

**CALENDAR ITEM
C94**

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04/26/2013

W30087

J. Ramos

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REQUEST AUTHORIZATION FOR THE EXECUTIVE OFFICER TO SIGN, ON BEHALF OF THE COMMISSION, THE PROPOSED RENEWAL OF THE MEMORANDUM OF UNDERSTANDING/CONSERVATION AGREEMENT TO ENSURE THE CONSERVATION OF A STATE ENDANGERED PLANT SPECIES, THE TAHOE YELLOW CRESS, LOCATED EXCLUSIVELY AT LAKE TAHOE, PLACER AND EL DORADO COUNTIES.

PARTY:

California State Lands Commission
100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202

BACKGROUND:

Tahoe yellow cress (*Rorippa subumbellata*) (TYC) is a rare plant species endemic to the shores of Lake Tahoe in California and Nevada. It was listed as endangered by the State of California in 1982 (Fish & G. Code § 2050 et seq.) and is considered endangered throughout its range by the California Native Plant Society. TYC is state-listed as critically endangered in Nevada (Nevada Revised Statutes 527.270 et seq.), and is considered threatened by the Northern Nevada Native Plant Society. It is classified as a candidate species for listing under the federal Endangered Species Act of 1973, as amended (64 Code of Federal Regulations [CFR] 57533).

Previous evidence suggested that threats to the number of sites occupied by TYC were primarily due to:

- Alterations in lake level dynamics caused by construction and operation of the Truckee River outlet dam and reservoir;
- Destruction of actual and potentially suitable habitat by the construction of piers, jetties, and other structures;
- High levels of recreational activity associated with beaches and dunes;
- Disturbance of the sand by public and private property maintenance activities; and

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- Possibly random environmental events.

Because of the threats facing the species, a task force, composed of the agencies listed below, was formed to develop and implement a Conservation Strategy (CS) for TYC. The CS is coupled with a Memorandum of Understanding (MOU)/Conservation Agreement (CA), and was signed by the California State Lands Commission (CSLC) in 2002 along with the other signatory agencies listed below. Implementation of the CS/MOU demonstrated the commitment of all involved to the long-term protection of the species. The CSLC has been an integral part of the conservation and protection of TYC and this role continues to be reflected in the CS.

The following entities have been committed to the implementation of the CS and are signatory to the MOU/CA: Tahoe Regional Planning Agency, U.S. Fish and Wildlife Service, U.S. Forest Service, Nevada Division of Forestry, Nevada Division of State Lands, Nevada Division of State Parks, Nevada Natural Heritage Program, CSLC, California Department of Fish and Wildlife, California Department of Parks & Recreation, California Tahoe Conservancy, Tahoe Lakefront Owners' Association, and League to Save Lake Tahoe.

Since implementation of the CS in 2002, great strides have been made in the conservation of the species. The agencies have continued annual lake-wide surveys of TYC and have produced annual reports (2002 to 2012) on the status of the plant around the lake. Extensive scientific research has occurred, including:

- Successful out-planting and transplanting of TYC at many sites around Lake Tahoe;
- Experimental designs testing survivorship along varying beach profiles;
- Genetic studies of the plant to understand the metapopulation of the species;
- Public outreach efforts;
- Establishing protective policies among agencies for shorezone projects (e.g., shorezone revetment and pier projects); and
- Developing site-specific information sheets on all known occupied TYC sites around the lake.

The MOU/CA adopted in 2002 expired on January 29, 2013. Presently, the Tahoe Yellow Cress Adaptive Management Working Group is requesting the signatory parties to approve the renewal of the MOU/CA to allow continued

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adaptive management of the species. The CSLC's continued responsibilities under the MOU/CA will not require more staff or resources than is already provided for the conservation of TYC. The MOU/CA outlines the CSLC's continued participation in and commitment to the Adaptive Management Working Group, formerly the Technical Advisory Group, and Executive Committee. CSLC staff would continue to oversee the successful implementation of the CS, ensure protective measures where the CSLC has leasing jurisdiction, and work with private landowners through education and stewardship.

OTHER PERTINENT INFORMATION:

1. The staff recommends that the Commission find that this activity is exempt from the requirements of the California Environmental Quality Act (CEQA) as a statutorily exempt project. The project is exempt under California Code of Regulations, Title 14, section 15262, because it involves a feasibility or planning study for possible future action, which the Commission has not approved, adopted, or funded.

Authority: Public Resources Code section 21102 and Title 14, California Code of Regulations, section 15262.

2. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq. Based upon the staff's consultation with the persons nominating such lands and through the CEQA review process, it is the staff's opinion that the project, as proposed, is consistent with its use classification.

REFERENCES:

- A. Conservation Strategy for Tahoe Yellow Cress. August 2002.

EXHIBIT:

- A. Memorandum of Understanding/Conservation Agreement. February 2013.

IT IS RECOMMENDED THAT THE COMMISSION:

1. Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, Title 14, section 15061 as a statutorily exempt project, Feasibility and Planning Studies, California Code of Regulations, Title 14, section 15262.

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2. Find that this activity is consistent with the use classification designated by the Commission for the land pursuant to Public Resources Code sections 6370 et seq.
3. Authorize the Executive Officer to sign, on behalf of the Commission, the renewal of the Memorandum of Understanding/Conservation Agreement to allow continued adaptive management of TYC, staff participation with the Adaptive Management Working Group, and staff implementation of the Conservation Strategy.

Memorandum of Understanding/Conservation Agreement

This Memorandum of Understanding/Conservation Agreement (MOU/CA) is made among the Tahoe Regional Planning Agency (TRPA); the U.S. Fish and Wildlife Service (USFWS); the U.S. Forest Service (USFS); the Nevada Division of State Parks; the Nevada Division of State Lands; the Nevada Division of Forestry (NDF); the Nevada Natural Heritage Program; the California Department of Fish and Wildlife (CDFW); the California Department of Parks and Recreation; the California Tahoe Conservancy; the California State Lands Commission; the League to Save Lake Tahoe, a non-profit organization; and the Tahoe Lakefront Owners' Association, a non-profit organization. The above entities are collectively known as "the Parties."

RECITALS

WHEREAS, Tahoe yellow cress (TYC) is a plant species endemic to the shores of Lake Tahoe; and

WHEREAS, imminent threats coupled with a reduction in the distribution and number of TYC populations caused the States of Nevada and California to list the species as endangered; and

WHEREAS, USFWS declared TYC to be a candidate for listing under the Endangered Species Act of 1973, as amended (ESA); and

WHEREAS, CDFW listed TYC as endangered pursuant to the Native Plant Protection Act of 1977 and the California Endangered Species Act of 1984, as amended (CESA); and

WHEREAS, the protection and conservation of TYC requires a coordinated effort of all the Parties; and

WHEREAS, it is the intent of the Parties to prevent the extinction and promote the recovery and conservation of TYC through coordinated management and cost sharing; and

WHEREAS, an Executive Committee of directors and executive officers was formed by members of all the Parties to guide the preparation and implementation of a Conservation Strategy (CS) for the protection and conservation of the TYC, and the Executive Committee appointed a Technical Advisory Group (TAG), the TYC Adaptive Management Working Group (TYC AMWG) to develop the CS; and

WHEREAS, the CS developed in response to the Executive Committee's direction provides the basis for avoiding, minimizing, and mitigating the effects of human activities within occupied and potentially suitable TYC habitat; and

WHEREAS, the CS coordinates conservation efforts among the Parties to adaptively manage this species and coordinate monitoring to provide for the recovery of this species; and

WHEREAS, the actions described within the CS for TYC are grounded in a rigorous review and analysis of this species and the Lake Tahoe region; and

WHEREAS, the key aspect of the biology of TYC is the metapopulation dynamic of its life history, which makes it necessary to consider both occupied and potentially suitable habitat for management; and

WHEREAS, the role of the private land owner in the stewardship of TYC is crucial and this critical role is reflected within the CS and this MOU/CA , with the intention of gaining landowner cooperation through education regarding TYC and strategies that respect private property rights; and

WHEREAS, the original MOU/CA expired by its terms on January 29, 2013; and

WHEREAS, the Parties desire to formalize their continuing commitment to implement the CS through signing this MOU/CA

NOW, THEREFORE, the Parties agree as follows:

A. PURPOSES

1. To ensure the implementation of conservation measures and management activities identified in the CS to provide long-term conservation benefits and achieve long-term survival of the TYC; and
2. To facilitate voluntary cooperation between the Parties to provide long-term protection for TYC and its habitat; and
3. To describe a process to be undertaken if a Party is unable to perform a conservation measure or management activity set forth in the CS; and
4. To set forth the miscellaneous provisions of the Parties' agreement to implement the CS.

B. COMMITMENT TO TYC CONSERVATION STRATEGY

1. Subject to the provisions of this MOU/CA, each Party agrees to implement the CS. Any action taken by an individual Party must be consistent with that Party's governing authority and decision making processes.
2. Each Party shall designate individuals to serve on both the TYC AMWG and also on the Executive Committee.
3. The Parties incorporate by reference into this MOU/CA the TYC CS, attached hereto as Exhibit A, and any future revisions to that document pursuant to Paragraph G.6 of this MOU/CA.

