

MEMORANDUM OF AGREEMENT
REGARDING
THE EARLY IMPLEMENTATION OF HABITAT PROJECTS
FOR THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT COORDINATED
OPERATIONS and BAY DELTA CONSERVATION PLAN

I. PURPOSE

This Memorandum of Agreement ("MOA") sets forth the agreement of the parties regarding the process of identifying and evaluating Habitat Projects that are intended to contribute to the habitat protection, enhancement, and restoration acreage requirements for operations of the State Water Project ("SWP") under the federal and state Endangered Species Acts and for operations of the Central Valley Project ("CVP") under the federal Endangered Species Act. This process is intended to provide assurance that acquisition and restoration of lands for such Habitat Projects prior to implementation of the Bay Delta Conservation Plan ("BDCP") will be credited toward meeting the restoration acreage objectives in the BDCP Conservation Strategy.

II. PARTIES

A. This MOA is entered into as of the effective date by and among the California Department of Water Resources ("DWR"), the United States Bureau of Reclamation ("Reclamation"), the State and Federal Contractors Water Agency ("SFCWA"), collectively "the Water Agencies," and the California Department of Fish and Game ("DFG"), the United States Fish and Wildlife Service ("USFWS"), and the National Marine Fisheries Service ("NMFS"), collectively "the Fishery Agencies."

B. It is anticipated that individual water agency members of the SFCWA may implement Habitat Projects. In this event, such agencies may become a Water Agency by executing this MOA.

III. DEFINITIONS

- A. "Bay Delta Conservation Plan" and "BDCP" mean the joint habitat conservation plan and natural community conservation plan prepared in accordance with the Planning Agreement and to be submitted for approval under Section 10 of the federal Endangered Species Act and section 2820 of the California Fish and Game Code.
- B. "BDCP Conservation Strategy" means the actions detailed in the November 18, 2010 draft Chapter 3 of the BDCP, as may be revised in subsequent drafts and a final Chapter 3.

- C. "Credit" and "Credits" mean the acreage and linear mileage contributions of particular Habitat Projects toward meeting the requirements of the Delta Smelt Biological Opinion, the Salmonids Biological Opinion, the Longfin ITP, and the BDCP conservation strategy; in this MOA, use of the verb "to credit" means to recognize and provide Credits.
- D. "Delta Smelt Biological Opinion" means the biological opinion issued by USFWS on December 15, 2008 and any subsequent biological opinion issued by USFWS on the CVP and SWP operations.
- E. "Fishery Agency" and "Fishery Agencies" means USFWS, NMFS, and DFG, individually and collectively.
- F. "Fishery Agency Strategy Team" or "FAST" means a review team composed of technical level representatives from each Fishery Agency and Reclamation that will work with the Proponent Water Agency to review and assist in planning Habitat Projects and provide guidance to the Water Agency on the expected benefits of proposed Habitat Projects in meeting the Restoration Objectives.
- G. "Habitat Projects" means projects that, once developed and implemented, are expected to provide valuable conservation benefits and contribute to the Restoration Objectives of the Longfin ITP and the BDCP Conservation Strategy, and will contribute towards completion of actions included in the Reasonable and Prudent Alternatives for the Delta Smelt Biological Opinion and the Salmonids Biological Opinion.
- H. "Longfin ITP" means the Incidental Take Permit issued by DFG on February 23, 2009 for the SWP with respect to longfin smelt, pursuant to Fish and Game Code Section 2081.
- I. "Planning Agreement" means the Planning Agreement regarding the Bay Delta Conservation Plan dated October 6, 2006, as amended in 2009, by DWR, Reclamation, USFWS, NMFS, DFG, and several other entities.
- J. "Proponent Water Agency" means a Water Agency or other agency that is proposing to implement a particular Habitat Project.
- K. "Prospectus" means information on a proposed Habitat Project provided to the Fishery Agency Strategy Team ("FAST") for the purposes of defining the type and amount of Credit the Habitat Project would yield if implemented as planned.
- L. "Restoration Objectives" means the acreage and linear mileage objectives and/or requirements for habitat protection, conservation, enhancement, and/or restoration contained in the Delta Smelt Biological Opinion, the Salmonids Biological Opinion, the Longfin ITP, and the BDCP Conservation Strategy or actions regarding habitat restoration included in the Reasonable and Prudent Alternatives for the Delta Smelt Biological Opinion and the Salmonids Biological Opinion.

- M. "Salmonids Biological Opinion" means the biological opinion issued by NMFS on June 4, 2009 and any subsequent biological opinion issued by NMFS on the CVP and SWP operations.
- N. "Water Agency" and "Water Agencies" means DWR, Reclamation, SFCWA, and a member of SFCWA that has executed this MOU, individually and collectively.

