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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF CALIFORNIA  
8

9 SAN LUIS & DELTA-MENDOTA WATER  
10 AUTHORITY; WESTLANDS WATER  
DISTRICT,

11 Plaintiffs,

12 v.

13 KENNETH LEE SALAZAR, as  
14 Secretary of the Interior, et  
al.,

15 Defendants,

16 NATURAL RESOURCES DEFENSE  
COUNCIL and THE BAY INSTITUTE,

17 Defendant-Intervenors.  
18

1:09-CV-00407 OWW DLB

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AND ORDER  
RE PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION

19  
20 I. INTRODUCTION

21 This case concerns the United States Fish and Wildlife  
22 Service's ("FWS") December 15, 2008 biological opinion ("BiOp" or  
23 "2008 BiOp") concerning the impact of coordinated operations of  
24 the Central Valley Project ("CVP") and State Water Project  
25 ("SWP") on the threatened delta smelt. San Luis & Delta-Mendota  
26 Water Authority ("Authority") and Westlands Water District  
27 ("Westlands") (collectively "Plaintiffs") move for a preliminary  
28 injunction to enjoin the application of Component 2 of the

1 Reasonable and Prudent Alternative ("RPA") in the BiOp, which  
2 imposes certain flow restrictions on CVP operations in the Old  
3 and Middle Rivers ("OMR") of the Sacramento-San Joaquin Delta.  
4 Doc. 31, filed April. 24, 2009 (Notice of Mot.); Doc. 32 (Mem. in  
5 Sup. of Mot.).

6 Plaintiffs' underlying complaint and motion for preliminary  
7 injunction raise claims against FWS based on the Endangered  
8 Species Act ("ESA") and the National Environmental Policy Act  
9 ("NEPA"). Plaintiffs have filed numerous supporting evidentiary  
10 declarations. Docs. 34-47, 71, 73-76, 78. Federal Defendants  
11 oppose the issuance of an injunction, and filed several  
12 evidentiary declarations. Doc. 56. Environmental Intervenors  
13 also oppose injunctive relief and filed an opposing evidentiary  
14 declaration. Doc. 58. The parties agreed to submit the Motion  
15 on the papers following oral argument.

16 Oral argument was heard May 22, 2009. Plaintiffs were  
17 represented by Kronick, Moskovitz, Tiedemann & Girard by  
18 Daniel J. O'Hanlon, Esq. Federal Defendants, including the  
19 Secretary of the Interior Kenneth Lee Salazar, the United States  
20 Department of the Interior, FWS, Acting Director of FWS Rowan  
21 Gould, Regional Director of FWS Ren Lohofenor, United States  
22 Bureau of Reclamation ("Bureau" or "Reclamation"), Acting  
23 Commissioner of Reclamation J. William McDonald, and Regional  
24 Director Donald Glaser, were represented by James A. Maysonett,  
25 Esq., and William J. Shapiro, Esq., Trial Attorneys, Environment  
26 and Natural Resources Division, U.S. Department of Justice.  
27 Defendant-Intervenors, The Bay Institute and Natural Resources  
28 Defense Council ("NRDC") were represented by George M. Torgun,

1 Esq., Katherine Poole, Esq. and Doug Obegi, Esq. After  
2 considering all of the briefs, oral argument, and evidence, the  
3 following findings of fact and conclusions of law are entered.  
4

5 II. BACKGROUND

6 The 2004 Biological Opinion on the effects of the  
7 coordinated operations of the CVP and SPW on the delta smelt, a  
8 species currently listed as "threatened" under the ESA, was found  
9 unlawful in a May 25, 2007 decision, *NRDC v. Kempthorne*, 1:05-CV-  
10 1207 ("NRDC"), 506 F. Supp. 2d 322 (E.D. Cal. 2007). See NRDC  
11 Doc. 323. After remand and a requested extension of time, on  
12 December 15, 2008, FWS issued a new biological opinion ("BiOp" or  
13 "2008 BiOp"). See Plaintiffs' Request for Judicial Notice  
14 ("PRJN"), Doc. 33, at Ex. A.<sup>1</sup> In the 2008 BiOp, FWS concludes  
15 that CVP and SWP operations, as proposed, are "likely to  
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17 <sup>1</sup> Plaintiffs request that the court take judicial notice  
18 of the following: (1) FWS December 15, 2008 biological opinion  
19 on proposed coordinated operations of the CVP and SWP, PRJN Ex.  
20 A; (2) Proclamation, State of Emergency - Water Shortage,  
21 Governor of the State of California, Arnold Schwarzenegger,  
22 February 27, 2009, PRJN Ex. B; (3) Executive Order S-06-08,  
23 Governor of the State of California, Arnold Schwarzenegger, June  
24 4, 2008, PRJN Ex. C; (4) Proclamation, State of Emergency -  
25 Central Valley Region, Governor of the State of California,  
26 Arnold Schwarzenegger, June 12, 2008, PRJN Ex. D; (5)  
27 Proclamation of Existence of a Local Emergency and Request for  
28 the Governor to Proclaim a State of Emergency and Request for a  
Presidential Declaration and Request for State and Federal  
Assistance by the Board of Supervisors, County of Fresno, State  
of California, Resolution 09-134, signed April 14, 2009, PRJN Ex.  
E. Pursuant to Federal Rule of Evidence 201, these public record  
are subject to judicial notice as to their content and existence  
but not for the truth of the matters stated therein. Plaintiffs'  
request is GRANTED.

1 jeopardize the continued existence of" the delta smelt and  
2 "adversely modify" its critical habitat. BiOp at 276-79.  
3 Because FWS reached a "jeopardy" conclusion, it adopted a  
4 "reasonable and prudent alternative" ("RPA") designed to avoid  
5 jeopardy and/or adverse modification. BiOp at 279-85. Component  
6 2 of that RPA requires Reclamation and the California Department  
7 of Water Resources ("DWR") to operate the Projects to limit  
8 negative water flows in OMR during a defined period in the spring  
9 to "no more negative than -1,250 to -5,000 [cubic feet per second  
10 (cfs)]," ending on June 30, or when water temperature reaches  
11 25°C for three consecutive days, whichever is sooner. BiOp at  
12 282, 357-68.

13 OMR flow restrictions have been the subject of a previous  
14 order. In July 2007, NRDC's motion for a preliminary injunction  
15 on OMR flow restrictions was denied. *NRDC*, Doc. 394. In  
16 December 2007, after a seven day remedies trial, extensive  
17 findings of fact were issued on the effects of negative OMR flows  
18 and Reclamation and DWR were ordered, among other things, to  
19 "operate the CVP and SWP to achieve a daily average net upstream  
20 flow in OMR of between 750 and 5,000 cfs on a seven-day running  
21 average" during a defined period in the spring. *NRDC*, Doc. 560  
22 at 7; *see also NRDC*, Doc. 561 at 15-20.

### 23 24 III. FINDINGS OF FACT

#### 25 A. Status of the Species.

26 1. The available, uncontradicted data indicates a  
27 precipitous decline (by as much as several orders of magnitude)  
28 in the relative abundance of delta smelt since 2000. In

1 previous, related proceedings, the expert witnesses were in  
2 agreement that the species is in serious trouble. NRDC, Doc. 561  
3 at ¶11.

4 2. More recent evidence shows that the species has  
5 declined even further since its status was last reviewed in  
6 December 2007. Recent fall mid-water trawl ("FMWT") abundance  
7 indices are among the lowest ever recorded. BiOp at 153-156.  
8 The 2008 index was 23, the lowest level ever recorded. Doc. 38,  
9 First Hanson Decl. at ¶7; Doc. 56-2, Goude Decl. at ¶2. Cay  
10 Goude, FWS's Assistant Field Supervisor for the endangered  
11 species program in FWS's Sacramento Fish and Wildlife Office,  
12 opines that the delta smelt's failure to rebound in 2009 is not  
13 surprising because of the smelt's low abundance and the fact that  
14 California is in its third consecutive year of dry or critically  
15 dry conditions. Goude Decl. at ¶11.

16 3. On March 6, 2009, the California Fish and Game  
17 Commission reclassified delta smelt from threatened to endangered  
18 under the California Endangered Species Act ("CESA"), finding  
19 that the species has "declined significantly since its listing as  
20 threatened and the species' abundance is now extremely low."  
21 Doc. 59-2, Obegi Decl. at ¶7 & Attch. 6. On July 10, 2008, FWS  
22 announced a ninety-day finding that uplisting delta smelt as  
23 endangered under the ESA may be warranted. 73 Fed. Reg. 39,639  
24 (July 10, 2008).

25  
26 B. Development of FWS's December 15, 2008 Biological Opinion.

27 4. On remand from the Court, the Bureau and DWR, with the  
28 advice and assistance of Plaintiffs and other water contractors,

1 prepared a biological assessment ("BA") describing the proposed  
2 operations for the consultation and evaluating the impact of  
3 proposed operations on the smelt. The BA included no measures to  
4 protect delta smelt, except for those measures required by the  
5 terms and conditions of the Projects' water rights permits and  
6 licenses. Obegi Decl. at ¶ 6 & Attch. 5.

7 5. FWS prepared a preliminary draft BiOp that was reviewed  
8 by both FWS's internal and an independent peer review team. See  
9 BiOp at vi. The final BiOp, issued December 15, 2008, concluded  
10 that the operations proposed in the BA would cause jeopardy to  
11 the continued existence and recovery of delta smelt and would  
12 adversely modify its critical habitat. *Id.* at 276-279. As a  
13 result of the jeopardy and adverse modification finding, FWS  
14 included a reasonable and prudent alternative ("RPA") designed to  
15 avoid jeopardy. *Id.* at 279-85.

16  
17 C. The Reasonable and Prudent Alternative.

18 6. The RPA comprises five (5) components. Components 1, 2  
19 and 3 establish a range of permissible OMR flows during different  
20 times of the winter and spring, with biologically based triggers  
21 to begin, suspend, or terminate each component. *Id.* at 279-285;  
22 see also BiOp Attch. B.<sup>2</sup> These components are designed to  
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24 <sup>2</sup> Component 4, which requires DWR to implement a program  
25 to create or restore habitat in the Delta and Suisun Marsh, is  
26 "intended to provide benefits to delta smelt habitat to  
27 supplement the benefits resulting from the flow actions"  
28 described in Components 1 through 3. BiOp at 283. Component 5  
requires the Bureau and DWR to implement a monitoring and  
reporting program. *Id.* at 284.

