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2 UNITED STATES DISTRICT COURT  
3 FOR THE EASTERN DISTRICT OF CALIFORNIA  
4

5 DELTA SMELT CONSOLIDATED  
6 CASES

1:09-CV-407 OWW DLB

7 SAN LUIS & DELTA-MENDOTA  
8 WATER AUTHORITY, *et al.* v.  
9 SALAZAR, *et al.*

MEMORANDUM DECISION RE  
CROSS-MOTIONS FOR SUMMARY  
JUDGMENT ON NEPA ISSUES

10 STATE WATER CONTRACTORS v.  
11 SALAZAR, *et al.*

12 COALITION FOR A SUSTAINABLE  
13 DELTA, *et al.* v. UNITED  
14 STATES FISH AND WILDLIFE  
15 SERVICE, *et al.*

16 METROPOLITAN WATER DISTRICT  
17 v. UNITED STATES FISH AND  
18 WILDLIFE SERVICE, *et al.*

19 STEWART & JASPER ORCHARDS *et*  
20 *al.* v. UNITED STATES FISH  
21 AND WILDLIFE SERVICE.

22 I. INTRODUCTION

23 This case arises out of the United States Fish and  
24 Wildlife Service's ("FWS") December 15, 2008 biological  
25 opinion ("BiOp" or "2008 smelt BiOp") addressing the impact of  
26 coordinated operations of the Central Valley Project ("CVP")  
27 and State Water Project ("SWP") (the "Projects") on the  
28 threatened delta smelt, prepared pursuant to Section 7(a)(2)  
of the Endangered Species Act ("ESA"), 16 U.S.C. §§  
1536(a)(2). Because the BiOp found that planned coordinated  
Project operations would jeopardize the continued existence of

1 the delta smelt and/or adversely modify its critical habitat,  
2 FWS proposed a Reasonable and Prudent Alternative ("RPA") that  
3 imposes certain operating restrictions on the Projects. The  
4 Bureau of Reclamation ("Reclamation") provisionally accepted  
5 and then implemented the BiOp and its RPA.

6  
7 Plaintiffs in three of the five consolidated cases,  
8 namely San Luis & Delta Mendota Water Authority ("Authority")  
9 and Westlands Water District ("Westlands"), State Water  
10 Contractors ("SWC"), and Metropolitan Water District of  
11 Southern California ("MWD") (collectively, "Plaintiffs") move  
12 for summary judgment, arguing that issuance and/or  
13 implementation of the BiOp/RPA is a "major federal action"  
14 that will inflict harm on the human environment, and that FWS  
15 and/or Reclamation should have, but did not conduct an  
16 environmental assessment ("EA") or prepare an environmental  
17 impact statement ("EIS") under the National Environmental  
18 Policy Act ("NEPA"). Doc. 245. Federal Defendants and  
19 Defendant-Intervenors oppose, Docs. 290 & 281, and have  
20 submitted supporting declarations, Docs. 290-2 (Paul  
21 Fujitani), 281-2 (Charles A. Simenstad). Plaintiffs replied  
22 and submitted a supporting declaration. Docs. 297 & 197-2  
23 (Thomas Boardman).

24  
25  
26 Defendant-Intervenors cross-move for summary judgment on  
27 this claim, arguing that FWS was not required to prepare an  
28

1 EIS in connection with issuance of the BiOp. Doc. 244.  
2 Plaintiffs oppose. Doc. 287. Defendant-Intervenors filed a  
3 reply. Doc. 298.

4 In response to the district court's request for further  
5 argument on Reclamation's liability under NEPA, the parties  
6 submitted supplemental briefs. Docs. 357-58, 360-61.  
7

## 8 II. STATEMENT OF FACTS

9 The 2008 BiOp concluded that "the coordinated operations  
10 of the CVP and SWP, as proposed, are likely to jeopardize the  
11 continued existence of the delta smelt" and "adversely modify  
12 delta smelt critical habitat." BiOp 276-78.<sup>1</sup> As required by  
13 law, FWS's BiOp includes an RPA designed to allow the projects  
14 to continue operating without causing jeopardy or adverse  
15 modification. BiOp 279. The RPA includes various operational  
16 components designed to reduce entrainment of smelt during  
17 critical times of the year by controlling and reducing water  
18 flows in the Delta. BiOp 279-85.  
19  
20

21 Component 1 (Protection of the Adult Delta Smelt Life  
22 Stage) consists of two Actions related to Old and Middle River  
23 ("OMR") flows. Action 1, requiring OMR flows to be no more  
24 negative than -2,000 cubic feet per second ("cfs") on a 14-day  
25 average and no more negative than -2,500 cfs for a 5-day  
26

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27 <sup>1</sup> Although the BiOp is part of the administrative record ("AR"), for  
28 ease of reference, its internal page references, rather than AR  
references, are used.