C. TYC SURVEYS AND MONITORING REPORTS

1. Occurrence of TYC surveys are directly linked to the water elevation of Lake Tahoe. At elevations at or above 6,226 feet Lake Tahoe Datum (LTD), a survey shall be conducted yearly. At water elevations below 6,226 feet LTD, a survey shall be conducted at least every other year. In order to monitor the seasonal pressures of recreation and construction related activities, surveys shall be conducted during the first week of September. The survey protocol and monitoring program are detailed in the CS.

2. By January 1 of each year following a survey, the TYC AMWG shall prepare a monitoring report describing the status of TYC, per the details outlined in the CS. This report will be a primary source of resource information for decision making for entities involved in conservation efforts.

3. To the extent permitted by law, all Parties agree to provide to each other all relevant information in their possession or control related to implementation of the CS within 90 days of a request by another Party.

4. The Executive Committee shall approve the monitoring report or request specific modifications within 30 days of the TYC AMWG delivering the report to the Parties.

D. FUNDING

1. This instrument is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the Parties to this instrument will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the Parties and shall be independently authorized by appropriate statutory authority. This instrument does not provide such authority. Specifically, this instrument does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or agreement for training or other services must fully comply with all applicable requirements for competition.

E. Enforceability of this MOU/CA

1. Successful implementation of the MOU/CA and CS should remove the threats to the species and ensure the long-term survival of TYC by maintaining and enhancing existing habitat in the Lake Tahoe basin and integrating new information on the biology of the species into future conservation and management activities. As a result, the need to list the species under the ESA should be avoided. The sole consequence of failure by the Parties to implement this MOU/CA shall be the consideration by the USFWS to list the TYC under the ESA.

2. Without limiting the applicability of rights granted to the public pursuant to any law, this MOU/CA or the CS shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof. The duties, obligations, and responsibilities of the Parties to this MOU/CA with respect to third parties shall remain as imposed under existing law.

F. Duration of MOU/CA and Termination Clause

1. This MOU/CA shall terminate 10 years from the date of the last signature of the Parties hereto (“the initiating date”).

2. If any Party anticipates that some portion of the CS cannot be carried out by their agency, then that Party must notify other Parties in writing within 60 days prior to final determination of its inability to carry out such action. Within that time frame, the remaining Parties will meet to discuss alternatives to the implementation of the unfulfilled action.

3. Any Party may suspend or terminate its participation in this MOU/CA and CS by providing 90 days written notice to all other Parties. Suspension or termination by one or more Parties shall not alter this MOU/CA between the remaining Parties. However, the suspension or termination of any Party from the MOU/CA raises the likelihood that USFWS will list TYC under the ESA.

G. MISCELLANEOUS PROVISIONS

1. Notices

Any notice permitted or required pursuant to this MOU/CA or CS shall be in writing, delivered to the appropriate persons listed in Exhibit B hereto. Notices may be delivered by mail, facsimile, electronic mail, or other electronic means. In the event that a Party is unresponsive to a notice delivered by electronic means the notice will be delivered personally or shall be deemed to be given fifteen (15) days after deposit in the United States mail, certified and postage prepaid, return receipt requested, and addressed as follows, or at such other address as any Party may from time to time specify to the other Parties in writing. Notices shall be transmitted so that they are received within the specified deadlines.

2. Elected officials not to benefit

No member of or delegate to the U.S. Congress or California or Nevada legislatures shall be entitled to any share or part of this MOU/CA, or to any benefit that may arise from it.

3. Relationship to Legal Authorities

a. The terms of this MOU/CA and the CS shall be governed by and construed in accordance with the federal ESA, the California ESA (CESA), the Nevada Revised Statutes (NRS), the TRPA Compact and Code of Ordinances, and other applicable federal and state laws.

b. Nothing in the MOU/CA or CS is intended to limit the authority of the USFWS, CDFW, NDF, and TRPA to seek penalties or otherwise fulfill their responsibilities under the ESA, CESA, NRS, and TRPA Code, respectively. Moreover, nothing in the MOU/CA or CS is intended to limit or diminish the legal obligations and responsibilities of the USFWS, USFS, CDFW, NDF, and TRPA as agencies of the federal and state governments. Nothing in this MOU/CA or CS limits the right or

obligation of any state or private entity to engage in appropriate consultation or permitting process required under any applicable federal or state law; however, it is intended that the rights and obligations of the Parties under the MOU/CA and CS may be considered in any consultation affecting a Party's use of the specified lands.