1 prevent entrainment of adults, juveniles, and larvae, as well as  
2 to improve flow conditions to allow delta smelt to spawn and rear  
3 successfully. *Id.* Once flow restrictions are triggered, FWS  
4 establishes the particular flow standard using an adaptive  
5 management process which incorporates current delta smelt surveys  
6 and sampling (including the FMWT, Spring Kodiak Trawl, 20-mm  
7 Survey, and TNS), water quality monitoring (turbidity and flow  
8 levels), particle tracking model ("PTM")<sup>3</sup> results, recent salvage  
9 data, and the advice of the Smelt Working Group ("SWG") and Water  
10 Operations Management Team ("WOMT"). *Id.*; see Goude Decl. at ¶7  
11 & Ex. F (SWG notes). Plaintiffs' expert's initial suggestion  
12 that the adaptive management process places undue weight on PTM  
13 results, while ignoring actual delta smelt distribution, First  
14 Hanson Decl. at ¶15, is wrong.

15 7. The RPA is designed to avoid jeopardy to the continued  
16 existence and recovery of delta smelt and to prevent the adverse  
17 modification of critical habitat by:

18 1) preventing/reducing entrainment of delta smelt at  
19 Jones and Banks; 2) providing adequate habitat  
20 conditions that will allow the adult delta smelt to  
21 successfully migrate and spawn in the Bay-Delta; 3)  
22 providing adequate habitat conditions that will allow  
23 larvae and juvenile smelt to rear; and 4) providing  
24 suitable habitat conditions that will allow successful  
25 recruitment of juvenile delta smelt to adulthood.

26 BiOp at 279.

27 8. The current motion only seeks to enjoin application of  
28 Component 2. Doc. 32 at 5, 13-14. The period for Component 1

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27 <sup>3</sup> PTM focuses on the impact of flows upon imaginary  
28 particles "injected" into a particular location in the Central  
Delta, station 815. BiOp at 366.

1 has expired, and Component 3 will not be implemented this year.  
2 *Id.* at 5 n.2. Component 2 is designed to protect larval and  
3 juvenile delta smelt from entrainment and to provide adequate  
4 flow conditions "so that larval and juvenile delta smelt can  
5 successfully rear in the Central Delta and move downstream when  
6 appropriate." *BiOp* at 282. It is triggered by one of three  
7 events: completion of Component 1; capture of spent delta smelt  
8 females in salvage or surveys; or a 3-station average of Delta  
9 water temperatures reaching 12°C. *Id.* Component 2 ends when the  
10 three-day average of water temperatures at Clifton Court Forebay  
11 reaches 25°C, or June 30, whichever event comes first. *Id.* RPA  
12 Component 2 requires an OMR flow standard of between -1,250 and  
13 -5,000 cfs, on a 14-day running average, with the five-day  
14 running average within 25% of the required flow. *Id.*

15 9. The actual OMR flow levels permitted under Component 2  
16 in May and June are based on an adaptive process developed in  
17 consultation with the SWG<sup>4</sup> starting in 2007, called  
18 "Influence-Exposure-Intensity-Response (IEIR) Analysis," which  
19 incorporates salvage data, distributional data from surveys, the  
20 location of X2, water temperature data, PTM results, and prior  
21 year FMWT data. *Id.* at 358-359, 364-366. "During most  
22 conditions, it is expected that maximum negative OMR flows will  
23 range between -2000 and -3500. During certain years of higher or  
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25  
26 <sup>4</sup> The SWG is no longer known as the "delta smelt working  
27 group" because it now also routinely considers protections for  
28 longfin smelt, another pelagic species that became a state  
candidate for listing under the California Endangered Species Act  
("CESA") in 2008. See *BiOp* at 30.

1 lower predicted entrainment risk, flow requirements as low as  
2 -1,250 or -5,000 will be recommended to the Service by the SWG."  
3 *Id.* at 357, fn. 10; see also *id.* at 360, 363. FWS will set  
4 negative OMR flows in a range between -1,250 cfs and -5,000 cfs,  
5 depending upon whether entrainment risk is deemed "low,"  
6 "lesser," or something greater. *Id.* at 359.

7 10. If "available physical and biological real-time  
8 monitoring data" indicate a "low-entrainment risk scenario," then  
9 OMR flows can be as negative as -5,000 cfs. *Id.* at 358. "Low"  
10 entrainment risk is indicated only when "there has been no  
11 evidence of delta smelt in the South and Central Delta or larval  
12 delta smelt are not yet susceptible to entrainment." *Id.* The  
13 BiOp's "high-entrainment risk scenario" arises when any delta  
14 smelt have been found in the South and Central Delta from the  
15 Spring Kodiak Trawl or the 20 mm survey, or when there is ongoing  
16 entrainment at the pumps. BiOp at 358. In these conditions, FWS  
17 will be more restrictive than -5,000 cfs. *Id.* at 358-59.

18 11. Component 2 is designed to "minimize the entrainment of  
19 larval/juvenile delta smelt in the Central and South Delta."  
20 BiOp at 360. "In recent years, the densest concentrations of  
21 both spawners and larvae have been recorded in the Cache  
22 Slough/Sacramento Deepwater Ship Channel complex in the North  
23 Delta." *Id.* at 148. The BiOp provides that "[w]hen the  
24 distribution of delta smelt is in the North or North/Central  
25 Delta," minimization of take will be accomplished "by holding  
26 entrainment to ~1 percent of the individuals utilizing the  
27 Central and South Delta (south and east [upstream] of Station  
28 815, see Map 2) across a 14-day particle modeling interval." *Id.*

1 at 360. FWS calls this 1% entrainment standard its  
2 "protectiveness criterion." *Id.* Under this criterion, FWS will  
3 seek to limit entrainment to approximately 1% of the larvae and  
4 juveniles at Station 815 in the Central Delta, even if only a  
5 small portion of the overall recorded population of larvae and  
6 juvenile delta smelt is in the Central and South Delta.

7 12. The BiOp further explains:

8 In circumstances where it is known or suspected that  
9 the Central Delta or South Delta is a principal source  
10 of emerging larvae, as occurred in WY 2003, OMR  
11 restrictions might be calculated using reduction of  
12 14-day Station 815 entrainment below 1 percent, or  
13 other methods as needed to ensure protection of the  
14 larval population in conditions of such severe  
15 vulnerability. The Action utilizes OMR restrictions to  
achieve the desired end, as OMR flow is a strong  
predictor of geographical variation in entrainment risk  
in the Central and North Delta.

14 *Id.* (emphasis added).

15 13. In addition to the adaptive management framework  
16 provided in the BiOp, the RPA also includes a provision stating  
17 that in consecutive dry or critically dry years, CVP/SWP export  
18 rates will never be required to drop below -1,500 cfs "in order  
19 to allow the CVP/SWP to provide health and safety needs, critical  
20 refuge supplies, and obligation[s] to senior water rights  
21 holders." BiOp at 296. The BiOp also allows for the  
22 reinitiation of consultation under certain circumstances. *Id.* at  
23 296-297.

24 14. Since December 15, 2008, FWS and the Bureau have been  
25 using the adaptive management framework to implement the BiOp.  
26 The SWG has met approximately every week to provide guidance to  
27 FWS in setting OMR flow requirements and has based its  
28 recommendations on survey, salvage, water quality, and other data

1 sets, in combination with PTM results. See Goude Decl. at ¶7 &  
2 Ex. F (SWG notes).

3  
4 D. Current Location of Smelt & Entrainment Risk.

5 15. The Spring Kodiak Trawl surveys completed by the  
6 California Department of Fish and Game ("DFG") in January,  
7 February, March, and April of 2009 reflect the distribution of  
8 adult spawning delta smelt. First Hanson Decl. at ¶8. The  
9 results of these surveys indicate that, up until May of this  
10 year, most of the adult delta smelt spawned in the northern and  
11 western reaches of the Delta. *Id.* However, the month of May is  
12 historically a period when high numbers of smelt become entrained  
13 at the export facilities. Fed. Def. Ex. B (Service Decision May  
14 21, 2009). The April 20-24 20 mm survey results found delta  
15 smelt at several stations in the Central and South Delta,  
16 including stations 705, 815, 910, and 914, while the May 5-8 20  
17 mm survey results found delta smelt at stations 901, 815, 705,  
18 and 801. Goude Decl., Ex. A; Obegi Decl., Attach. 4. As of May  
19 21, 2009, the most recent 20 mm survey again indicates that some  
20 delta smelt were caught in the Central Delta. Fed. Def. Ex. B.

21 16. Salvage has also increased: on May 16, 12 delta smelt  
22 were salvaged; 24 on May 17; 20 on May 18; 4 on May 19; 28 on May  
23 20; and 8 on May 21. Fed. Def. Ex C (Central Valley Operations  
24 Office, Delta Smelt and Splittal, May-09). Larvae smaller than  
25 20 mm are not counted in these salvage reports. BiOp at 163.

26  
27 E. Implementation of Related Actions.

28 17. On February 23, 2009, DFG issued a permit to DWR

1 authorizing the legal take of longfin smelt under CESA. Obegi  
2 Decl. at ¶2 & Attch. 1 (ITP permit). That permit imposes OMR  
3 flow restrictions to protect juvenile longfin smelt between  
4 January and June, which are very similar to those required by  
5 FWS's delta smelt BiOp. When triggered, OMR flows must remain  
6 between -1,250 and -5,000 cfs, based on "survey data, including  
7 all of the distributional and abundance data, and other pertinent  
8 biological factors that influence the entrainment risk of larval  
9 and juvenile delta smelt." *Id.* (ITP at 10-11). DFG identified  
10 likely flow conditions of -2,000 to -5,000 cfs for April and May,  
11 and -5,000 cfs for June. *Id.* (ITP at 11). One reason why DFG  
12 has not imposed pumping restrictions to protect longfin smelt is  
13 that "Current delta smelt advice will be protective of longfin  
14 smelt larvae." See Goude Decl., Ex. F (2009 SWG notes from 3/16,  
15 3/23, 3/30, 4/6).

16 18. Action by the DWR or DFG is not a concern that need be  
17 addressed here due to the protections afforded by the RPA.

18

19 F. Socioeconomic and Environmental Effects of Water Shortage,  
20 Drought, and Recession.

21 19. On February 27, 2009, the Governor of California  
22 declared a state-wide drought emergency, based on his finding  
23 that "conditions of extreme peril to the safety of persons and  
24 property exist in California caused by the current and continuing  
25 severe drought conditions and water delivery restrictions." PRJN  
26 Ex. B. On April 14, 2009, the Fresno County Board of Supervisors  
27 adopted a proclamation declaring an emergency and requesting  
28 federal and state assistance to address soaring unemployment and

1 shortages of food. According to the proclamation, due to water  
2 shortages "thousands of people who once relied on employment in  
3 the agricultural sector are now unemployed and struggling to meet  
4 their most basic needs, such as providing food for their family."  
5 PRJN Ex. E at 2:8-10. The Community Food Bank has inadequate  
6 capacity to meet the overwhelming increase in need. *Id.* at  
7 2:21-3:2.

