA process, if such agencies have special expertise or jurisdiction by law, and their cooperation is found by Reclamation to be appropriate. These entities may include, but are not limited to, DWR, DFW, counties, cities, water districts, flood districts, and other such groups with appropriate knowledge about components of their respective geographic regions. As provided above in section 5.4.7, each Public Water Agency that qualifies will be a cooperating agency for the NEPA process. The designation as a cooperating agency does not diminish but adds to the roles and

responsibilities of each Public Water Agency accorded under this MOU and under Section 4004 of the WIIN Act.

6.4.2 Designated Non-Federal Representatives

Reclamation and DWR both retain responsibility for operation of the CVP and SWP, respectively. Many water and power users may participate in the ESA consultation process as a Designated Non-Federal Representative (DNFR), as defined by 50 C.F.R. 402.08. As a DNFR, certain water and power users may be allowed to participate in development of the BA during the informal consultation process with NMFS and USFWS. Staff in water and power organizations have a technical understanding of the CVP and SWP, their operations, and corresponding ecosystem responses. Moreover, the contractual relationships between water and power users and DWR and Reclamation leads to the conclusion that it would be appropriate to designate certain water and power users as DNFRs for development of the BA during the informal consultation process. Reclamation has designated each Public Water Agency that qualifies as a DNFR. The designation as a DNFR does not diminish but adds to the roles and responsibilities of each Public Water Agency accorded under this MOU.

6.4.3 Expanded Stakeholder Engagement Process

Organizations with specific interests or concerns regarding the Reinitiation of Consultation on the Coordinated Long-term Operation of the CVP and SWP, including Environmental and Recreational Fishery, Commercial Fishery, Commercial Passengry Fishery Non-Governmental Organizations (NGOs), Federal and State water and power users and Federal and State agencies within the purview of the reinitiation will be invited to participate in an expanded stakeholder engagement process specific to the development of the EIS for NEPA. Participants of this process will provide input during the preparation of NEPA environmental documents and BA associated with the reinitiation of consultation. By attending and receiving the presentations of materials presented at the expanded stakeholder engagement forum, participants will gain a deep understanding of the analyses and assumptions. Moreover, participants will review administrative draft documents associated with the EIS at the same time as cooperating agencies.

6.4.4 Federally Recognized Tribes

Federally Recognized Tribes with a specific interests or concerns regarding the Reinitiation of Consultation on the Coordinated Long-term Operation of the CVP and SWP, will be invited by Reclamation to become a cooperating agency for the associated NEPA process. As a cooperating agency, these Federally Recognized Tribes will participate in the development and review of the EIS and identify issues and provide information to be considered. Moreover, Reclamation leadership will engage in Government-to-Government consultation if requested

by the Federally Recognized Tribe(s), seeking their input and considering their interest as a necessary and integral part of the decision-making process.

6.5 No Delegation of Authority

Nothing in this Memorandum shall cause, or shall be deemed to cause, any delegation of authority from any Party to this Memorandum to any other Party.

6.6 Applicable Laws

All activities undertaken pursuant to this Memorandum must be in compliance with applicable laws and regulations. All parties understand and acknowledge that regulations promulgated by USFWS and NMFS at 50 C.F.R. Part 402 govern consultations under Section 7 of the ESA and nothing in this Memorandum is to be construed contrary to the meaning and intent of those regulations.

6.7 Severability

In the event one or more provisions contained in this Memorandum is rendered illegal or impossible, or implementation is otherwise barred in any way by, executive or legislative branch action, or by policy decisions therein, the Parties will meet and confer to determine whether such portion will be deemed severed from this Memorandum and the remaining parts of this Memorandum will remain in full force and effect as though such, illegal, impossible or barred portion had never been a part of this Memorandum.

6.8 No Legally Enforceable Rights Created

All parties acknowledge and understand that this Memorandum sets out the expectations of each party as to the conduct of the reinitiated consultation on the Project in accordance with the ESA and the regulations governing such consultations contained in 50 C.F.R. Part 402. All parties also acknowledge and agree that this Memorandum does not, and shall not be construed to, create any rights or obligations for any party enforceable in a court of law by any party, by any party contracting with DWR or Reclamation, by any stakeholder affected by the Project, by any Designated Non-Federal Representative, or by any other third party, agency, person, or entity.

6.9 Anti-Deficiency Act

The Federal agency obligations described in this Memorandum are contingent on appropriations. No liability shall accrue to the United States or Federal agencies in the event funds are not appropriated or allotted.

Bureau of Reclamation

Mid-Pacific Regional Director

Date

Department of Water Resources

Director Date

California Department of Fish and Wildlife

Director Date

United States Fish and Wildlife Service

Pacific Southwest Regional Director

Date

National Marine Fisheries Service

West Coast Regional Administrator

Date

Public Water Agency

General Manager

Date

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