4. Successors and assigns

This MOU/CA and each of its covenants and conditions shall be binding on and shall insure to the benefit of the Parties and their respective successors and assigns. Assignment or other transfer of the MOU/CA shall be governed by the TRPA, USFWS, CDFW, and NDF regulations in force at the time.

5. Public documents

Information provided to any governmental agency pursuant to this MOU/CA and CS may be subject to release to members of the public under either state or federal law including but not limited to information furnished to the USFWS under the Freedom of Information Act (5 U.S.C. 552).

6. Process for modifications and amendments to the MOU/CA and the CS.

- a. Proposals to modify and or amend either the MOU/CA or the CS will be distributed in writing to the Executive Committee members to review. A written response indicating the approval or not to proceed with the proposed modification is required in 90 days from the date of distributing the proposal. Notification and distribution of proposals may be sent in accordance with section G.1, herein.
- b. This MOU/CA may be amended, as necessary, by the consensus of the Executive Committee members or their designated proxies, through the execution of a written amendment signed and dated by all the Parties, in accordance with the agreed upon voting and consensus building procedures in Exhibit C.
- c. Additional participants, including property owners, property managers, special districts, non-profit entities and members of the public may join the MOU/CA by execution of a Signature page, subject to the consensus of all the Parties, in accordance with the agreed upon voting and consensus building procedures in Exhibit C.
- d. The CS may also be modified, as necessary, by the consensus of the Executive Committee members or their designated proxies. The modified CS will be reviewed by the Parties and voted on for adoption, by the consensus of the Executive Committee members, in accordance with the agreed upon voting and consensus building procedures in Exhibit C. Voting may occur through the use of electronic mail.
- e. The Executive Committee shall approve the modifications or amendments to the MOU/CA and or the CS or request specific changes within 90 days of receiving a document to review.

7. Participation in similar activities

This instrument in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations, and individuals.

8. No regulatory approvals

Neither this MOU/CA nor CS constitutes regulatory approval by any Party of any projects mentioned in the MOU/CA or CS. All projects and actions must follow the otherwise applicable regulatory process for all necessary permits or approvals.

9. Text messaging while driving

In accordance with Executive Order (EO) 13513, "Federal Leadership on Reducing Text Messaging While Driving," any and all text messaging by Federal employees is banned: a) while driving a Government owned vehicle (GOV) or driving a privately owned vehicle (POV) while on official Government business; or b) using any electronic equipment supplied by the Government when driving any vehicle at any time. All cooperators, their employees, volunteers, and contractors are encouraged to adopt and enforce policies that ban text messaging when driving company owned, leased or rented vehicles, POVs or GOVs when driving while on official Government business or when performing any work for or on behalf of the Government.

10. Debarment and suspension

The Parties shall immediately inform the U.S. Forest Service if they or any of their principals are presently excluded, debarred, or suspended from entering into covered transactions with the federal government according to the terms of 2 CFR Part 180. Additionally, should the Parties or any of their principals receive a transmittal letter or other official Federal notice of debarment or suspension, and then they shall notify the U.S. Forest Service without undue delay. This applies whether the exclusion, debarment, or suspension is voluntary or involuntary.

11. Authorized representatives

By signature below, each Party certifies that the individuals listed in this document as representatives of the individual Parties are authorized to act in their respective areas for matters related to this MOU. In witness whereof, the Parties here to have executed this MOU as of the last date written below.

12. Counterparts

This MOU may be executed in one or more counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the Parties hereto have caused this agreement to be executed as of the day and year first above written

