

DRAFT INFORMATION/BRIEFING MEMORANDUM

DATE: July 21, 2017
FROM: Reclamation, USFWS and NMFS staff
SUBJECT: Endangered Species Act (ESA) Compliance for Long-term Water Service Contract Renewals

This paper describes advantages and disadvantages to completing ESA section 7 consultations for long-term water service contract renewals prior to the completion of ESA section 7 consultation on long-term operations (LTO) of the Central Valley Project (CVP) and State Water Project (SWP)

KEY TAKEAWAY

- Reclamation needs National Environmental Policy Act (NEPA) and ESA compliance to extend for at least 40 years in order to be able to sign the expected 40-year municipal and industrial (M&I) water service contracts with the 10 contractors whose water service contracts will be up for renewal in the next 5 years.

BACKGROUND

Reclamation currently has 10 long-term M&I water service contracts that are up for renewal in the next five years. M&I water service contracts are up to 40 years, but Reclamation has never signed an M&I contract that is less than 40 years. Reclamation also has 17 long-term agricultural and M&I water service contracts that are up for renewal in the next 5 years. M&I and agricultural contracts are signed for up to 25 years. HR 23, passed by the House of Representatives, would return all contracts to 40 year contracts.

American River water contractors want to pursue separate NEPA and ESA compliance for renewal of long-term contracts rather than wait for the Reinitiation of Consultation (ROC) on the LTO of the CVP and SWP to be complete in three to five years.

DISCUSSION

Possible ESA issues with not waiting for the ROC on LTO to sign long-term water contracts include:

- **Irreversible or irretrievable commitment of resources:** Reclamation and NMFS have discussed and are not aware of any case law regarding Section 7(d) of the ESA and signing water contracts after the initiation of consultation on the LTO. Section 7(d) of the ESA prohibits an irreversible or irretrievable commitment of resources (which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures) after initiation of consultation. There is a risk of litigation if Reclamation moves forwards with signing contracts prior to completing consultation on the LTO. However, Reclamation could choose to consult independently of the ROC on LTO on each water contract renewal.
- **Entire CVP and SWP Operations Included in Water Contract Renewal Consultations:** Because long-term contracts are part of the reason why Reclamation operates the CVP and SWP, there is a question whether extensive analysis of the entire

CVP and SWP would be required in each consultation for signing a long-term water service contract.

- **Environmental Baseline:** Per the ESA Handbook, effects of the past operation of the entire project are required to be included in the environmental baseline. Long-term water contract consultations could rely on the analysis done for the 2008 LTO Biological Assessment, unless the ROC on LTO environmental baseline has been developed, in which case long-term water contract consultations should use the ROC on LTO environmental baseline. If the 2008 LTO Biological Assessment environmental baseline is used, there are changed conditions since 2008 that would not be incorporated. Bringing the environmental baseline up to the present could require analysis that would be duplicative to what Reclamation is doing under the ROC on LTO.
- **Interrelated and Interdependent Effects:** Per the ESA Handbook, an interrelated activity is an activity that is part of the proposed action and depends on the proposed action for its justification. An interdependent activity is an activity that has no independent utility apart from the action under consultation. Coordinated Long-term Operation of the CVP and SWP will continue to occur without the renewal of long-term contracts, as Reclamation must operate the CVP even without contracts for D-1641, flood control and other purposes. Operation of the CVP and SWP also has independent utility apart from renewal of long-term contracts, and does not depend on long-term contract renewals for its justification. Therefore, the overall operation of the CVP and SWP is not interrelated or interdependent to renewal of long-term contracts.
- **Indirect Effects:** Per the ESA Handbook, indirect effects are caused by or result from the proposed action, are later in time, and are reasonably certain to occur. Indirect effects may occur outside of the area directly affected by the action. Indirect effects may include other Federal actions that have not undergone section 7 consultation but will result from the action under consideration, but they must be reasonably certain to occur. The operation of the CVP and SWP is not an indirect effect because it is not related to signing of the long-term contracts.
- **Resource Issues:** Doing several concurrent consultations will slow down the ROC on LTO due to workload issues in Reclamation and NMFS.
- **Reopener Clause:** It is likely that NMFS will not complete separate water contract consultations without the inclusion in water contracts of a term that specifically requires contracts to be subject to the terms from the future ROC on LTO. Even if this is not included, as the operations of the CVP and SWP from the 2008 Biological Assessment will be superseded by the operations described in the reinitiation of consultation, long-term water contracts will be subject to the future Biological Opinions from the reinitiation of consultation.

POSITION OF INTERESTED PARTIES

Water service contractors would like to get long-term contracts as soon as possible. However, it should be clear to them that these contracts would be subject to reopeners due to the ROC on LTO. They may or may not be less interested in signing long-term water contracts given the future uncertainty in the contract.

NMFS would prefer to consult on the long-term water service contracts after the ROC on LTO consultation is complete.