1 running average, is triggered during low and high entrainment  
2 risk periods based on physical and biological monitoring.  
3 BiOp 281, 329. Action 2, setting maximum negative flows for  
4 OMR, is triggered immediately after Action 1 ends or if  
5 recommended by the Smelt Working Group ("SWG"). BiOp 281-282,  
6 352.  
7

8 Under Component 2 (Protection of Larval and Juvenile  
9 Delta Smelt), OMR flows must remain between -1,250 and -5,000  
10 cfs beginning when Component 1 is completed, when Delta water  
11 temperatures reach 12° Celsius, or when a spent female smelt  
12 is detected in trawls or at salvage facilities. BiOp 282,  
13 357-358. Component 2 remains in place until June 30 or when  
14 the Clifton Court Forebay water temperature reaches 25°  
15 Celsius. BiOp 282, 368.  
16

17 Component 3 (Improve Habitat for Delta Smelt Growth and  
18 Rearing) requires sufficient Delta outflow to maintain average  
19 mixing point locations of Delta outflow and estuarine water  
20 inflow ("X2") from September to December, depending on water  
21 year type, in accordance with a specifically described  
22 "adaptive management process" overseen by FWS. BiOp 282-283,  
23 369.  
24

25 Under Component 4 (Habitat Restoration), the California  
26 Department of Water Resources ("DWR") is to create or restore  
27 8,000 acres of intertidal and subtidal habitat in the Delta  
28

1 and Suisun Marsh within 10 years. BiOp 283-284, 379.

2 Under Component 5 (Monitoring and Reporting), the  
3 Projects gather and report information to ensure proper  
4 implementation of the RPA actions, achievement of physical  
5 results, and evaluation of the effectiveness of the actions on  
6 the targeted life stages of delta smelt, so that the actions  
7 can be refined, if needed. BiOp 284-285, 328, 375, 37.

8 It is undisputed that no NEPA documentation was prepared  
9 by either FWS or Reclamation in connection with the issuance,  
10 provisional adoption, and/or implementation of the BiOp and  
11 RPA.  
12

13  
14 **III. ANALYSIS**

15 **A. Threshold Issues.**

16 **1. Requests for Judicial Notice.**

17 **a. Plaintiffs' Request for Judicial Notice.**

18 Plaintiffs request judicial notice of the May 29, 2009  
19 Findings of Fact and Conclusions of Law entered in this case.  
20 Doc. 94. This document is judicially noticeable as part of  
21 the court record. Plaintiffs also request judicial notice of  
22 a document authored by DWR, entitled "Delta Water Exports  
23 Could be Reduced by Up to 50 Percent Under New Federal  
24 Biological Opinion: DWR Director Snow Responds to Delta Smelt  
25 Biological Opinion" (Dec. 15, 2008). This is a judicially  
26 noticeable record or report of an administrative body, see  
27  
28

1 *United States v. 14.02 Acres of Land More or Less in Fresno*  
2 *County*, 547 F.3d 943, 955 (9th Cir. 2008), although only for  
3 its publication and the existence of its content, not for the  
4 truth of disputed matters asserted in the document.  
5

6 b. Defendant Intervenors' Request for Judicial  
7 Notice.

8 Defendant Intervenors request judicial notice of the  
9 following three documents attached to the Declaration of  
10 George Torgun, Esq., Doc. 285:

- 11 • Exhibit 1: Reclamation's Draft EIS/EIR for the El  
12 Dorado County Water Agency Proposed Water Service  
13 Contract.
- 14 • Exhibit 2: A Summary Document, published by CalFed,  
15 concerning the Two Gates Project.
- 16 • Exhibit 3: A DWR Fact Sheet on the Two Gates  
17 Project.  
18

19 These are public documents published by administrative bodies  
20 and readily available on the internet. They may be judicially  
21 noticed for their publication and their contents, but not for  
22 the truth of disputed matters asserted in the documents.  
23

24 2. Effect of Preliminary Injunction Decision.

25 The May 29, 2009 Findings of Fact and Conclusions of Law  
26 and Order Re Plaintiffs' Motion for Preliminary Injunction  
27 ("May 29, 2009 PI Decision" or "PI Decision"), found that  
28

1 Plaintiffs were likely to succeed on their NEPA claim against  
2 the FWS. Doc. 94. Plaintiffs cite the PI Decision's  
3 findings, suggesting that the district court "has already  
4 determined" several key issues in this case. See, e.g., Doc.  
5 245-2 at 7. But, "decisions on preliminary injunctions are  
6 just that -- preliminary -- and must often be made hastily  
7 and on less than a full record." *S. Or. Barter Fair v.*  
8 *Jackson County, Or.*, 372 F.3d 1128, 1136 (9th Cir. 2004)  
9 (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395  
10 (1981)).  
11

12 Thus, even [where] the facial challenge presented  
13 to the district court here involved primarily  
14 issues of law, we see no reason why [a] court  
15 should [] deviate[] from the general rule that  
16 decisions on preliminary injunctions 'are not  
17 binding at trial on the merits, and do not  
18 constitute the law of the case.

19 *Id.* (internal citations and quotations omitted).

20 Although the PI Decision may be considered, it is not law  
21 of the case nor is it dispositive of any issue presently  
22 before the court.