IV. RECITALS

A. Whereas: The USFWS Biological Opinion of December 15, 2008 on the continued long-term coordinated operations of the CVP and SWP with respect to delta smelt ("Delta Smelt Biological Opinion"), the NMFS Biological Opinion of June 4, 2009 on the CVP and SWP operations with respect to salmonid species ("Salmonids Biological Opinion"), and the California Department of Fish and Game ("DFG") Incidental Take Permit of February 23, 2009 for the SWP with respect to longfin smelt ("Longfin ITP"), each have requirements for habitat preservation, enhancement, and restoration programs, which the Habitat Projects are anticipated to help fulfill.

B. Whereas: The 2006 Planning Agreement regarding the BDCP states in Section 7.7.1:

The Parties may elect to preserve, enhance or restore, either by acquisition or other means, aquatic and associated riparian and floodplain habitat in the Planning Area that support native species of fish, wildlife or natural communities prior to approval of the BDCP. The Parties will confer with the Fishery Agencies regarding potential resources to be protected. The Fishery Agencies agree to credit such resources toward the land and water acquisition or habitat protection, enhancement, and restoration requirements of the BDCP, as appropriate, provided these resources are appropriately conserved, restored or enhanced, and managed to contribute to the BDCP's conservation strategy.

C. Whereas: The parties desire to implement Habitat Projects, which will require substantial time, funding, staffing, and other resources. The Water Agencies will contribute resources for Habitat Projects provided that the Water Agencies are authorized to undertake the action, and that there is reasonable certainty that Habitat Projects implemented by the Water Agencies before approval of the BDCP will be credited toward the requirements of the Delta Smelt Biological Opinion, the Salmonids Biological Opinion, and the Longfin ITP, as appropriate, and toward applicable BDCP requirements upon approval of the BDCP.

D. Whereas: This MOA reflects the parties' agreement regarding the process by which the parties will work cooperatively to identify Habitat Projects that may result in one or more of the following actions: 1) The USFWS will credit Habitat Projects toward the Restoration Objectives of the Delta Smelt Biological Opinion; 2) NMFS will credit Habitat Projects toward the Restoration Objectives of the Salmonids Biological Opinion; 3) DFG will credit Habitat Projects toward the Restoration Objectives of the Longfin ITP; and 4) USFWS, NMFS, and DFG agree that the Habitat Projects will contribute to the habitat protection, enhancement, and Restoration Objectives of the BDCP Conservation Strategy.

E. Whereas: Development of BDCP goals and objectives is ongoing, and refinement of conservation measures in response to the final BDCP goals and objectives may further define habitat functions and expected outcomes needed to comply with the terms of the BDCP. Therefore, the parties agree that contribution of an individual Habitat Project toward the BDCP Conservation Strategy may need to be re-evaluated to better identify the expected outcomes of the project for the final BDCP.

V. HABITAT CREDITING PROCESS

A. Overview of the FAST.

1. Upon execution of this MOA, the Fishery Agencies will form the FAST for the purpose of providing review and guidance to the Water Agencies in the planning, development, and implementation of specific Habitat Projects. Upon its formation, the FAST will establish an organizational structure, procedures, and review timelines consistent with this MOA.

2. The FAST shall be composed of at least one technical level representative from each Fishery Agency and Reclamation, who shall coordinate and organize the participation of additional technical staff from within their respective organization as appropriate. The FAST shall designate one representative as the primary contact person for coordination with the Water Agencies. As appropriate, the FAST shall also coordinate the participation of other regulatory agencies, such as the U.S. Army Corps of Engineers and the appropriate Regional Water Quality Control Board, with the FAST on a case-by-case basis.

B. Initial Concept Review. At the request of a Proponent Water Agency, the FAST shall convene to provide an initial concept review of proposed Habitat Projects. The Water Agency's request for initial concept review will be accompanied with sufficient relevant information on a proposed Habitat Project or Projects to allow the FAST to make an initial assessment on whether the project may be likely to contribute to the Restoration Objectives; an initial assessment on the specific types and amounts of habitat Credits the

Habitat Project is likely to yield; recommendations for adjustments, refinements, or alternatives that should be explored; and recommendations for studies that should be pursued; and identify potential issues with affected local government sponsored Habitat Conservation Plans (HCPs) or Natural Community Conservation Planning (NCCP) programs. The FAST's assessment and recommendations will be provided in writing within a reasonable time.

C. Early Technical Assistance. Following initial concept review for a Habitat Project, the Proponent Water Agency may request early technical assistance of the FAST in the planning and development of the proposed Habitat Project. The FAST will provide such assistance in the form of participation on planning teams, review of technical reports, attendance and guidance at project status meetings, site visits, and other assistance as requested and appropriate, as resources allow.

