

**Concept Offered for Consideration by
BDCP Implementation Structure/Governance Work Group**

Offered by Natural Heritage Institute

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The critical infrastructure improvement emerging in the BDCP to move the delta from a high conflict to a low conflict environment is the isolated conveyance facility (ICF), which may be operated in a dual conveyance configuration with the south delta pumping plants. The virtue of constructing an additional point of diversion is that it will increase the flexibility of water extractions to avoid conflicts with the fish. But the ICF will also increase the ability to extract water from the system, which raises concerns among environmental interests about potential for inflicting additional damage on the fisheries, among area of origin interests about increased exports of Sacramento Valley water moving to the southland, and among delta farmers about salinity intrusion. As the ICF will require legislative (and perhaps Congressional) action to authorize its construction and (probably) appropriate funds, satisfying these political concerns may be essential to the viability of the BDCP solution. Thus, the governance challenge is to assure that an increase in the capacity to move water out of the delta will not be used for that purpose.

This challenge is exacerbated by the reality that the economic and political power of the service area for the delta exports far exceed that of these vulnerable constituencies. Thus, limitations on the use of the ICF to increase exports of water must be durable over time such that any limitations agreed to in the BDCP conservation plan cannot be abrogated by legislative fiat in the face of the inevitable future water supply crises in the state. At the same time, the limitations on the use of the ICF must be flexible enough to adapt to lessons that will emanate from the adaptive management program. How do we devise a governance structure that can provide operational assurance that are both durable enough and yet flexible enough to satisfy all constituencies?

As one reviews the types of legal constructs that could be employed to address this unique situation, one is struck that conventional approaches just won't work. The most durable water allocation construct that the law affords is an interstate compact, which requires both an act of congress and the consent of all of the states to amend. But the delta water system is wholly instate. Legislative enactments are inherently unstable, as previously noted. Even super-majority arrangements such constitutional

amendments are not immutable. Regulations, joint powers authorities, or even contracts among public agencies can all be altered by legislation.

On inspection, it turns out that the most durable (and yet flexible) construct is probably a contract that includes private parties and penalties for breach onerous enough to prevent one (such as liquidated damages calibrated to the marginal cost of substitute water in the system).

How could that work in the context of the ICF? Suppose that a private corporation were created, with a board of directors that represents (at least) the interests that would be vulnerable to a “misused” ICF. Suppose this corporation were granted, through contract with the ICF operators (DWR and USBR), a property right to a fraction of the capacity of the ICF (say 20% for sake of illustration), and that the remaining 80% would be sufficient to assure that the water supply commitments of the BDCP could be met. Now the private corporation owns a constraint on the operations of the ICF that it can manage as it thinks best to protect its interests. One can envision a “cap-and-trade” type of arrangement taking place—not unlike the EWA. When larger volumes of extractions can be accomplished without harm to the fish, the corporation could allow a portion (or all) of its capacity to be utilized by the water projects in exchange for larger capacity constraints that it could utilize at times when the fish are vulnerable. A more elaborate structure would also confer property rights to the capacity of the south delta pumps on the private corporation.

As is apparent, this type of experiential flexibility would easily accommodate an adaptive management program. Notice, too, that a construct of this sort would neutralize the debate over the size of the ICF. A larger pipe would simply entail a larger portion of the capacity being allocated to the corporation. This would be advantageous in that, other considerations (such as cost) aside, the larger the pipe, the greater the operational flexibility.

There are many tricky (but not insurmountable) issues that would have to be resolved to make this governance option feasible:

- How could private rights be conferred over infrastructure that is publicly financed?
- What should be composition and charter of the private corporation? What interests should be represented? How would it be funded? How would it itself be governed?
- Should the corporation have the right to contract directly with SWP/SWP contractors to deliver water out of its capacity, perhaps on an interruptible basis in the event that covered fish unexpectedly show up at the export pumps?

- Would legislation be necessary to authorize DWR and/or DWR to enter into contracts of the sort contemplated?
- What other functions would the corporation have, if any, to implement the BDCP?
- How would the corporation interface with the adaptive management program?
- How would the water supply commitments of the BDCP be assured under such privately managed capacity constraints?

The threshold question is whether this concept holds enough promise to warrant further development such that a group of creative lawyers and other institutional design junkies should be assembled to flesh it out? NHI believes that it does and is willing to devote time to vet it with others.