23 There is no requirement that Defendants supply new  
24 law or facts to justify a different decision at the  
25 summary judgment stage. Although a court has the  
26 discretion to dissolve or modify a preliminary injunction  
27 upon introduction of new facts or law, or a showing of  
28 changed conditions, see *Mariscal-Sandoval v. Ashcroft*,  
370 F.3d 851, 859 (9th Cir. 2004), summary judgment is an

1 entirely independent proceeding from the preliminary  
2 injunction phase.

3  
4 3. Burden of Proof.

5 Plaintiffs suggest that the "shift in procedural  
6 posture," from preliminary injunction to summary adjudication,  
7 "lessens Plaintiffs' burden." Doc. 245-2 at 3. Their  
8 argument continues.

9 This Court's preliminary injunction was predicated,  
10 in part, on the Court's determination that Plaintiffs  
11 demonstrated they were likely to suffer irreparable  
12 harm because of the 2008 BiOp's effects on the human  
13 environment. On summary judgment, however,  
14 Plaintiffs' required showing is relaxed: if the Court  
15 determines the 2008 BiOp may affect the human  
16 environment, NEPA's requirements are triggered.

17 *Id.* This inaccurately states the governing standards. In the  
18 preliminary injunction context, "a plaintiff seeking a  
19 preliminary injunction must establish that he is likely to  
20 succeed on the merits, that he is likely to suffer irreparable  
21 harm in the absence of preliminary relief, that the balance of  
22 equities tips in his favor, and that an injunction is in the  
23 public interest." *Am. Trucking Assns., Inc. v. City of Los*  
24 *Angeles*, 559 F.3d 1046, 1042 (9th Cir. 2009) (citing *Winter v.*  
25 *NRDC*, --- U.S. ---, 129 S. Ct. 365 (2008)). Within the  
26 likelihood of success on the merits prong, a court must  
27 evaluate each claim according to applicable legal standards.  
28 Here, that standard, in part, involves an inquiry into whether  
"there are substantial questions about whether a project may

1 cause significant degradation of the human environment.

2 *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233,  
3 1239 (9th Cir. 2005). For a preliminary injunction,  
4 plaintiffs only had to establish that they are "likely" to  
5 meet this burden under. On summary judgment, plaintiff must  
6 actually prove success by a preponderance of the evidence.  
7

8 **B. Applicable Legal Standards.**

9 Because NEPA contains no separate provision for judicial  
10 review, compliance with NEPA is reviewed under the  
11 Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); *NW*  
12 *Resource Info. Ctr., Inc. v. NMFS*, 56 F.3d 1060, 1066 (9th  
13 Cir. 1995), provided (1) there is final agency action and (2)  
14 Plaintiffs can show that they have suffered a legal wrong or  
15 will be adversely affected within the meaning of the statute,  
16 *Northcoast Env't'l Ctr. v. Glickman*, 136 F.3d 660, 668 (9th  
17 Cir. 1998). It is undisputed that the challenged agency  
18 action, the issuance of the 2008 smelt BiOp and its RPA, is  
19 "final agency action." See *Bennet v. Spear*, 520 U.S. 154,  
20 161, 178 (1997) (issuance of biological opinion is "final  
21 agency action"). It is also undisputed that Plaintiffs have  
22 been adversely affected by the issuance of the 2008 smelt BiOp  
23 and implementation of its RPA controlling the Projects' water  
24 flows.  
25  
26

27 NEPA requires all federal agencies to prepare an EIS to  
28

1 evaluate the potential environmental consequences of any  
2 proposed "major Federal action[] significantly affecting the  
3 quality of the human environment." 42 U.S.C. § 4332(C).<sup>2</sup> The  
4 preparation of an EIS serves a number of purposes:

5  
6 It ensures that the agency, in reaching its decision,  
7 will have available, and will carefully consider,  
8 detailed information concerning significant  
9 environmental impacts; it also guarantees that the  
relevant information will be made available to the  
larger audience that may also play a role in both the  
decisionmaking process and the implementation of that  
decision.

10 Simply by focusing the agency's attention on the  
11 environmental consequences of a proposed project,  
12 NEPA ensures that important effects will not be  
13 overlooked or underestimated only to be discovered  
14 after resources have been committed or the die  
15 otherwise cast. Moreover, the strong precatory  
language of § 101 of the Act and the requirement that  
agencies prepare detailed impact statements  
inevitably bring pressure to bear on agencies to  
respond to the needs of environmental quality. 115  
Cong. Rec. 40425 (1969) (remarks of Sen. Muskie).

16 Publication of an EIS, both in draft and final form,  
17 also serves a larger informational role. It gives the  
18 public the assurance that the agency has indeed  
19 considered environmental concerns in its  
decisionmaking process, and, perhaps more  
significantly, provides a springboard for public  
comment.

20 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349  
21 (1989) (internal citations and quotations omitted). "NEPA  
22 does not contain substantive requirements that dictate a  
23 particular result; instead, NEPA is aimed at ensuring agencies  
24 make informed decisions and contemplate the environmental  
25

26  
27 <sup>2</sup> That FWS declares itself a federal agency subject to NEPA, see FWS  
28 NEPA reference handbook, available at: <http://www.fws.gov/r9esnepa>, is not  
dispositive of the question of whether NEPA applies here. This means FWS  
must undertake a major federal action with the required effect on the  
human environment, to make FWS subject to NEPA.