8 20. Plaintiffs' members are trying to compensate for these  
9 shortages through the use of groundwater. Doc. 36, Diedrich  
10 Decl. at ¶¶ 4, 7; Doc. 35, Coburn Decl. at ¶4; Doc. 39, First  
11 Harris Decl. at ¶¶ 2-3; Doc. 43, Nelson Decl. at ¶¶ 3, 7; Doc.  
12 37, First Freeman Decl. at ¶¶ 7, 11, 12. However, groundwater  
13 supplies cannot meet all crop demands, and often contain  
14 undesirably high concentrations of salts and minerals. See First  
15 Freeman Decl. at ¶12. Pumping of groundwater also entails  
16 increased energy usage. *Id.* at ¶17. Without replacement water  
17 supplies, many farmers' only other option is to fallow land.  
18 Harris Decl. at ¶¶ 4-5; Diedrich Decl. at ¶4; Freeman Decl. at  
19 ¶ 11, 12. The water supply situation has resulted in loss of  
20 on-farm employment, reduced crop production, destruction of some  
21 permanent crops, and may require some farmers to sell their land  
22 and abandon farming altogether. Coburn Decl. at ¶¶ 5-7; Allen  
23 Decl. at ¶5; Harris Decl. at ¶¶ 7-8; Diedrich Decl. at ¶8.

24 21. Based on the initial 2009 water year zero percent  
25 allocation from the CVP by Reclamation, 220,000 to 250,000 acres  
26 (of the total 560,000 normally under production) are expected to  
27 be fallowed within Westlands this year. Freeman Decl. at ¶¶ 3,  
28 11. Substantial land fallowing is expected in other districts

1 that depend upon CVP water deliveries for irrigation. Doc. 43,  
2 Nelson Decl. at ¶¶ 10-11; Doc. 40, Harrison Decl. at ¶11.

3 22. Plaintiffs submit the declarations of Robert Silva,  
4 Mayor of the City of Mendota, and Marcia Sablan, Mayor of the  
5 City of Firebaugh, who describe, from their perspective, the  
6 impact of agricultural job losses on their communities. These  
7 declarations assert that the current unemployment rate in Mendota  
8 and Firebaugh is 40 percent. Silva Decl. at ¶3; Sablan Decl. at  
9 ¶4. That reductions in employment and farm and farmworker  
10 incomes have resulted in a loss of tax revenue available to fund  
11 municipal services, leading to a reduction in staffing of local  
12 government. Silva Decl. at ¶4; Sablan Decl. at ¶6. Ms. Sablan  
13 believes that if the City of Firebaugh's tax revenues continue to  
14 decrease "it is possible that fire and police protection services  
15 will be faced with substantial cuts." Sablan Decl. at ¶6.  
16 Although the City of Mendota currently has no independent police  
17 force, the economic conditions have stalled the City's  
18 implementation of plans to start its own police department.  
19 Silva Decl. at ¶4

20 23. Local schools are suffering as well. Sablan Decl. at  
21 ¶7. Families of displaced farm workers are often forced to  
22 combine households resulting in crowded and stressful conditions  
23 impacting affected students' academic performance. *Id.*  
24 Additionally, as families and students relocate from rural areas  
25 due to a lack of employment, the rural school districts lose much  
26 needed revenue from the State. *Id.*; see also Hernandez Decl.,  
27 Doc. 41.

28 24. Plaintiffs also submit the declaration of Dana Wilkie,

1 the CEO of the Community Food Bank, a non-profit organization  
2 that provides food to hungry families in Fresno, Madera, and  
3 Kings Counties. Doc. 47. She declares that "[t]he number of  
4 people in our service area experiencing food insecurity has  
5 recently increased substantially." *Id.* at ¶6. In response, the  
6 Food Bank is endeavoring to increase its distribution of food to  
7 needy members of the community to respond to the increasing  
8 number of people requiring such assistance. *Id.* at ¶4.

9 25. There is also a possibility that increased reliance  
10 upon groundwater will lead to unsustainable overdraft of the  
11 groundwater basin and resulting land subsidence, causing damage  
12 to wells and water distribution facilities, as well as increased  
13 soil salinity and toxicity as a result of applying water with  
14 higher salinity and minerals to the soil. Freeman Decl. at  
15 ¶¶ 13-16. Increased land fallowing is also known to cause  
16 increased dust emissions which degrade air quality. *Id.* at ¶21.

17 26. Environmental Plaintiffs present the declaration of  
18 Jeffrey A. Michael, Ph.D., an economist who analyzes data from  
19 California's Employment Development Department regarding recent  
20 employment trends in the farm and non-farm sectors around the  
21 state. Dr. Michael explains that the San Joaquin Valley, like  
22 the rest of the United States, is suffering from the deepest  
23 recession since the Great Depression and that the recession is  
24 largely caused by foreclosures and the collapse of the real  
25 estate market. Doc. 58-2, Michael Decl. at ¶2. California has  
26 experienced the largest drop in real estate prices in the nation,  
27 and the San Joaquin Valley is experiencing among the highest  
28 foreclosure rates in the nation. *Id.* at ¶3. These factors have

1 contributed to widespread unemployment across the state,  
2 particularly in non-farm sectors such as the construction and  
3 hospitality sectors. *Id.* at ¶¶2-3.

4 27. Dr. Michael opines that employment in the farm sector  
5 has fared "relatively well," with farm employment increasing by  
6 2.5% across California between March 2008 and March 2009, and  
7 increasing in several Valley counties over the same time period,  
8 including Fresno (by 3.2%), Kern (by 4.2%) Tulare (by 4.3%), and  
9 Stanislaus-Merced-Madera-Kings (by 5.8%). *Id.* at ¶6 & Ex. 3.

10 These increases in farm employment have buffered the overall  
11 decline in employment for metropolitan areas such as Fresno and  
12 Bakersfield, which are experiencing lower unemployment rates than  
13 eight other large metropolitan areas in the State, including Los  
14 Angeles, Sacramento, Oakland, Riverside, San Diego, Orange, San  
15 Jose, and San Francisco. *Id.* at ¶7 & Ex. 2. Dr. Michael also  
16 opines that declining school enrollment and sales tax revenue are  
17 being experienced across California and are largely explained by  
18 high rates of residential foreclosures and the real estate  
19 downturn. *Id.* at ¶9.

20 a. In response to Dr. Michael's declaration,  
21 Plaintiffs offer the testimony of Dr. Richard Howitt of the  
22 University of California at Davis, an agricultural economics  
23 professor, who presents the results of his recent, published  
24 research on the predicted impacts of the current drought and  
25 fishery related pumping restrictions on the communities of the  
26 Central Valley. Doc. 74, Howitt Decl. at ¶2. Dr. Howitt opines  
27 that more than 34,000 jobs will be lost in the San Joaquin Valley  
28 as a result of the water delivery restrictions, and that most of

1 these job losses will be suffered by farm workers and employees  
2 of packing houses and processing plants. *Id.* at ¶5. He further  
3 states that these individuals are typically low-income workers  
4 with few alternatives for other work. *Id.*

5 b. Dr. Howitt opines that Dr. Michael's declaration  
6 is "largely irrelevant to the question of measuring the  
7 incremental loss in employment due to water reductions to the  
8 Westside of the San Joaquin valley," because, among other things,  
9 Dr. Michael used employment data that extends only to the start  
10 of the current farm year in March 2009 and therefore cannot  
11 project the impacts of cuts in water supply; and the data he used  
12 is aggregated over all regions of Fresno County, obscuring  
13 relative impacts to the Westside. *Id.* at ¶9.

14 c. In light of Dr. Howitt's undisputed criticisms,  
15 Dr. Michael's declaration is only marginally relevant, as it  
16 measures economic trends at a "macro" scale.

17  
18 G. Predicted Impact of OMR Restrictions on Pumping during Late  
19 May and June.

20 28. Under Reclamation's April forecast of operations,  
21 released April 21, south-of-Delta CVP water service agricultural  
22 contractors are projected to receive a 10% contract allocation,  
23 instead of the zero allocation indicated by the March forecast.  
24 Snow Decl. at ¶¶ 13-14; Exs. B, C. However, the volume of water  
25 actually delivered will depend, at least in part, upon how FWS  
26 regulates negative OMR flows from May 18 through June 30. *Id.* at  
27 ¶¶ 15-19.

28 29. Reclamation's April 2009 forecast of CVP operations, on

1 which the 10% allocation is based, indicates a CVP export pumping  
2 for the period beginning May 18 through May 31 of about 65,000  
3 acre-feet. *Id.* at ¶15. The forecast indicates an expected  
4 volume of CVP pumping of about 150,000 acre-feet during the month  
5 of June. *Id.* Reclamation's forecast further indicates that OMR  
6 flows will be at about -3,000 cfs during late May, and -3,900 cfs  
7 during June. *Id.* It is undisputed that if the CVP were free to  
8 pump water at rates unrestricted by the criteria for negative OMR  
9 flows prescribed by the BiOp, the allocation of water for  
10 south-of-Delta CVP contractors could be increased by  
11 approximately 60,000 acre-feet. *Id.* at ¶16. This is  
12 approximately equivalent to an additional 5% allocation. *Id.*

13 30. Relatedly, if FWS restricts OMR flows in late May and  
14 June more tightly than the April forecast indicates, the Bureau  
15 may not be able deliver the 10% allocation. *Id.* ¶ 18. The 10%  
16 allocation depends upon the assumed pumping in late May and June,  
17 because, under the current forecast, the CVP pumps will already  
18 be at maximum capacity beginning on July 1. *Id.* ¶19. There  
19 would be no opportunity to make up for lost May and June pumping  
20 using the CVP facility beginning in July. *Id.* Although the SWP  
21 pumps can pump CVP water under the "joint point of diversion"  
22 provisions of Decision 1641, this procedure is subject to a  
23 number of contingencies, including the Bureau having capacity to  
24 hold water in storage for pumping after June 30, whether the SWP  
25 will have available capacity at the Banks Pumping Plant, and  
26 whether the projects would be able to meet water quality  
27 requirements. *Id.* at ¶19.

28

1 IV. CONCLUSIONS OF LAW

2 A. Standard of Review.

3 1. In general, the standard for granting a preliminary  
4 injunction balances plaintiff's likelihood of success against the  
5 relative hardship to the parties. The Ninth Circuit previously  
6 recognized two different sets of criteria for preliminary  
7 injunctive relief. Under the traditional test, "a plaintiff must  
8 show: (1) a strong likelihood of success on the merits, (2) the  
9 possibility of irreparable injury to plaintiff if preliminary  
10 relief is not granted, (3) a balance of hardships favoring the  
11 plaintiff, and (4) advancement of the public interest (in certain  
12 cases)." *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007).  
13 An "alternative" test required that "a plaintiff demonstrate  
14 either a combination of probable success on the merits and the  
15 possibility of irreparable injury or that serious questions are  
16 raised and the balance of hardships tips sharply in his favor."  
17 *Id.* "These two formulations represent[ed] two points on a  
18 sliding scale in which the required degree of irreparable harm  
19 increases as the probability of success decreases. They [were]  
20 not separate tests but rather outer reaches of a single  
21 continuum." *Id.*

22 2. The Supreme Court, in *Winter v. NRDC*, --- U.S. ---, 129  
23 S. Ct. 365 (2008), rejected the Ninth Circuit's application of  
24 that part of the alternative test which permitted an injunction  
25 where there was only the "possibility of irreparable injury."  
26 *Winter* found this standard "too lenient," and reiterated that its  
27 own "frequently reiterated standard requires plaintiffs seeking  
28 preliminary injunctive relief to demonstrate that irreparable

1 injury is likely in the absence of an injunction." *Id.* at 375.