D. Prospectus Review.

1. At an appropriate time in the development of a specific Habitat Project, the Proponent Water Agency will provide to the FAST a "Prospectus" for the purpose of describing the type and amount of Credit the Proponent Water Agency believes the proposed project would yield. The Prospectus should include:

a. Site Information - Habitat surveys, project designs, and other information, such as environmental planning documents and permitting documentation, evidence of coordination with local government and consistency with locally sponsored HCPs or NCCP programs, if available, relevant to the type and amount of habitat to be created, restored, enhanced and/or preserved;

b. Conservation Strategy - The existing conservation strategy or other framework that identifies regional conservation goals, objectives and criteria and how the project fits within the strategy and/or framework;

c. Site specific Agreement - A proposed agreement to govern the establishment, operation, and management of the proposed Habitat Project;

d. Perpetual Conservation Mechanism - The instrument by which the Proposed Habitat Project site will be protected in perpetuity;

e. Conservation, Restoration and Long-term Management Plan - A proposed long-term management plan that has the primary goal of maintaining the Project habitat for the intended species and natural community conservation objectives; and

f. Funding - Information showing that sufficient funding will be provided to implement the Habitat Project and its long-term management plan.

2. At a mutually acceptable time thereafter, the FAST shall convene a meeting with the Proponent Water Agency to review the prospectus information and determine the type and amount of habitat protection, enhancement and restoration Credit that the Habitat Project would likely yield toward the Restoration Objectives if implemented as planned. The FAST shall make its determination based on the information provided and any other relevant information and in accordance with applicable state and federal law and each Fishery Agencies' written policies and guidelines. If the FAST lacks sufficient information to make its recommendation, the FAST shall identify and request from the Proponent Water Agency the specific information needed to make its recommendation.

3. The FAST will prepare and submit to the Fishery Agencies a memorandum describing its recommendation concerning the type and amount of habitat Credit and a proposed Credit release schedule for the Habitat Project under review. For restoration projects pursued as mitigation for a project impact, the documentation memo will refer to Credits as mitigation Credits, except as provided in E.3., below. The Fishery Agencies will review the FAST recommendations and will forward their determination to the Proponent Water Agency. A mechanism will be developed by the FAST to track accumulated Credits.

E. Habitat Crediting

1. BDCP Crediting - Following approval of the BDCP, Credits that have been determined for restoration projects, as described in D. 3, shall also be applied toward the requirements of the BDCP, where consistent with the BDCP Conservation Strategy and consistent with the Credit release schedule. Such additional Credit shall also be applicable toward requirements of the Section 7 biological opinions prepared by USFWS and NMFS for purposes of the BDCP, and the findings made by DFG in its approval of the BDCP under the Fish and Game Code.

2. Current or Future Biological Opinion Crediting - Based on the determination of the type and amount of habitat Credit made in D.3. above, USFWS is expected to apply the agreed upon types and amounts of habitat Credits of the Habitat Projects toward the requirements of the Delta Smelt Biological Opinion or applicable requirements of any subsequent biological opinion then effective, NMFS is expected to apply the agreed upon habitat Credits of the Habitat Projects toward the requirements of the Salmonids Biological Opinion or applicable requirements of any subsequent biological opinion then effective, and DFG is expected to apply the agreed upon habitat Credits of the

Restoration Projects toward the Longfin ITP or applicable requirements of any subsequent Fish and Game Code 2081 Permit for the SWP.

3. Specific Project Mitigation - If, and to the extent that, any Habitat Project is used to mitigate the impacts of specific projects, actions, or activities that are not BDCP covered activities, the project will not count toward the mitigation requirements or conservation objectives of the BDCP.

4. Specific Habitat Projects - For Habitat Projects that are being pursued in whole or in part through FloodSAFE and the CALFED Ecosystem Restoration Program, the Fishery Agencies will consider, on a case-by-case basis, whether the conservation outcomes of specific projects will be applied toward applicable conservation objectives of BDCP upon approval of BDCP, provided that the same habitat credit is not attributable to more than one program or project authorized under the federal and state Endangered Species Act (for example, BDCP and a Biological Opinion on a separate levee repair project).

VI. MISCELLANEOUS

A. Relationship to BDCP. The parties anticipate that upon approval of the BDCP, the BDCP Implementing Agreement and other related agreements will provide the mechanism and procedures for the planning, funding, implementation, development, and management of Habitat Projects that implement the BDCP Conservation Strategy. This MOA is not intended to define the procedures for the BDCP and in the event of inconsistencies between this MOA and the subsequent BDCP and related agreements, the BDCP and related agreements shall control.

B. Compliance with Laws. The agency or organization implementing the Habitat Project shall comply with all applicable laws, including, but not limited to, state and federal environmental laws.