1 impacts of their actions." *Ocean Mammal Inst. v. Gates*, 546  
2 F. Supp. 2d 960, 971 (D. Hi. 2008) (quoting *Idaho Sporting*  
3 *Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). "NEPA  
4 emphasizes the importance of coherent and comprehensive up-  
5 front environmental analysis to ensure informed decision  
6 making to the end that the agency will not act on incomplete  
7 information, only to regret its decision after it is too late  
8 to correct." *Ctr. for Biological Diversity v. U.S. Forest*  
9 *Service*, 349 F.3d 1157, 1166 (9th Cir. 2003) (internal  
10 citation and quotations omitted).  
11

12 Federal regulations implementing NEPA define major  
13 federal action:

14  
15 Major Federal action includes actions with effects  
16 that may be major and which are potentially subject  
17 to Federal control and responsibility. Major  
18 reinforces but does not have a meaning independent of  
19 significantly ([40 C.F.R.] § 1508.27). Actions  
20 include the circumstance where the responsible  
21 officials fail to act and that failure to act is  
22 reviewable by courts or administrative tribunals  
23 under the Administrative Procedure Act or other  
24 applicable law as agency action.

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

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

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

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

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

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

15 40 C.F.R. § 1508.18.

16 When an agency takes major federal, the agency must  
17 prepare an EIS "where there are substantial questions about  
18 whether a project may cause significant degradation of the  
19 human environment." *Native Ecosystems*, 428 F.3d at 1239. An  
20 agency may choose to prepare an environmental assessment  
21 ("EA") to determine whether an EIS is needed. 40 C.F.R. §§  
22 1501.4, 1508.9(b). The EA must identify all reasonably  
23 foreseeable impacts, analyze their significance, and address  
24 alternatives. 40 C.F.R. §§ 1508.8, 1508.9, 1508.27. If,  
25 based on the EA, the agency concludes that the proposed  
26 actions will not significantly affect the environment, it may  
27  
28

1 issue a Finding of No Significant Impact ("FONSI") and forego  
2 completion of an EIS. See *Bob Marshall Alliance v. Hodel*, 852  
3 F.2d 1223, 1225 (9th Cir. 1988); 40 C.F.R. § 1501.4(e).

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

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

24 *Id.* at 1185-86 (citing 40 C.F.R. § 1508.27(b)(2), (4), (5),  
25 (7)).

26 The parties debate at length the degree of deference owed  
27 to an agency's decision under NEPA. However, in this case,  
28 neither agency made any NEPA-related decision to which  
29 deference is owed. The relevant standard is "reasonableness,"  
30 as articulated in *High Sierra Hikers Ass'n v. Blackwell*:

31 Typically, an agency's decision not to prepare an EIS  
32 is reviewed under the arbitrary and capricious

1 standard; however, where an agency has decided that a  
2 project does not require an EIS without first  
conducting an EA, we review under the reasonableness  
3 standard.

390 F.3d 630, 640 (9th Cir. 2004). "Further, when an agency  
4 has taken action without observance of the procedure required  
5 by law, that action will be set aside." *Id.* (citations  
6 omitted).

8  
9 C. Major Federal Action.

10 1. Was FWS's Issuance of the Biological Opinion Major  
Federal Action?

11 a. 40 C.F.R. § 1508.18.

12 Plaintiffs suggest that the issuance of the 2008 BiOp  
13 constitutes a "major federal action" under 40 C.F.R. §  
14 1508.18, which provides that the word "major" in the phrase  
15 major federal action "reinforces but does not have a meaning  
16 independent of" the term "significantly" in "significantly  
17 affecting the human environment." Does the issuance of a BiOp  
18 constitute a "federal action" under the meaning of the  
19 statute? Section 1508.18(b) provides that "[f]ederal actions  
20 tend to fall within one of the following categories":

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

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

1 based.

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

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

12 40 C.F.R. § 1508.18 (emphasis added). Plaintiffs principally  
13 rely on § 1508.18(b)(4) as applicable to the coordinated  
14 operations of the Projects.

15 The only court that has applied 40 C.F.R. § 1508.18(b)(4)  
16 to require NEPA analysis for a biological opinion is *Ramsey v.*  
17 *Kantor*, 96 F.3d 434 (9th Cir. 1996), which applied NEPA to the  
18 National Marine Fisheries Service's ("NMFS") issuance of a  
19 biological opinion and incidental take statement ("ITS") under  
20 ESA § 7 permitting state regulators to issue salmon fishing  
21 regulations consistent with that take statement. 96 F.3d at  
22 441-445. *Ramsey* found the biological opinion and ITS  
23 constituted "major federal action," triggering NEPA  
24 compliance, because it was "clear ... both from our cases and  
25 from the federal regulations, see 40 C.F.R. § 1508.18, that if  
26 a federal permit is a prerequisite for a project with adverse  
27 impact on the environment, issuance of that permit does  
28 constitute major federal action and the federal agency  
involved must conduct an EA and possibly an EIS before

1 granting it." *Id.* at 444.