2 3. Following *Winter*, the Ninth Circuit revised its  
3 preliminary injunction standard:

4 In *Winter*, the [Supreme] Court reversed one of our  
5 decisions, which, it determined, upheld a grant of a  
6 preliminary injunction by use of a standard that was  
7 much too lenient. As the Court explained, an injunction  
8 cannot issue merely because it is possible that there  
9 will be an irreparable injury to the plaintiff; it must  
10 be likely that there will be....

11 The Court [defines] the rule ... as follows:

12 A plaintiff seeking a preliminary injunction must  
13 establish that he is likely to succeed on the  
14 merits, that he is likely to suffer irreparable  
15 harm in the absence of preliminary relief, that  
16 the balance of equities tips in his favor, and  
17 that an injunction is in the public interest.

18 To the extent that our cases have suggested a lesser  
19 standard, they are no longer controlling, or even  
20 viable.

21 *Am. Trucking Ass'ns., Inc. v. City of Los Angeles*, 559 F.3d 1046,  
22 1042 (9th Cir. 2009) (emphasis added).<sup>5</sup>

23 B. Analysis.

24 1. Likelihood of Success on the Merits.

25 a. Lack of Claims Against Reclamation.

26 4. Plaintiffs request Federal Defendants be enjoined "from  
27 limiting pumping at the CVP's Jones pumping plant between now and  
28 June 30, 2009 pursuant to the provisions of the BiOp" unless FWS

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29 <sup>5</sup> Although it does not appear to be an issue in this  
30 case, district courts within the Ninth Circuit have suggested  
31 that the second prong of the alternative test, which permits  
32 injunctive relief where plaintiff is able to show "serious  
33 questions going to the merits," survived *Winter*. See *Save  
34 Strawberry Canyon v. Dept. of Energy*, --- F. Supp. 2d ---, 2009  
35 WL 723836, \*13 n.2 (N.D. Cal. 2009).

1 provides further justification for its decisions. See Doc. 48,  
2 Prop'd Order, at 2; Draft Hearing Transcript, May 22, 2009, at  
3 29-30. Federal Defendants object to the issuance of any  
4 injunctive relief against the Bureau because, although Plaintiffs  
5 sued Reclamation, they have not alleged any claims against  
6 Reclamation. See Complaint, Doc. 1. Plaintiffs name the Bureau  
7 as a defendant, Compl. ¶ 18, but do not allege that Reclamation  
8 has violated any laws. Instead, their complaint asserts that  
9 they have only named Reclamation as a defendant "so that the  
10 Court may provide an adequate remedy ... regarding CVP  
11 operations...." Compl. at ¶51.

12 5. To enjoin the Bureau, the court must have jurisdiction  
13 over the agency, which requires, at a bare minimum, that  
14 Plaintiffs bring claims against the Bureau. See *Or. Natural*  
15 *Desert Ass'n v. Lohn*, 485 F. Supp. 2d 1190, 1196 (D. Or. 2007),  
16 vacated on other grounds, 2007 WL 2377011 (D. Or. June 11, 2007)  
17 (denying injunctive relief against an action agency in an ESA  
18 case where Plaintiffs "brought suit only against the consulting  
19 agencies"). However, the preliminary injunction Plaintiffs seek  
20 is directed at how FWS will set OMR flows within the -1,250 to  
21 -5,000 cfs range through June 30, or until the water temperatures  
22 reach 25°C in Clifton Court Forebay. Plaintiffs rejoin that  
23 "[o]nce FWS sets that limitation, Reclamation will presumably  
24 comply and pump what water it can consistent with that limitation  
25 to fulfill its contractual and other obligations." Doc. 70 at  
26 12.

27 6. Component 2's adaptive management process affords the  
28 Bureau some say in the setting of OMR flows, but that input is

1 subject to FWS's ultimate authority. Specifically, once FWS  
2 receives a recommendation from the SWG that an action should be  
3 initiated, changed, suspended, or terminated, FWS "determines  
4 whether the proposed action should be implemented, modified, or  
5 terminated; and the OMR flow needed to achieve the protection."  
6 BiOp at 280. FWS then presents its determination to the WOMET,  
7 which is made up of representatives from the Bureau, DWR, FWS,  
8 NMFS, and DFG. *Id.* at 28, 280. The WOMET may either "concur with  
9 the recommendation or provide a written alternative to the  
10 recommendation" to FWS within one calendar day. *Id.* at 280. FWS  
11 "shall then make a final determination on the proposed action to  
12 be implemented, which shall be documented and posted" on the  
13 internet. *Id.* If FWS determines that an OMR flow change is  
14 required, the Bureau and DWR "shall adjust operations to manage  
15 to the new OMR flow within two days of receipt of [FWS's]  
16 determination." *Id.* Because FWS has ultimate control over  
17 setting OMR flows, and the Bureau must comply with those  
18 recommendations, it is sufficient that Plaintiffs filed suit  
19 against and seek to enjoin only FWS's actions.<sup>6</sup>

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<sup>6</sup> Under the circumstances, any injunction issued in this case will bind the Bureau's implementation of OMR flow restrictions pursuant to Federal Rule of Civil Procedure 65's provision that "persons who are in active concert or participation" with a properly named defendant can be bound by an injunction.

1           2.    NEPA Claims Against FWS.

2           a.    Does the Issuance of the BiOp Trigger the Need for  
3                NEPA Compliance?

4           7.    Because the admissibility of evidence of economic harm  
5 turns on the viability of the NEPA claim, it is appropriate to  
6 first evaluate Plaintiffs' likelihood of success on that claim.  
7 Plaintiffs argue that FWS was required to prepare an  
8 environmental impact statement ("EIS") in connection with the  
9 issuance of the BiOp. It is undisputed that no NEPA document was  
10 prepared.

11           8.    NEPA requires all federal agencies to prepare an EIS to  
12 evaluate the potential environmental consequences of any proposed  
13 "major Federal action[] significantly affecting the quality of  
14 the human environment" 42 U.S.C. § 4332(C). The preparation of  
15 an EIS serves a number of purposes:

16                   It ensures that the agency, in reaching its decision,  
17                   will have available, and will carefully consider,  
18                   detailed information concerning significant  
19                   environmental impacts; it also guarantees that the  
20                   relevant information will be made available to the  
21                   larger audience that may also play a role in both the  
22                   decisionmaking process and the implementation of that  
23                   decision.

24                   Simply by focusing the agency's attention on the  
25                   environmental consequences of a proposed project, NEPA  
26                   ensures that important effects will not be overlooked  
27                   or underestimated only to be discovered after resources  
28                   have been committed or the die otherwise cast.  
29                   Moreover, the strong precatory language of § 101 of the  
30                   Act and the requirement that agencies prepare detailed  
31                   impact statements inevitably bring pressure to bear on  
32                   agencies "to respond to the needs of environmental  
33                   quality." 115 Cong. Rec. 40425 (1969) (remarks of Sen.  
34                   Muskie).

35                   Publication of an EIS, both in draft and final form,  
36                   also serves a larger informational role. It gives the  
37                   public the assurance that the agency has indeed  
38                   considered environmental concerns in its decisionmaking  
39                   process, and, perhaps more significantly, provides a

1 springboard for public comment.

2 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349  
3 (1989) (internal citations and quotations omitted).

4 "NEPA does not contain substantive requirements that dictate a  
5 particular result; instead, NEPA is aimed at ensuring agencies  
6 make informed decisions and 'contemplate the environmental  
7 impacts of their actions.'" *Ocean Mammal Inst. v. Gates*, 546 F.  
8 Supp. 2d 960, 971 (D. Hi. 2008) (quoting *Idaho Sporting Cong. v.*  
9 *Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)).

10 9. The Ninth Circuit has held that an agency must prepare  
11 an EIS "where there are substantial questions about whether a  
12 project may cause significant degradation of the human  
13 environment." *Native Ecosystems Council v. U.S. Forest Serv.*,  
14 428 F.3d 1233, 1239 (9th Cir. 2005). An agency may choose to  
15 prepare an environmental assessment ("EA") to determine whether  
16 an EIS is needed. 40 C.F.R. §§ 1501.4, 1508.9(b). The EA must  
17 identify all reasonably foreseeable impacts, analyze their  
18 significance, and address alternatives. 40 C.F.R. §§ 1508.8,  
19 1508.9, 1508.27. If, based on the EA, the agency concludes that  
20 the proposed actions will not significantly affect the  
21 environment, it may issue a Finding of No Significant Impact  
22 ("FONSI") and forego completion of an EIS. *Bob Marshall Alliance*  
23 *v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988); 40 C.F.R. §  
24 1501.4(e).

25 10. Federal regulations implementing NEPA help to define  
26 when "major federal actions" take place:

27 Major Federal action includes actions with effects that  
28 may be major and which are potentially subject to  
Federal control and responsibility. Major reinforces

1 but does not have a meaning independent of  
2 significantly ([40 C.F.R.] § 1508.27). Actions include  
3 the circumstance where the responsible officials fail  
4 to act and that failure to act is reviewable by courts  
5 or administrative tribunals under the Administrative  
6 Procedure Act or other applicable law as agency action.

7 (a) Actions include new and continuing activities,  
8 including projects and programs entirely or partly  
9 financed, assisted, conducted, regulated, or  
10 approved by federal agencies; new or revised  
11 agency rules, regulations, plans, policies, or  
12 procedures; and legislative proposals (§§ 1506.8,  
13 1508.17). Actions do not include funding  
14 assistance solely in the form of general revenue  
15 sharing funds, distributed under the State and  
16 Local Fiscal Assistance Act of 1972, 31 U.S.C.  
17 1221 *et seq.*, with no Federal agency control over  
18 the subsequent use of such funds. Actions do not  
19 include bringing judicial or administrative civil  
20 or criminal enforcement actions.

21 (b) Federal actions tend to fall within one of the  
22 following categories:

23 (1) Adoption of official policy, such as  
24 rules, regulations, and interpretations  
25 adopted pursuant to the Administrative  
26 Procedure Act, 5 U.S.C. 551 *et seq.*; treaties  
27 and international conventions or agreements;  
28 formal documents establishing an agency's  
policies which will result in or  
substantially alter agency programs.

(2) Adoption of formal plans, such as  
official documents prepared or approved by  
federal agencies which guide or prescribe  
alternative uses of Federal resources, upon  
which future agency actions will be based.