TAHOE REGIONAL PLANNING AGENCY

By: _____
Joanne Marchetta, Executive Director Date _____

U.S. FISH AND WILDLIFE SERVICE

By: _____
Ted Koch, Manager Date _____
California/Nevada Operations Office

U.S. FOREST SERVICE,
LAKE TAHOE BASIN MANAGEMENT UNIT

By: _____
Nancy Gibson, Forest Supervisor Date _____

NEVADA DIVISION OF STATE PARKS

By: _____
David K. Morrow, Administrator Date _____

NEVADA DIVISION OF STATE LANDS

By: _____
James R. Lawrence, Administrator Date _____

NEVADA DIVISION OF FORESTRY

By: _____
Pete Anderson, State Forester Firewarden Date _____

NEVADA NATURAL HERITAGE PROGRAM

By: _____
Jennifer Newmark, Program Manager Date _____

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

By: _____
Tina Bartlett, Regional Manager Date _____

CALIFORNIA DEPARTMENT OF PARKS AND RECREATION

By: _____
Marilyn Linkem, Superintendent Date _____

CALIFORNIA TAHOE CONSERVANCY

By: _____
Patrick Wright, Executive Director Date _____

CALIFORNIA STATE LANDS COMMISSION

By: _____
Jennifer Lucchesi, Executive Officer Date _____

LEAGUE TO SAVE LAKE TAHOE

By: _____
Darcie Goodman Collins, Executive Director Date _____

TAHOE LAKEFRONT OWNERS ASSOCIATION

By: _____
Jan Brisco, Executive Director Date _____

Exhibit A: TYC Conservation Strategy

Exhibit B

Executive Committee Members

Agency/Group and Representatives

Tahoe Regional Planning Agency	Joanne Marchetta
U.S. Fish and Wildlife Service	Ted Koch
U.S. Forest Service, Lake Tahoe Basin Management Unit	Nancy Gibson
Nevada Division of State Parks	David K. Morrow
Nevada Division of State Lands	James R. Lawrence
Nevada Division of Forestry	Pete Anderson
Nevada Natural Heritage Program	Jennifer Newmark
California Department of Fish and Wildlife	Tina Bartlett
California Department of Parks and Recreation	Marilyn Linkem
California Tahoe Conservancy	Patrick Wright
California State Lands Commission	Jennifer Lucchesi
League to Save Lake Tahoe	Darcie Goodman Collins
Tahoe Lakefront Owners Association	Jan Brisco

Exhibit C

VOTING AND CONSENSUS-BUILDING PROCEDURES

Members of the Executive Committee (Committee) include agencies and entities with significant land management, resource management, regulatory or cultural heritage responsibilities in the Lake Tahoe Basin that have signed the MOU. The Committee provides high-level leadership and direction toward implementation of the MOU and CS. Members of the Committee are executive level representatives, with the ability to speak for their agency or entity.

If new agencies or entities adopt, then their executive representative shall be invited to join the Committee. Each MOU signatory shall have one member on the Committee. When a vacancy occurs, the committee co-chairs will ask the represented entity to designate a replacement within 30 days.

The continuity and sustained commitment of all members are critical to the success of the Committee. Individual agencies retain the authority to determine their involvement in the Committee and their level of participation in implementing the CS.

The Committee members are also expected to have an active level of participation to carry out the work and responsibilities of the Committee and participate in consensus. Those members that have not participated in Committee meetings in more than 18 months or since the last Committee meeting (whichever is longer), should abstain from participation in consensus.

As full and equal partners, the Executives agree to use a consensus seeking process to develop the Committee's advice and recommendations. Actions requiring consensus are only taken on issues or items listed on the meeting agenda unless otherwise agreed to by all Committee members present.

For the purpose of the Committee, consensus means that everyone agrees that they can live with the final proposal after reasonable effort has been made to meet any outstanding interests. This is not the same as unanimity, where all parties agree. The consensus gauge below shall be used to indicate the degree of agreement of any committee member. If all committee members are in the range of 1 through 4, the group shall be considered in consensus and no further discussion is needed. If several individuals are at a 4, then additional discussion may be needed. Further discussion is required if one or more members are at a 5 or 6.

Consensus Gauge

1. The proposed decision is fully acceptable. Support the committee's decision or recommendation.
2. The proposed decision is acceptable with minor reservations. Support the committee's decision or recommendation.
3. The proposed decision is acceptable, even with major reservations, but it is the best decision at this time. Support the committee's decision or recommendation.
4. Stand aside/abstain; won't block but cannot offer support.
5. Cannot live with the decision; must be able to offer an alternative.
6. Need more information; must be able to identify the information needed.

Exhibit C

The following process shall generally be followed for any item necessitating consensus. Each executive or their designated alternate representative on the Committee present is to be polled to determine if consensus has been achieved. The alternate representatives are empowered to act on behalf of the executives they represent. The Committee members must be fully informed of the issue to register their level of consensus. There is no absentee participation in the consensus process, but participation via teleconferencing may be permissible if agreed to, and arranged for, in advance.

Meeting agenda will include notification of any items requiring consensus. As this is a non-binding charter any consensus achieved will not supersede any member agency's policies, regulations, or other guiding documents.

FS Agreement No. 13-MU-11051900-005

The authority and format of this agreement have been reviewed and approved for signature.

Kellie L. Hamilton
U.S. Forest Service Grants & Agreements Specialist

Date