2 *Ramsey* determined:

3 [T]he incidental take statement in this case is  
4 functionally equivalent to a permit because the  
5 activity in question would, for all practical  
6 purposes, be prohibited but for the incidental take  
7 statement. Accordingly, we hold that the issuance of  
8 that statement constitutes major federal action for  
9 purposes of NEPA.

10 *Id.*

11 The *Ramsey* federal defendants contended that there was  
12 insufficient federal participation in a state run project to  
13 require an EIS. The Appeals Court disagreed: "if a federal  
14 permit is a prerequisite for a project with adverse impact on  
15 the environment, issuance of that permit does constitute a  
16 major federal action...." triggering NEPA. *Id.* at 444  
17 (internal citations and quotations omitted). *Ramsey* held that  
18 "the incidental take statement in [that] case is functionally  
19 equivalent to a permit because the activity in question would,  
20 for all practical purposes, be prohibited but for the  
21 incidental take statement." *Id.* Because the ITS was the  
22 functional equivalent of a permit, NEPA applied to the  
23 issuance of the biological opinion, despite federal  
24 defendants' contention that the mere issuance of an ITS was  
25 insufficient federal participation in a state project.

26 Here, unlike *Ramsey*, the CVP is an entirely federal  
27 project, operated by Reclamation, a federal agency, rendering  
28 *Ramsey's* "functional equivalency" analysis largely irrelevant.

1 Ramsey stands for two important principles: First, under  
2 certain circumstances, a biological opinion may qualify as a  
3 major federal action for NEPA purposes; second, not every  
4 biological opinion is a major federal action.<sup>3</sup>

5 Plaintiffs maintain that the 2008 smelt BiOp qualifies as  
6 a major federal action under 40 C.F.R. § 1508.18(b)(4) as a  
7 matter of course. See Doc. 245-2 at 10 (suggesting, without  
8 any analysis that the 2008 smelt BiOp is subject to NEPA  
9 because under 1508(b)(4) "actions approved by permit or other  
10 regulatory decision are major federal actions"). Plaintiffs  
11 do not explicate the basis for § 1508.18(b)(4)'s application  
12  
13

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14 <sup>3</sup> Defendant Intervenors and Federal Defendants cite several cases  
15 that support the general proposition that BiOps are not always subject to  
16 NEPA. For example, in *Southwest Center for Biological Diversity v.*  
17 *Klasse*, 1999 WL 34689321 (E.D. Cal. Apr. 1, 1999), the issue was whether  
18 FWS failed to comply with NEPA when it issued a BiOp and ITS after  
19 consultation with the Army Corps of Engineers ("Corps") regarding its  
20 operation of a dam on the Kern River. The court rejected this argument,  
21 finding that plaintiffs' claim was based on an "overbroad interpretation"  
22 of Ramsey, which "did not intend to require the FWS to file NEPA documents  
23 every time it issues an incidental take statement to a federal agency."  
24 1999 WL 34689321 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 the work  
of the Corps by preparing its own EA or EIS."); *City of Santa Clarita v.*  
*FWS*, 2006 WL 4743970 at \*19 (C.D. Cal. Jan. 20, 2006) (finding that ITSs  
issued by FWS "were not 'major federal action' triggering separate and  
additional NEPA obligations on the part of the Service"); *Miccosukee Tribe*  
*of Indians of Fla. v. U.S.*, 430 F. Supp. 2d 1328, 1335 (S.D. Fla. 2006)  
("To expect or require FWS to submit its own EIS, in spite of the fact  
that it was not the action agency and that the Corps had already issued  
one is nonsensical and an utter waste of government resources.").

These cases are distinguishable. In three of the four cases cited,  
*City of Santa Clarita*, *Partnership for a Sustainable Future*, and  
*Miccosukee Tribe*, the action agency either had already or was in the  
process of completing environmental analysis under NEPA. The fourth case,  
*Klasse*, was a challenge to the Army Corps of Engineers' modification of  
operations at Isabella Reservoir. *Klasse* found that the Corps'  
modifications, like those at issue in *Upper Snake River*, discussed below,  
did not "deviate[] from [the Corps'] standard management scheme regarding  
water levels." 1999 WL 34689321 at \*11.

1 to the 2008 Smelt BiOp. Plaintiffs' argument that the BiOp is  
2 the "functional equivalent" of a permit, premised on Ramsey,  
3 is unhelpful because Ramsey is distinguishable.

4 Plaintiffs rely on language from the PI Decision  
5 suggesting the BiOp is an "approval of [a] specific project[],  
6 such as [a] management activit[y] located in a defined  
7 geographic area ... approved by ... [a] regulatory decision."  
8 See 40 C.F.R. 1508.18(b)(4). No party provides any relevant  
9 regulatory definitions, legislative history, or caselaw  
10 interpreting the "management activity" language from  
11 1508.18(b)(4). The BiOp and its RPA/ITS arguably constitute a  
12 "management activity," as they prescribe concerted actions to  
13 manage federal resources implementing a specific plan designed  
14 to "manage" threats to the smelt. The BiOp is also, arguably,  
15 a "formal plan[]... which guide[s] or prescribe[s] alternative  
16 uses of Federal resources, upon which future agency actions  
17 will be based." See 40 C.F.R. § 1508.18(b)(2).<sup>4</sup>  
18  
19  
20