(3) Adoption of programs, such as a group of  
concerted actions to implement a specific  
policy or plan; systematic and connected  
agency decisions allocating agency resources  
to implement a specific statutory program or  
executive directive.

(4) Approval of specific projects, such as  
construction or management activities located  
in a defined geographic area. Projects  
include actions approved by permit or other  
regulatory decision as well as federal and  
federally assisted activities.

40 C.F.R. § 1508.18 (emphasis added).

1 11. "Whether an action may 'significantly affect' the  
2 environment requires consideration of 'context' and 'intensity.'" *Center for Biological Diversity v. Nat'l Highway Traffic Safety*  
3 *Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008)  
4 (citing 40 C.F.R. § 1508.27). "Context delimits the scope of the  
5 agency's action, including the interests affected." *Id.* (citing  
6 *Nat'l. Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731  
7 (9th Cir. 2001)).  
8

9 Intensity refers to the "severity of impact," which  
10 includes both beneficial and adverse impacts, "[t]he  
11 degree to which the proposed action affects public  
12 health or safety," "[t]he degree to which the effects  
13 on the quality of the human environment are likely to  
14 be highly controversial," "[t]he degree to which the  
possible effects on the human environment are highly  
uncertain or involve unique or unknown risks," and  
"[w]hether the action is related to other actions with  
individually insignificant but cumulatively significant  
impacts."

15 *Id.* at 1185-86 (citing 40 C.F.R. § 1508.27(b)(2), (4), (5), (7)).  
16 If an agency does not prepare an EIS, the reviewing court must  
17 "determine whether the responsible agency has 'reasonably  
18 concluded' that the project will have no significant adverse  
19 environmental consequences." *Upper Snake River Ch. of Trout*  
20 *Unlimited v. Hodel*, 921 F.2d 232, 234 (9th Cir. 1990).

21 12. Plaintiffs principally rely on two cases to support  
22 their assertion that an EIS was required here: *Westlands v.*  
23 *United States*, 850 F. Supp. 1388 (E.D. Cal. 1994) and *Ramsey v.*  
24 *Kantor*, 96 F.3d 434 (9th Cir. 1996). The *Westlands* decision  
25 denied federal defendants' motion to dismiss water districts'  
26 claims that NMFS and the Bureau failed to comply with NEPA by,  
27 among other things, not completing an EA or EIS before issuing a  
28 biological opinion concerning the effects of coordinated



1 from the suggestions in a biological opinion, and so  
2 long as he or she takes "alternative, reasonably  
3 adequate steps to insure the continued existence of any  
4 endangered or threatened species," no ESA violation  
5 occurs. *Id.* at 1193-95; *Pyramid Lake Paiute Tribe of*  
6 *Indians v. Department of Navy*, 898 F.2d 1410, 1418 (9th  
7 Cir.1990) ("a non-Interior agency is given discretion  
8 to decide whether to implement conservation  
9 recommendations put forth by the FWS"). The Joint  
10 Regulations state:

11 The Service may provide with the biological  
12 opinion a statement containing discretionary  
13 conservation recommendations. Conservation  
14 recommendations are advisory and are not intended  
15 to carry any binding legal force.

16 50 C.F.R. § 402.14(j) (1992). 50 C.F.R. § 402.15(a)  
17 states:

18 (a) Following the issuance of a biological  
19 opinion, the Federal agency shall determine  
20 whether and in what manner to proceed with the  
21 action in light of its section 7 obligations and  
22 the Service's biological opinion.

23 Courts have attempted to define the "point of  
24 commitment," at which the filing of an EIS is required,  
25 during the planning process of a federal project. See  
26 *Sierra Club v. Peterson*, 717 F.2d 1409, 1414  
27 (D.C.Cir.1983). "An EIS must be prepared before any  
28 irreversible and irretrievable commitment of  
resources." *Conner v. Burford*, 848 F.2d 1441, 1446 (9th  
Cir.1988), cert. denied 489 U.S. 1012 (1989). 40 C.F.R.  
§ 1502.5(a) similarly provides, "For projects directly  
undertaken by Federal agencies, the environmental  
impact statement shall be prepared at the feasibility  
analysis (go/no go) stage and may be supplemented at a  
later stage if necessary."

[One of the water agency plaintiffs] points out that  
the Environmental Review Procedures, under the National  
Oceanic and Atmospheric Administration ("NOAA") Order  
No. 216-6, § 6.02.c.2(d), require an EIS for:

Federal plans, studies, or reports prepared by  
NOAA that could determine the nature of future  
major actions to be undertaken by NOAA or other  
federal agencies that would significantly affect  
the quality of the human environment.

It is undisputed that the NMFS's actions are subject to  
an EIS requirement, if those actions are a "major  
federal action significantly affecting the human  
environment." Under 40 C.F.R. § 1508.18(b)(2), an

1 activity is a federal action if it "guides," rather  
2 than binds, the use of federal resources. CVP water is  
3 a federal resource. The Bureau's options were narrow  
4 had it declined to follow the NMFS's reasonable and  
5 prudent alternatives. See *Tribal Village of Akutan*, 869  
6 F.2d at 1193 (agency need not adopt reasonable and  
7 prudent alternatives in biological opinion, so long as  
8 it complied with ESA Section 7(a)(2) by taking  
9 "alternative, reasonably adequate steps to insure the  
10 continued existence of any endangered or threatened  
11 species"); *Portland Audubon Society v. Endangered*  
12 *Species*, 984 F.2d 1534, 1537 (9th Cir.1993) (discusses  
13 exemptions from ESA, by application to the Committee  
14 under 16 U.S.C. §§ 1536(a)(2), (g)(1)-(2)).

15 The government submits *Bennett v. Plenert*, CV-93-6076,  
16 1993 WL 669429 (D.Or.1993), as authority that  
17 biological opinions are not binding on federal  
18 agencies, and consequently are not major federal  
19 actions. But in *Bennett*, the court left open the issue  
20 that a biological opinion could constitute a major  
21 federal action under NEPA. *Id.* at p. 11, n. 4.  
22 Biological opinions are not binding on the Secretary,  
23 nor do they invariably require an EIS. The inquiry  
24 requires a case by case analysis.

25 *Id.* at 1420-22 (emphasis added) (parallel citations omitted).

26 Applying the required case-by-case approach, because "the  
27 biological opinion is part of a systematic and connected set of  
28 agency decisions which result in the commitment of substantial  
29 federal resources for a statutory program, which resulted in  
30 reallocation of over 225,000 acre feet of CVP water under the ESA  
31 for salmon protection with the environmental impacts alleged,"  
32 the biological opinion was major federal action.

33 13. Here, Federal Defendants argue that if anything  
34 constitutes a major federal action, it is the Bureau's  
35 implementation of the OMR flow restrictions, not FWS's adoption  
36 of the 2008 BiOp itself. Doc. 56 at 20. Federal Defendants  
37 argue that FWS's issuance of the BiOp "by itself, is not an  
38 irretrievable commitment of resources," and therefore does not  
39 trigger NEPA. *Id.* at 17. In theory, the Bureau had the option

1 to reject FWS's RPA, albeit at its own peril under the ESA.  
2 However, in reality, the Bureau is implementing the projects in  
3 accordance with the RPA under an adaptive management structure  
4 that places ultimate control over OMR flows in the FWS. Although  
5 the facts of *Westlands* do not exactly parallel the circumstances  
6 here, there is a strong likelihood that Plaintiffs will be able  
7 to establish that NEPA was triggered by the issuance of the final  
8 biological opinion in this case.<sup>7</sup>

9 14. Federal Defendants argue this case is more like Upper  
10 Snake River , 921 F.2d at 234, in which the Ninth Circuit  
11 "reaffirmed a long-standing principle that a federal action is  
12 not 'major' for NEPA purposes where the agency activity does not  
13 change the status quo and was inferentially part of routine  
14 management action in the operation of the dam." *Westlands*, 850  
15 F. Supp. 1415 (citing *Upper Snake River*, 912 F.2d at 234).  
16 *Westlands* specifically distinguished *Upper Snake River*,  
17 determining that whether or not an EIS was required "will, of  
18 necessity, depend heavily upon the unique factual circumstances  
19 of each case." *Id.* (citing *Westside Property Owners v.*

20  
21 <sup>7</sup> Environmental Intervenors also correctly point out that  
22 the Ninth Circuit reversed the district court's ruling on a  
23 related issue; i.e., federal defendants' contention that an  
24 irreconcilable conflict between the CVPIA and NEPA existed.  
25 *Westlands Water Dist. v. NRDC*, 43 F.3d 457, 460 (9th Cir. 1994).  
26 The Ninth Circuit found that CVPIA §§ 3406(b)(2) and (d)(1)  
27 required implementation of the CVPIA "upon enactment." *Id.*  
28 After this ruling, Plaintiffs voluntarily dismissed their claim  
that NMFS and the Bureau failed to conduct a NEPA review of the  
biological opinion concerning CVP impacts on winter-run Chinook  
salmon. See *Stockton East Water Dist. v. United States*, 75 Fed.  
Cl. 321, 326 (2007). This does not derogate *Westlands'*  
substantive NEPA analysis.

1 *Schlesinger*, 597 F.2d 1214, 1224 (9th Cir. 1979)).

2 To some extent, the finding is based on whether the  
3 proposed agency action and its environmental effects  
4 were within the contemplation of the original project  
5 when adopted or approved. See [*Port of Astoria, Or. v.*  
6 *Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)]; *Robinswood*  
7 *Community Club [v. Volpe]*, 506 F.2d 1366 [(9th Cir.  
8 1974)]. The inquiry requires a determination of whether  
9 plaintiffs have complained of actions which may cause  
10 significant degradation of the human environment.  
11 [*City and County of San Francisco v. United States*, 615  
12 F.2, 498, 500 (9th Cir. 1980)].

13 *Westlands*, 850 F. Supp. at 1415. "[T]he taking of water for non-  
14 agricultural purposes is alleged to have changed the operational  
15 requirements of the CVP, imposed new standards for reverse flows  
16 in the Western Delta, carryover storage in the Shasta reservoir,  
17 and caused closure of the Delta cross-channel. Such actions and  
18 the environmental effects alleged are not routine managerial  
19 changes." *Id.* at 1421.