C. Preservation of Rights and Authorities. All provisions of this MOA are intended and will be interpreted to be consistent with all applicable provisions of state and federal law. The parties recognize that each party to this MOA has specific statutory and regulatory authority and responsibilities, and that actions of these public agencies must be consistent with applicable procedural and substantive requirements. Nothing in this MOA is intended to, nor will have the effect of, constraining or limiting any public entity in carrying out its statutory responsibilities. Nothing in this MOA constitutes an admission by any party as to the proper interpretation of any provision of law, nor is anything in this MOA intended to, nor will it have the effect of, waiving or limiting any public entity's rights and remedies under any applicable law.

D. Modification. This MOA may be modified upon written agreement of all signatories. Modification may be proposed by one or more signatories. Proposals for modification will be circulated to all signatories for a 20-working day period of review. Approval of such proposals will be indicated by written acceptance by each signatory, which may be executed in counterparts.

E. Party Withdrawal. Any party may withdraw from participation in this MOA upon written notice to the other parties. The MOA shall remain in effect as to the remaining parties, provided the purpose of the MOA is not frustrated by the withdrawal of the particular party.

F. Term of the MOA. This MOA shall become effective on the last date of execution by DFG, DWR, NMFS, Reclamation, USFWS, and SFCWA, and will remain in effect until terminated by mutual agreement of the parties.

G. Funding. Nothing in this MOA may be construed to obligate Reclamation, USFWS, NMFS, or the United States to any current or future expenditure of resources in advance of the availability of appropriations from Congress. No liability shall accrue to the United States for failure to perform any obligation under this MOA in the event that funds are not appropriated or allotted. This MOA does not commit any party to funding of Habitat Projects or actions described in this MOA, including any funding that may be necessary for a party to carry out provisions of this MOA. Funding for a party's participation in actions to implement the process described by the MOA shall be borne by that party.

H. Execution in Counterparts. This MOA may be executed in counterparts.

IN WITNESS WHEREOF, the parties hereto executed this MOA on the date(s) indicated below.

United States Bureau of Reclamation

By:




Donald R. Glaser, Regional Director

Date:

9/15/11

United States Fish and Wildlife Service

By: 
Ren Lohofener
Regional Director, Pacific Southwest Region

Date: 9/30/2011

National Marine Fisheries Service

By: _____
Rodney R. McInnis
Regional Administrator, Southwest Region

Date: _____

Department of Fish and Game

By: _____
~~John McCannan, Director~~
CHUCK BONHAM

Date: _____

Department of Water Resources

By: _____
Mark W. Cowin, Director

Date: _____

State and Federal Contractors Water Agency

By: _____
Byron Buck, Executive Director

Date: _____

United States Fish and Wildlife Service

By: _____
Ren Lohofener
Regional Director, Pacific Southwest Region

Date: _____

National Marine Fisheries Service

By: Rodney R. McInnis
Rodney R. McInnis
Regional Administrator, Southwest Region

Date: 9-20-11

Department of Fish and Game

By: _____
~~John McGinnis~~, Director
Chuck Conham,

Date: _____

Department of Water Resources

By: Mark W. Cowin
Mark W. Cowin, Director

Date: 9/16/2011

State and Federal Contractors Water Agency

By: _____
Byron Buck, Executive Director

Date: _____

United States Fish and Wildlife Service

By: _____
Ren Lohofener
Regional Director, Pacific Southwest Region

Date: _____

National Marine Fisheries Service

By: _____
Rodney R. McInnis
Regional Administrator, Southwest Region

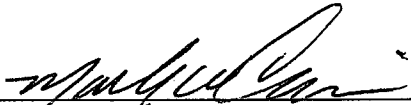
Date: _____

Department of Fish and Game

By: _____
~~John McCannan~~, Director
Chuck Bonham,

Date: _____

Department of Water Resources

By: _____

Mark W. Cowin, Director

Date: 9/6/2011

State and Federal Contractors Water Agency

By: _____
Byron Buck, Executive Director

Date: _____

United States Fish and Wildlife Service

By: _____
Ren Lohofener
Regional Director, Pacific Southwest Region


Date: _____

National Marine Fisheries Service

By: _____
Rodney R. McInnis
Regional Administrator, Southwest Region

Date: _____

Department of Fish and Game

By:  _____
Charlton H. Bonham, Director

Date: 9.14.11

Department of Water Resources

By: _____
Mark W. Cowin, Director

Date: _____

State and Federal Contractors Water Agency

By: _____
Byron Buck, Executive Director

Date: _____

United States Fish and Wildlife Service

By: _____
Ren Lohofener
Regional Director, Pacific Southwest Region

Date: _____

National Marine Fisheries Service

By: _____
Rodney R. McInnis
Regional Administrator, Southwest Region

Date: _____

Department of Fish and Game

By: _____
~~John McGamman, Director~~
Chuck Southam

Date: _____

Department of Water Resources

By: _____
Mark W. Cowin, Director

Date: _____

State and Federal Contractors Water Agency

By:  _____
Byron Buck, Executive Director

Date: 9/13/11