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21 <sup>4</sup> Plaintiffs do not expressly invoke 40 C.F.R. § 1508.18(b)(3)  
22 (federal actions tend to include "[a]doption of programs, such as a group  
23 of concerted actions to implement a specific policy or plan; systematic  
24 and connected agency decisions allocating agency resources to implement a  
25 specific statutory program or executive directive"). *Westlands Water Dist.*  
26 *v. U.S. Dept. of Interior, Bureau of Reclamation*, 850 F. Supp. 1388, 1422  
27 (E.D. Cal. 1994), found that the BiOp in that case was part of a set of  
28 "systematic and connected agency decisions allocating agency resources to  
implement a specific statutory program," namely the Central Valley Project  
Improvement Act ("CVPIA"). The 2008 smelt BiOp does not fit this  
definition, because it resulted from the Bureau's Section 7 consultation  
on the proposed coordinated operations of the CVP-SWP. No "specific  
statutory program or executive directive" like the CVPIA caused federal  
resources (water) to be reallocated to protect the smelt. Rather, it was  
the BiOp, required by the ESA, which determined an RPA was necessary to  
avoid jeopardy to the smelt and its habitat.

1 Federal Defendants counter that the BiOp cannot possibly  
2 constitute major federal action because it is not binding upon  
3 Reclamation. They suggest, if the BiOp is merely a suggested  
4 course of action, it is not an "approval of [a] specific  
5 project[], such as [a] management activit[y] located in a  
6 defined geographic area ... approved by ... [a] regulatory  
7 decision," or a "formal plan[]... which guide[s] or  
8 prescribe[s] alternative uses of Federal resources, upon which  
9 future agency actions will be based."  
10

11  
12 b. Is the BiOp Binding Upon Reclamation?

13 *Westlands Water Dist. v. U.S. Dept. of Interior, Bureau*  
14 *of Reclamation*, 850 F. Supp. 1388, 1422 (E.D. Cal. 1994),  
15 considered as a factor in deciding if a BiOp is major federal  
16 action whether the BiOp is binding upon the action agency.  
17 Plaintiffs maintain that "[t]he binding nature of the 2008  
18 BiOp is not susceptible to reasonable debate." Doc. 287 at 8.  
19 This is an overstatement.  
20

21 *Westlands* denied federal defendants' motion to dismiss  
22 water districts' claims that NMFS and the Bureau failed to  
23 comply with NEPA by, among other things, not completing an EA  
24 or EIS before issuing a biological opinion concerning the  
25 effects of coordinated Project operations on the winter-run  
26 Chinook Salmon and implementing the RPA articulated in that  
27 biological opinion. *Id.* at 1394-95. The federal defendants  
28

1 in *Westlands* argued that the biological opinion was not a  
2 "major federal action" because it was merely advisory. *Id.* at  
3 1420 (citing 40 C.F.R. § 1508.18(b)(3)). The *Westlands*  
4 plaintiffs, as the Plaintiffs do here, suggested that the  
5 biological opinion and RPA at issue effectively bound  
6 Reclamation because Reclamation "must either follow the  
7 alternative suggested or risk violation of ESA § 7(a)(2)...."  
8 *Id.* at 1420.

10 *Westlands* found that, as a general rule, "[b]iological  
11 opinions are not binding on the Secretary, nor do they  
12 invariably require an EIS." 850 F. Supp. at 1422 (emphasis  
13 added). Rather, a case-by-case analysis is required:

15 A biological opinion is part of the ESA process  
16 originated by 16 U.S.C. § 1536(a)(2), which requires  
17 federal agencies, with the assistance of the  
18 Secretary, to "insure that any action authorized,  
19 funded, or carried out by such agency ... is not  
20 likely to jeopardize the continued existence of any  
21 endangered species or threatened species." The  
22 federal agency undertaking such activity must consult  
23 the service having jurisdiction over the relevant  
24 endangered species. 16 U.S.C. § 1536(a)(3). The  
25 U.S. Fish and Wildlife Service (FWS) and the National  
26 Marine Fisheries Service (NMFS), are jointly  
27 responsible for administering the ESA. 50 C.F.R. §  
28 402.01(b) (1992). The consulting service then issues  
a biological opinion that details how the proposed  
action "affects the species or its critical habitat,"  
including the impact of incidental takings of the  
species. 16 U.S.C. § 1536(b)(3)(A).