20 15. Federal Defendants maintain that, like in *Upper Snake*  
21 *River* and unlike in *Westlands*, "Reclamation's continued  
22 management of the CVP - even after issuance of the Service's  
23 biological opinion - is within historical operating parameters."  
24 Doc. 56 at 18. *Upper Snake River*, specifically concerned the  
25 Bureau's decision to reduce flows below Palisades Dam and  
26 Reservoir. Although it was standard operating procedure since  
27 1956 to maintain flows below that dam above 1,000 cfs, during  
28 previous dry periods, the average flow had "been lower than 1,000  
cfs for 555 days (or 4.75% of the total days in operation)." *Id.*  
at 233. Because the challenged flow fluctuations were within  
historical operational patterns, no NEPA compliance was required:

The Federal defendants in this case had been operating  
the dam for upwards of ten years before the effective  
date of the Act. During that period, they have from

1 time to time and depending on the river's flow level,  
2 adjusted up or down the volume of water released from  
3 the Dam. What they did in prior years and what they  
4 were doing during the period under consideration were  
5 no more than the routine managerial actions regularly  
6 carried on from the outset without change. They are  
7 simply operating the facility in the manner intended.  
8 In short, they are doing nothing new, nor more  
9 extensive, nor other than that contemplated when the  
10 project was first operational. Its operation is and has  
11 been carried on and the consequences have been no  
12 different than those in years past.

13 The plaintiffs point out that flow rates have been  
14 significantly below 1,000 cfs for periods of seven days  
15 or more only in water years 1977, 1982, and 1988, all  
16 years of major drought. They also note that prior to  
17 construction of the dam, the lowest recorded flow rate  
18 did not fall below 1400 cfs. From these facts, they  
19 argue that the Bureau's reduction of the flow below  
20 1,000 cfs is not a routine managerial action. However,  
21 a particular flow rate will vary over time as changing  
22 weather conditions dictate. In particular, low flows  
23 are the routine during drought years. What does not  
24 change is the Bureau's monitoring and control of the  
25 flow rate to ensure that the most practicable  
26 conservation of water is achieved in the Minidoka  
27 Irrigation Project. Such activity by the Bureau is  
28 routine.

*Id.* at 235-36 (emphasis added).

16 16. Here, unlike in *Upper Snake River*, the OMR restrictions  
17 imposed by the 2008 BiOp are not "routine managerial actions  
18 regularly carried on from the outset [of the Project] without  
19 change." It is undisputed that the OMR flow restrictions of  
20 Component 2 have the potential to impose restrictions on the  
21 CVP's ability to export water south of the Delta above and beyond  
22 that which would result from natural conditions and pre-existing  
23 legal regimes. See generally Doc. 46, Snow Decl; Doc. 56-3,  
24 Milligan Decl. As was the case in *Westlands*, "the taking of  
25 water for non-agricultural purposes is alleged to have changed  
26 the operational requirements of the CVP [and] imposed new  
27 standards for reverse flows in the Western Delta...." 850 F.

1 Supp. at 1421. Evidence shows that operation at -1250 cfs during  
2 the relevant time period will result in a net reduction of water  
3 service to Plaintiffs exceeding 200,000 acre feet ("AF"). There  
4 is substantial likelihood that Plaintiffs will be able to  
5 establish that these changes substantially depart from the type  
6 of routine managerial changes that took place prior to the 2008  
7 BiOp.

8 17. Plaintiffs also rely on *Ramsey*, which held that NMFS  
9 was required to comply with NEPA when it issued a biological  
10 opinion and incidental take statement under ESA § 7, permitting  
11 state regulators to issue salmon fishing regulations consistent  
12 with the take statement. 96 F.3d at 441-445. *Ramsey* found the  
13 biological opinion and incidental take statement constituted  
14 "major federal action," triggering NEPA compliance, as it was  
15 "clear ... both from our cases and from the federal regulations,  
16 see 40 C.F.R. § 1508.18, that if a federal permit is a  
17 prerequisite for a project with adverse impact on the  
18 environment, issuance of that permit does constitute major  
19 federal action and the federal agency involved must conduct an EA  
20 and possibly an EIS before granting it." *Id.* at 444.

21 18. *Ramsey* then determined:

22 the incidental take statement in this case is  
23 functionally equivalent to a permit because the  
24 activity in question would, for all practical purposes,  
25 be prohibited but for the incidental take statement.  
Accordingly, we hold that the issuance of that  
statement constitutes major federal action for purposes  
of NEPA.

26 *Id.*

27 19. Federal Defendants suggest *Ramsey* has no direct bearing  
28 on this case, because, unlike Washington and Oregon, here, the

1 Bureau does not require a section 10 permit to operate the CVP in  
2 compliance with the BiOp:

3           Instead, as in the instant case, Section 7 of the ESA  
4 provides a procedure whereby federal agencies may  
5 obtain an exception to the ESA's 'take' prohibition  
6 through the issuance of a biological opinion and  
7 incidental take statement; unlike the Section 10  
8 context, if NEPA applies at all in the context of  
9 Section 7, it applies when the action agency takes some  
10 action.... There is no suggestion in Ramsey that NEPA  
11 would apply in the instant case, where the take  
12 statement authorized merely the activities of federal  
13 agencies, and in no way acts like a Section 10 permit  
14 for private parties. The highly unusual circumstances  
15 in Ramsey render that holding inapplicable to the case  
16 at bar.

17 Doc. 56 at 18-19.

18           20. The federal defendants in *Ramsey* argued that there was  
19 insufficient federal participation in a state run project to  
20 require an EIS. The Appeals Court disagreed: "if a federal  
21 permit is a prerequisite for a project with adverse impact on the  
22 environment, issuance of that permit does constitute a major  
23 federal action...." triggering NEPA. 96 F.3d at 444 (citing  
24 *Jones v. Gordon*, 792 F.2d 821, 827-29 (9th Cir. 1986); *Port of*  
25 *Astoria v. Hodel*, 595 F.2d 467, 478-79 (9th Cir. 1979)). *Ramsey*  
26 held that "the incidental take statement in this case is  
27 functionally equivalent to a permit because the activity in  
28 question would, for all practical purposes, be prohibited but for  
the incidental take statement." *Id.* Because the incidental take  
statement was the functional equivalent of a permit, NEPA applied  
to the issuance of the biological opinion under *Jones* and *Port of*  
*Astoria*, despite federal defendants' contention that the mere  
issuance of an incidental take statement was insufficient federal  
participation in a state project. Here, in contrast, the CVP is

1 an entirely federal project, rendering the "functional  
2 equivalency" analysis from *Ramsey* largely irrelevant. In a more  
3 general sense, *Ramsey* simply stands for the proposition that it  
4 may be appropriate to apply NEPA to the issuance of a biological  
5 opinion under certain circumstances.

6 21. More directly applicable is 40 C.F.R. § 1508.18(4),  
7 which provides that major federal actions include:

8 Approval of specific projects, such as construction or  
9 management activities located in a defined geographic  
10 area. Projects include actions approved by permit or  
11 other regulatory decision as well as federal and  
12 federally assisted activities.

13 The BiOp, and specifically Component 2 of the RPA, are management  
14 activities located in a defined geographic area that were  
15 approved by a regulatory decision.

16 22. Environmental Intervenors and Federal Defendants cite a  
17 number of cases for the proposition that *Ramsey* should be limited  
18 to its facts. For example, in *Southwest Center for Biological*  
19 *Diversity v. Klasse*, 1999 WL 34689321 (E.D. Cal. Apr. 1, 1999),  
20 the court considered whether FWS failed to comply with NEPA when  
21 it issued a BiOp and incidental take statement after consultation  
22 with the Army Corps of Engineers ("Corps") regarding its  
23 operation of a dam on the Kern River. The court rejected this  
24 argument, finding that plaintiffs' claim was based on an  
25 "overbroad interpretation" of *Ramsey*, which "did not intend to  
26 require the FWS to file NEPA documents every time it issues an  
27 incidental take statement to a federal agency." 1999 WL 34689321  
28 at \*11. See also *P'ship for a Sustainable Future v. U.S. Fish &*  
*Wildlife Serv.*, 2002 WL 33883548 at \*7 (M.D. Fla. July 12, 2002)  
("As a cooperating agency, the FWS is not required to duplicate

1 the work of the Corps by preparing its own EA or EIS"); *City of*  
2 *Santa Clarita v. FWS*, 2006 WL 4743970 at \*19 (C.D. Cal. Jan. 20,  
3 2006) (finding that ITSs issued by FWS "were not 'major federal  
4 action' triggering separate and additional NEPA obligations on  
5 the part of the Service"); *Miccosukee Tribe of Indians of Fla. v.*  
6 *U.S.*, 430 F. Supp. 2d 1328, 1335 (S.D. Fla. 2006) ("To expect or  
7 require FWS to submit its own EIS, in spite of the fact that it  
8 was not the action agency and that the Corps had already issued  
9 one is nonsensical and an utter waste of government resources").<sup>8</sup>

10  
11 23. These cases are not persuasive. In three of the four  
12 cases cited, *City of Santa Clarita*, *Partnership for a Sustainable*  
13 *Future*, and *Miccosukee Tribe*, the action agency either had  
14 already or was in the process of completing environmental  
15 analysis under NEPA. The fourth case, *Klasse*, concerned  
16 challenge to the Army Corps of Engineers' modification of  
17 operations at Isabella Reservoir. *Klasse* found that the Corps'  
18 modifications, like those at issue in *Upper Snake River*, did not

19  
20 <sup>8</sup> Plaintiffs point to Federal Rule of Appellate Procedure  
21 32.1 and Ninth Circuit Rule 36-3, which prohibit citation to  
22 unpublished appellate decisions issued prior to January 1, 2007.  
23 However, these rules do not address citation to unpublished  
24 district court opinions, which are, like published district court  
25 opinions, only persuasive authority. See *Carmichael Lodge No.*  
26 *2103, Benevolent and Protective Order of Elks of the United*  
27 *States of Am. v. Leonard*, 2009 WL 1118896 (E.D. Cal., Apr. 23,  
28 2009) (noting that "there is no prohibition in citing  
'unpublished' district court opinions (unless a local rule so  
provides. They are either persuasive to the case at bar, or they  
are not. District court opinions, published or not, do not set  
binding precedent for other cases....") (irony of citing  
unpublished district court opinion as authority for citing  
unpublished district court opinion noted).

1 "deviate[] from [the Corps'] standard management scheme regarding  
2 water levels." 1999 WL 34689321 at \*11.<sup>9</sup>

3 24. In the final analysis, while the issuance of an  
4 incidental take statement does not necessarily require the  
5 preparation of an EIS, *Westlands Water Dist. v. United States*  
6 *Dep't of the Interior*, 275 F. Supp. 2d 1157, 1221 (E.D. Cal.  
7 2002) ("FWS is not required to file NEPA documents every time it  
8 issues a biological opinion or an incidental take statement."),  
9

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10 <sup>9</sup> Similarly, federal Defendants cite *Greater Yellowstone*  
11 *Coal v. Flowers*, 359 F.3d 1257, 1276 (10th Cir. 2004), for the  
12 proposition that *Ramsey* should be limited to its facts. But  
13 *Greater Yellowstone* simply cites *Ramsey's* holding, without  
14 limiting its reach or scope. Moreover, the issue in *Greater*  
15 *Yellowstone* was whether the action agency should have prepared an  
16 EIS rather than a FONSI, not whether FWS had any NEPA obligations  
17 relative to its issuance of a BiOp. Likewise, *Center for*  
18 *Biological Diversity v. Fish and Wildlife Service*, 2005 WL  
19 2000928 (N.D. Cal. Aug. 19, 2005) ("CBD"), involved a challenge  
20 to a rule issued pursuant to section 4(d) of the ESA, which  
21 requires the Secretary to "issue such regulations as he deems  
22 necessary and advisable to provide for the conservation of [a]  
23 threatened species." 16 U.S.C. § 1533(d). *CBD* summarily  
24 dismissed the possibility that a section 4(d) regulation could be  
25 subject to NEPA because applying NEPA would "confuse matters by  
26 overlaying its own independent matrix" on top of the ESA's  
27 statutorily defined factors for determining that a species should  
28 be listed as threatened. 2005 WL 2000928 at \*12. There is no  
parallel set of statutory factors with which NEPA could conflict  
in this case. Finally, Federal Defendants cite, *Westlands Water*  
*District v. United States Department of the Interior*, 275 F.  
Supp. 2d 1157, 1221 (E.D. Cal. 2002), which involved a  
no-jeopardy opinion, in which the court cited *Keasee* with  
approval for the proposition that "FWS is not required to file  
NEPA documents every time it issues a biological opinion or an  
incidental take statement." *Id.* at 1221-22. Nevertheless,  
Reclamation and FWS did release an Environmental Impact  
Statement/Report, *id.* at 1171, and the Court ultimately ordered  
"Interior" to complete a supplemental EIS. *Id.* at 1235.

1 rev'd, aff'd, remanded on other grounds, 376 F.3d 853 (9th Cir.  
2 2004), factual circumstances may give rise to NEPA obligations in  
3 connection with the issuance of a BiOp/ITS, see *Westlands*, 850 F.  
4 Supp. at 1422; *Ramsey*, 96 F.3d at 441-445.

5 25. FWS's RPA is major federal action that has unquestioned  
6 ability to inflict great harm to Plaintiffs and the human  
7 environment. The federal action is prescribed by FWS and  
8 implemented by Reclamation. These agencies' actions are  
9 inextricably intertwined. There is a strong likelihood that  
10 Plaintiffs will be able to establish that OMR flow restrictions  
11 imposed by the 2008 BiOp will have substantial, detrimental,  
12 indirect effects on the Plaintiffs, the community, and the human  
13 environment. Because FWS ultimately controls OMR flows, there is  
14 a strong likelihood that Plaintiffs will prevail on the merits of  
15 their NEPA claim under the specific facts of this case.

16  
17 b. Federal Defendants' Reliance on *Metropolitan*  
18 *Edison is Misplaced.*

19 26. Federal Defendants argue that "as a matter of law, NEPA  
20 does not impose requirements for an action that does not, by  
21 itself, alter the physical environment," citing *Metropolitan*  
22 *Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772  
23 (1983). The language from *Metropolitan Edison* to which Federal  
24 Defendants refer addressed whether NEPA requires agencies to  
25 consider effects on human health, specifically psychological  
26 health, as part of the "physical environment." *Id.* at 771. The  
27 Supreme Court rejected this argument:

28 To paraphrase the statutory language in light of the  
facts of this case, where an agency action

1 significantly affects the quality of the human  
2 environment, the agency must evaluate the  
3 "environmental impact" and any unavoidable adverse  
4 environmental effects of its proposal. The theme of §  
5 102 is sounded by the adjective "environmental": NEPA  
6 does not require the agency to assess every impact or  
7 effect of its proposed action, but only the impact or  
8 effect on the environment. If we were to seize the word  
9 "environmental" out of its context and give it the  
10 broadest possible definition, the words "adverse  
11 environmental effects" might embrace virtually any  
12 consequence of a governmental action that some one  
13 thought "adverse." But we think the context of the  
14 statute shows that Congress was talking about the  
15 physical environment—the world around us, so to speak.  
16 NEPA was designed to promote human welfare by alerting  
17 governmental actors to the effect of their proposed  
18 actions on the physical environment.

19 *Id.* at 772.

20 27. Whether the OMR flow restrictions set forth in the BiOp  
21 significantly affect the physical environment is a question of  
22 fact on which *Metropolitan Edison* sheds no light. Plaintiffs  
23 have submitted undisputed evidence that shows the OMR  
24 restrictions may have significant effects on the physical  
25 environment, including land fallowing and increased groundwater  
26 use, as well as adverse effects on the water table, soil quality,  
27 and air quality.

28 c. Wrong Lead Agency Argument.

29 28. Environmental intervenors argue that Plaintiffs' NEPA  
30 claim must fail because FWS, the only named defendant in that  
31 claim, is not the appropriate "lead agency" for NEPA purposes.<sup>10</sup>

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32 <sup>10</sup> In a related argument Environmental intervenors attempt  
33 to further distinguish *Ramsey* based on the fact that, in that  
34 case, NMFS both issued and was one of the recipients of the  
35 incidental take statement. In this way, the Ninth Circuit noted  
36 in a footnote that *Ramsey* was "factually ... unusual." 96 F.3d

1 Where more than one federal agency is involved in an action, the  
2 agencies are required to coordinate their efforts and determine a  
3 "lead agency" responsible for NEPA compliance. 40 C.F.R. §  
4 1501.5(c); see *id.* § 1508.16 (defining "Lead agency"). Other  
5 agencies involved are designated as "cooperating agencies." *Id.*  
6 § 1501.6; see *id.* § 1508.5 (defining "Cooperating agency"). The  
7 lead agency is required to use any environmental analysis from  
8 cooperating agencies, which may have jurisdiction by law or  
9 expertise in particular areas, in preparing its NEPA documents.  
10 § 1501.6.

11 29. Applicable regulations allow agencies to share NEPA  
12 responsibility if more than one agency is involved in the same  
13 action or a group of related actions. See *Sierra Club v. U.S.*  
14 *Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002); 40  
15 C.F.R. § 1501.5. Environmental Intervenors correctly point out  
16 that, in this case, the Bureau has been designated the "lead  
17 Federal agency," at least for the purposes of ESA consultation,  
18 concerning coordinated CVP-SWP operations. BiOp at i. The  
19 Bureau also prepared the BA regarding impacts of CVP operations  
20 on the delta smelt, which is a step often taken as part of an  
21 agency's NEPA compliance. See 16 U.S.C. § 1536(c)(1) (BA "may be  
22 undertaken as part of a Federal agency's compliance with the  
23 requirements of [NEPA] section 102").

24 30. However, FWS nevertheless proceeded as the sole issuing  
25

---

26 at 441 n.11. But, the Ninth Circuit did not assign this unusual  
27 factual circumstance any particular weight, other than to note  
28 that no party suggested that the agency suffered from a conflict  
of interest. *Id.*

1 agency of the BiOp, which contains the RPA and incidental take  
2 statement, and proscribed the implementation of the adaptive  
3 management process, which constitutes and will involve regulated  
4 agency actions, in the absence of NEPA compliance. An agency may  
5 not justify, post hoc, its failure to comply with NEPA on the  
6 basis that some other agency prepared an environmental assessment  
7 in the past or may prepare one in the future. See *Anacostia*  
8 *Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 485-486 (D.D.C.  
9 1994).

10  
11 d. Is Any Requirement to Comply with NEPA Obviated by  
12 the Court-Imposed Time Constraints.

13 31. Environmental intervenors argue that "[e]ven if the BO  
14 could be considered a major federal action, this Court's previous  
15 orders setting a fixed time period for FWS to issue the opinion  
16 precluded NEPA compliance." Doc. 58 at 19. The 2004 BiOp was  
17 remanded on December 14, 2007, with instructions to complete a  
18 new BiOp on or before September 15, 2008. NRDC Doc. 560 at 2.  
19 On July 29, 2008, the Federal Defendants informed the Court that  
20 "the Service no longer believed that it would be possible to  
21 complete a scientifically sound and legally defensible biological  
22 opinion by September 15, 2008, and moved to extend the deadline  
23 to December 15, 2008." See Doc. 753, Findings of Fact,  
24 Conclusions of Law, and Order Granting Federal Defendants' Motion  
25 for Extension of Time, at 1-2. DWR joined in that motion. *Id.*  
26 at 2. No other party opposed the extension to provide the agency  
27 a full year to complete the new BiOp. *Id.* The district court  
28 granted Federal Defendants' request for additional time based on

1 Federal Defendants submission that:

2 The consultation between the Bureau of Reclamation  
3 ("Reclamation") and the Service on the OCAP will be one  
4 of the most complex "in the history of the [Endangered  
5 Species Act ('ESA')]." See Declaration of Cay Collette  
6 Goude, Docket No. 712-2 (July 29, 2008), ¶ 6.  
7 Reclamation's "biological assessment" ("BA") of the  
8 effects of these operations itself totals more than  
9 1,000 pages. Id. The Service is required by the ESA to  
10 review all of the "best scientific and commercial data  
11 available," 16 U.S.C. § 1536(a)(2), in preparing this  
12 biological opinion, and the statute and its regulations  
13 allow the Service 135 days to complete a biological  
14 opinion (from the submission and review of the BA). See  
15 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e) (allowing  
16 90 days for formal consultation and then 45 additional  
17 days to write the biological opinion). For these  
18 reasons, holding the Service to the current deadline of  
19 September 15, 2008 could result in a biological opinion  
20 that was not scientifically sound or legally  
21 defensible, and thus result in another cycle of remand,  
22 interim remedies, and judicial review that would  
23 ultimately delay the completion of an adequate  
24 biological opinion and tax the resources of the Court,  
25 the agencies, and the parties.

26 Id.

27 32. Environmental Intervenors argue that the expedited  
28 timeframe for issuance of a new BO precluded compliance with  
NEPA. Even recognizing authority in support of this proposition,  
see H. Conf. Rep., No. 765, 91st Cong., 1st Sess. (1969),  
reprinted in 1969 U.S.C.C.A.N. 2767, 2770 (indicating that NEPA  
applies unless "the existing law applicable to such agency's  
operations expressly prohibits or makes full compliance with one  
of the directives impossible"); *Westlands*, 850 F. Supp. 2d. at  
1416-17 (acknowledging the possibility that an evidentiary  
showing by Federal Defendants could establish that NEPA  
compliance is impossible), Federal Defendants have expressly  
declined to invoke this exception here, after direct inquiry in  
open court at the hearing on this motion. This exception does

1 not apply. Draft Hearing Transcript, May 22, 2009, at 68-69.

2  
3 e. Consequences of Failing to Comply with NEPA.