24 "The agency is not required to adopt the alternatives  
25 suggested in the biological opinion; however, if the  
26 Secretary deviates from them, he does so subject to  
27 the risk that he has not satisfied the standard of  
28 Section 7(a)(2)." *Tribal Village of Akutan v. Hodel*,  
869 F.2d 1185, 1193 (9th Cir. 1988) (citation  
omitted), cert. denied, 493 U.S. 873 (1989). A  
Secretary can depart from the suggestions in a  
biological opinion, and so long as he or she takes

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

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

14 50 C.F.R. § 402.14(j) (1992). 50 C.F.R. § 402.15(a)  
15 states:

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

21 Courts have attempted to define the "point of  
22 commitment," at which the filing of an EIS is  
23 required, during the planning process of a federal  
24 project. See *Sierra Club v. Peterson*, 717 F.2d 1409,  
25 1414 (D.C.Cir. 1983). "An EIS must be prepared  
26 before any irreversible and irretrievable commitment  
27 of resources." *Conner v. Burford*, 848 F.2d 1441,  
28 1446 (9th Cir. 1988), cert. denied 489 U.S. 1012  
(1989). 40 C.F.R. § 1502.5(a) similarly provides,  
"[f]or 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  
 3 is a federal resource. The Bureau's options were  
 4 narrow had it declined to follow the NMFS's  
 5 reasonable and prudent alternatives. See *Tribal*  
 6 *Village of Akutan*, 869 F.2d at 1193 (agency need not  
 7 adopt reasonable and prudent alternatives in  
 8 biological opinion, so long as it complied with ESA  
 9 Section 7(a)(2) by taking "alternative, reasonably  
 10 adequate steps to insure the continued existence of  
 11 any endangered or threatened species"); *Portland*  
 12 *Audubon Society v. Endangered Species*, 984 F.2d 1534,  
 13 1537 (9th Cir.1993) (discusses exemptions from ESA,  
 14 by application to the Committee under 16 U.S.C. §§  
 15 1536(a)(2), (g)(1)(2)).

9 The government submits *Bennett v. Plenert*, CV 93  
 10 6076, 1993 WL 669429 (D.Or.1993), as authority that  
 11 biological opinions are not binding on federal  
 12 agencies, and consequently are not major federal  
 13 actions. But in *Bennett*, the court left open the  
 14 issue that a biological opinion could constitute a  
 15 major federal action under NEPA. *Id.* at p. 11, n. 4.  
 16 Biological opinions are not binding on the Secretary,  
 17 nor do they invariably require an EIS. The inquiry  
 18 requires a case by case analysis.

15 Taking the facts alleged in the plaintiffs'  
 16 complaints as true, the biological opinion is part of  
 17 a systematic and connected set of agency decisions  
 18 which result in the commitment of substantial federal  
 19 resources for a statutory program, which resulted in  
 20 reallocation of over 225,000 acre feet of CVP water  
 21 under the ESA for salmon protection with the  
 22 environmental impacts alleged. This is NEPA major  
 23 federal action.

24 *Id.* at 1420-22 (emphasis added) (parallel citations omitted).<sup>5</sup>

21  
 22 <sup>5</sup> Federal Defendants and Defendant-Intervenors place great weight on  
 23 a line of authority that suggests where the specific "dimensions" of a  
 24 proposal are still evolving and have not yet reached the point  
 25 "immediately preced[ing] where there will be 'irreversible and  
 26 irretrievable commitments of resources' to [an] action affecting the  
 27 environment," it is premature to require NEPA compliance. *Sierra Club v.*  
 28 *Hathaway*, 579 F.2d 1162, 1158 (1978); see also *Metcalf v. Daley*, 214 F.3d  
 1135, 1143 (9th Cir. 2000) (NEPA analysis not required until decision  
 results in an "irreversible and irretrievable commitment of resources").  
 Plaintiffs rejoin that the "irreversible and irretrievable commitment of  
 resources" standard concerns the timing of NEPA, not its applicability,  
 and is therefore inapplicable. Plaintiffs are correct that the  
 "irreversible and irretrievable commitment of resources" is most often  
 used to determine when, rather than whether, NEPA analysis is required,  
 and is designed to ensure that agencies engage in the NEPA process early

1 The biological opinion was found not binding on Reclamation,  
2 and the court instead applied 1508.18(b)(3) to find that NEPA  
3 applied to the BiOp because it was part of a "systematic and  
4 connected set of agency decisions which result in the  
5 commitment of substantial federal resources for a statutory  
6 program," a provision that is inapplicable here. *Id.* at  
7 1422.<sup>6</sup>  
8

9 Here, to satisfy its obligations under NEPA, Reclamation  
10 initiated formal consultation and prepared a BA to describe  
11 the proposed action. FWS, as the consulting agency, reviewed  
12 the BA, disagreed with its conclusion, and issued the 2008  
13 BiOp with an RPA. See BiOp i-vi. Reclamation was free to  
14 accept or reject, in whole or in part, FWS's recommendations  
15 and advice prescribed in that RPA. The consultation  
16 regulations state that "the Federal [action] agency shall  
17 determine whether and in what manner to proceed with the  
18 action in light of its section 7 obligations and the Service's  
19 biological opinion." 50 C.F.R. § 402.15(a).<sup>7</sup> However, FWS  
20  
21

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22 enough to "insure that planning and decisions reflect environmental  
23 values, to avoid delays later in the process, and to head off potential  
24 conflicts." *Metcalfe*, 214 F.3d at 1143 (citing 40 C.F.R. § 1501.2). But,  
25 this does not render the inquiry irrelevant here. Rather, the point at  
26 which an "irreversible and irretrievable commitment of resources" takes  
27 place is relevant to determining which agency is responsible for  
28 undertaking NEPA analysis in this case. See *Westlands*, 850 F. Supp. at  
1422.