4 If a full EIS would have been required for the BiOp, FWS  
5 and/or the Bureau would have had to evaluate the cumulative and  
6 indirect impacts of, and consider a reasonable range of  
7 alternatives to the RPA. See *Ctr. for Biological Diversity*, 538  
8 F.3d at 1185. NEPA does not dictate the outcome of agency  
9 deliberations; "instead, NEPA is aimed at ensuring agencies make  
10 informed decisions and contemplate the environmental impacts of  
11 their actions." *Ocean Mammal Inst.*, 546 F. Supp. 2d at 971  
12 (citing *Idaho Sporting Cong.*, 137 F.3d at 1149).

13  
14 3. ESA Claims against FWS.

15 33. The Complaint and motion for preliminary injunction  
16 also raise claims under the ESA. Because there is likelihood of  
17 success on the NEPA claims, it is unnecessary to evaluate the  
18 merit of the ESA claims at this time.

19  
20 4. The Requested Injunction.

21 34. Plaintiffs request a limited injunction to prohibit  
22 FWS, and those acting in concert or participation with FWS,  
23 including the Bureau, from setting or implementing the OMR flow  
24 restrictions under BiOp RPA Component 2 unless and until FWS  
25 further explains why alternative, less restrictive OMR flows

1 would not adequately protect the delta smelt.<sup>11</sup>

2 35. Plaintiffs maintain that further explanation is  
3 warranted because it is not clear from the BiOp or FWS's  
4 subsequent Decisions implementing the adaptive management  
5 protocol why flows have been set at the chosen, allegedly over-  
6 protective levels, without considering the adverse environmental  
7 consequences and irreparable injury this major federal action  
8 will cause.

9  
10 5. Balance of the Harms.

11 a. Potential Harm to the Species.

12 36. Federal Defendants and Environmental Intervenors  
13 maintain that enjoining implementation of the RPA would  
14  
15  
16

---

17 <sup>11</sup> Environmental Intervenors note that both the delta  
18 smelt and longfin smelt are state-listed species under CESA. See  
19 14 Cal. Code Regs. § 670.5; Obegi Decl. at ¶8 & Attch. 7. The  
20 SWG, which includes DFG staff as members, has repeatedly found  
21 that "[c]urrent delta smelt advice will be protective of longfin  
22 smelt larvae" and has not imposed additional OMR flow  
23 restrictions to protect longfin smelt (or to protect delta smelt,  
24 in the event FWS failed to do so). Goude Decl. at ¶4 & Ex. F  
25 (2009 SWG notes from 3/16, 3/23, 3/30, 4/6). If implementation  
26 of the RPA is enjoined, Environmental Intervenors argue that DFG  
27 likely would have a legal obligation to impose OMR flow  
28 restrictions to protect delta smelt and longfin smelt under state  
law. The nature of the requested injunction largely obviates  
this concern, as Plaintiffs merely request that FWS further  
justify any OMR flow restrictions under Component 2. To the  
extent that the deliberative process engenders any change to the  
manner in which FWS implements Component 2, FWS is nevertheless  
obliged to ensure that jeopardy and/or adverse modification is  
avoided.

1 irreparably harm the species.<sup>12</sup> Federal Defendants argue that,  
2 although "[w]e cannot know exactly what effect unlimited pumping  
3 would have on the delta smelt this year because it would depend  
4 on hydrologic conditions in the Delta and the geographic  
5 distribution of the delta smelt population.... unless conditions  
6 are favorable, it could entrain up to 50% of delta smelt larvae  
7 and cause a severe reduction in production, which would have a  
8 'substantial' effect on the species." Doc. 56 at 21 (citing BiOp  
9 at 164-65).

10 37. FWS's May 21, 2009 Decision regarding Component 2  
11 implementation indicates that salvage increased during the week  
12 prior and that, at the current rate, salvage "may exceed the  
13 Concern Level in the 2008 biological opinion of 299 delta smelt."  
14 Fed. Def. Ex. B. FWS further noted that delta smelt are "likely  
15 just starting to reach a size that they are more effectively  
16 detected at the fish salvage facilities. As the fish get larger,  
17 they will be detected more frequently. Also, the end of May is  
18 historically a period when high numbers of delta smelt become  
19 entrained at the export facilities. Salvage usually starts at  
20 the CVP before the SWP also salvages delta smelt. Currently,

21 \_\_\_\_\_  
22 <sup>12</sup> As a threshold matter, Federal Defendants frame  
23 Plaintiffs' proposal as one that would permit "unlimited  
24 pumping." Doc. 56 at 20-21. Plaintiffs complain that this "is a  
25 straw man argument" insofar as they have not requested "unlimited  
26 pumping," because various other legal mandates make truly  
27 unlimited pumping out of the question. Doc. 70 at 2. However,  
28 it appears that Federal Defendants use the term "unlimited" to  
mean a pumping regime that is not constrained by Component 2.  
Federal Defendants' argument that "unlimited pumping could cause  
irreparable harm to the delta smelt" will be interpreted in this  
light.

1 delta smelt have been salvaged at the CVP over the past 4 days.”  
2 *Id.*

3 38. The ESA embodies a policy of “institutionalized  
4 caution.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194  
5 (1978). It is not inappropriate to err on the side of the  
6 species when there is substantial uncertainty, and it is  
7 reasonable to do so, so long as FWS does not do so arbitrarily or  
8 in violation of NEPA, by ignoring irreparable injury from  
9 environmental and related harms that will be effectuated by over-  
10 zealous reductions of CVP flows. FWS must evaluate and avoid, to  
11 the extent practicable, irreparable harm to Plaintiffs resulting  
12 from unnecessarily overprotective RPA measures.

13  
14 b. Harm to Water Users & Dependent Communities.

15 39. It is undisputed that current conditions are causing  
16 economic hardship for water users and the communities upon which  
17 they depend. There is also substantial evidence establishing  
18 additional, non-economic hardships, involving dislocation of  
19 families and related impacts, loss of school and tax revenue,  
20 widespread food insecurity, and adverse impacts to groundwater  
21 supply and quality, soil quality, and air quality.

22 40. Despite the general economic downturn and/or natural  
23 hydrologic conditions, as opposed to the BiOp’s flow constraints,  
24 the Westside service areas are almost exclusively farmlands, and  
25 farm-related activities support the communities in that region.  
26 The absence of water supply directly impairs and harms all of  
27 these interests, even if there are concurrent causes. Federal  
28 Defendants “cannot control the weather,” and the court “cannot

1 hold [them] responsible for the absence of rain," *Alabama v. U.S.*  
2 *Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1134 (N.D. Ala.  
3 2006), or the effects of economic recession. Here, however,  
4 substantial evidence shows that the BiOp and RPA's flow  
5 constraints, and specifically Condition 2, if overzealously  
6 implemented, will worsen the water shortage, causing increased  
7 harm. NEPA required consideration of such agency-caused  
8 consequences. Federal Defendants failed to engage in this  
9 analysis.

10 a. Information contained within the declaration of  
11 Ronald Milligan, Doc. 56-3, the manager of the Bureau's Central  
12 Valley Operations Office, indicates that total pumping by the CVP  
13 after May 17 would be reduced from 342,000 AF if OMR flows are  
14 set at -5000 cfs, to 90,000 AF if OMR flows are set at -1,250.  
15 This difference of 252,000 AF is substantial.

16 41. Plaintiffs have shown that irreparable harm will likely  
17 occur in the absence of injunctive relief, including loss of  
18 water supplies, damage to permanent crops, including orchards and  
19 vineyards, crop loss or reduction in crop productivity, job  
20 losses, reductions in public school enrollment, limitations on  
21 public services, impaired ability to reduce the toxic effects of  
22 salt and other minerals in the soil, groundwater overdraft,  
23 increased energy consumption, and land fallowing that causes air  
24 quality problems

25  
26 c. Balance of the Hardships.

27 42. The balance of the harms must be evaluated in light of  
28 the nature of the requested injunction. Plaintiffs request, that

1 FWS be required to justify why it sets OMR flows at a  
2 particularly restrictive level, instead of at a level that would  
3 be less harmful to Plaintiffs' interests as federal contractors.  
4 The law does not require FWS to take any action that would  
5 imperil the continued survival and jeopardy of the smelt. the  
6 requested injunction requires FWS to, on an ad hoc basis,  
7 consider the issues it would have evaluated had it engaged in a  
8 NEPA review of the BiOp and RPA. Such an injunction will not  
9 subject the species to any harm. In this light, the balance of  
10 the harms tips strongly in favor of Plaintiffs.

11  
12 6. Public Interest.

13 43. The public interest favors granting injunctive relief,  
14 as the harms cannot be remedied by monetary compensation, the  
15 environmental consequences cannot be avoided or reasonably  
16 mitigated, and the damage to the community is now occurring and  
17 will continue to be exacerbated.

18  
19 V. CONCLUSION AND ORDER.

20 For the reasons set forth above, Plaintiffs' motion for  
21 Preliminary Injunction is GRANTED. FWS, its agents, and those  
22 acting in active concert or participation with them, are ENJOINED  
23 AND RESTRAINED as follows:

24 1. The FWS, its agents, and those acting in active concert  
25 or participation with them, are ENJOINED from setting and  
26 implementing unnecessarily restrictive OMR flow restrictions  
27 under BiOp RPA Component 2 unless and until FWS first considers  
28 the harm that these decisions and actions are likely to cause

1 humans, the community, and the environment, during the period  
2 through June 30, 2009, or three consecutive days when water  
3 temperatures exceed 25°C, whichever first occurs. FWS, an agency  
4 with expertise in biology, not economics or sociology, need not  
5 independently evaluate and/or weigh the harms to humans, the  
6 community, and the environment versus any potential harm to the  
7 species. Rather, in light of the likelihood that Plaintiffs will  
8 succeed on their claim that the BiOp was unlawfully issued  
9 without NEPA compliance and the alternatives analysis such  
10 compliance would have required, FWS must explain why alternative,  
11 less restrictive OMR flows would not adequately protect the delta  
12 smelt, considering location, abundance, entrainment, and all  
13 other assessment criteria currently in use, to evaluate risk to  
14 the species.

15 2. If FWS, its agents, and those acting in active concert  
16 or participation with them, determine that OMR flow restrictions  
17 under BiOp RPA Component 2 must be imposed to protect the  
18 species, FWS must explain why alternative, less restrictive OMR  
19 flows would not adequately protect the delta smelt.

20 3. For each decision setting or implementing OMR flow  
21 restrictions under BiOp RPA Component 2, FWS, its agents, and  
22 those acting in active concert or participation with them shall  
23 provide to the Court, and all parties to this lawsuit, a written  
24 statement explaining why alternative, less restrictive OMR flows  
25 would not adequately protect the delta smelt. These written  
26 explanations shall be provided forthwith through the Court's  
27 electronic case filing system and by any additional means FWS  
28 desires. Such explanation shall be provided no less frequently

1 than weekly, even if FWS maintains the same OMR flow restriction  
2 from one week to the next.

3  
4 SO ORDERED

5 Dated: May 29, 2009

6  
7 /s/ Oliver W. Wanger  
8 Oliver W. Wanger  
9 United States District Judge  
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