<sup>6</sup> *Westlands* was vacated on other grounds, *Westlands Water Dist. v. NRDC*, 43 F.3d 457 (9th Cir. 1994), and the NEPA claim was voluntarily withdrawn by plaintiffs before a merits ruling issued, see *Stockton East Water Dist. v. U.S.*, 75 Fed. Cl. 321, 326 (2007).

<sup>7</sup> Courts have consistently held that the action agency retains the ultimate responsibility for deciding whether, and how, to proceed with the

1 could not issue the BiOp without also including an RPA to  
2 mitigate jeopardy. FWS proposed an RPA that called for  
3 actions that commit federal water to smelt protection.  
4 Reclamation was not "bound" to accept the proposed RPA, but it  
5 did so. Resulting operations reduced 2008-09 water deliveries  
6 by several hundred thousand acre-feet. In this case, actions  
7 speak louder than words.  
8

9 Plaintiffs argue that the FWS's issuance of the 2008 BiOp  
10 requires that FWS prepare an EIS, because a BiOp has a  
11 "powerful coercive effect" on the action agency. Doc. 245-2  
12 at 12. On the one hand, if Reclamation had disregarded the  
13 RPA, the 2008 BiOp would not have provided an exemption from  
14 the ESA's take prohibitions, potentially subjecting the  
15 operators to civil and criminal liability. 16 U.S.C. §§  
16 1538(a) (prohibiting the "take" of listed species); 1536(o)(2)  
17 (a taking in compliance with a biological opinion's ITS "shall  
18 not be considered to be a prohibited taking of the species  
19 concerned").<sup>8</sup> However, Federal Defendants argue Reclamation's  
20  
21

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22 proposed action after Section 7 consultation. See, e.g., *Pyramid Lake*  
23 *Paiute Tribe of Indians v. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th  
24 Cir. 1990); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th  
25 Cir. 1988) ("[the action] agency is not required to adopt the alternatives  
26 suggested in the biological opinion"); *Sierra Club v. Marsh*, 816 F.2d  
27 1376, 1386 (9th Cir. 1987) ("The ESA does not give the FWS the power to  
28 order other agencies to comply with its requests or to veto their  
29 decisions."); *Westlands*, 850 F. Supp. at 1422 ("Biological opinions are  
30 not binding on the Secretary"); *Nat'l Wildlife Fed'n v. Coleman* 529 F.2d  
31 359, 371 (5th Cir. 1976) ("Section 7 does not give [the Service] a veto  
32 over the actions of other federal agencies").

<sup>8</sup> Plaintiffs emphasize *Bennett v. Spear*, 520 U.S. 154, 161, 178  
(1997), which held that biological opinions have a "virtually  
determinative," and "powerful coercive effect" on an action agency. But

1 departure from the RPA would not necessarily violate Section 7  
2 of the ESA, if Reclamation took "alternative, reasonably  
3 adequate steps to insure the continued existence" of listed  
4 species. *Tribal Village of Akutan*, 869 F.2d at 1193. This is  
5 sophistry. Reclamation operated the joint Projects and  
6 managed federal resources (CVP water) in accordance with the  
7 RPA, resulting in a major revision of 2008-09 coordinated CVP  
8 operations and substantial reallocation of federal resources.  
9 The only reason Reclamation did so was to meet the mandate of  
10 the ESA and the BiOp.<sup>9</sup> Both agencies participated to some  
11 degree in the agency action at issue here.

12  
13 Assuming, *arguendo*, NEPA applies, is it required that one  
14 of the agencies should have acted as "lead agency" in any  
15 effort to comply with NEPA's requirements? Plaintiffs  
16 acknowledge that "to avoid duplication, applicable regulations  
17

18  
19 Bennett concerned "final agency action" requirement under APA, not NEPA's  
"major federal action" trigger.

20 <sup>9</sup> Reclamation has considered alternative approaches to mitigating  
jeopardy. In recent NEPA reviews performed by Reclamation on CVP-SWP  
21 projects, Reclamation has indicated that it is "still reviewing" the BiOp  
to determine if it "can be implemented in a manner that is consistent with  
22 the intended purpose of the [2004 Operations Criteria and Plan], is within  
Reclamation's legal authority and jurisdiction, and is economically and  
23 technologically feasible." See, e.g., Defendant Intervenor's Request for  
Judicial Notice ("DIRJN"), Ex. 1, El Dorado County Water Agency Proposed  
24 Water Service Contract Draft EIS/EIR (July 2009) at 1-5. The Bureau has  
also evaluated alternatives to the RPA in its NEPA review for the "Two-  
25 Gates Project," which proposes an "alternative management strategy" to  
achieve protection of the delta smelt "with higher than the minimum  
26 allowed water exports described in the [2008 Smelt BiOp's RPA] while  
operating within the other water management requirement (D-1641)." DIRJN,  
27 Ex. 2, Two-Gates Fish Protection Demonstration Project, Summary Document  
(July 16, 2009) at 1; DIRJN, Ex. 3, DWR Fact Sheet, Two-Gates Project: A  
28 project led by the U.S. Bureau of Reclamation (August 2009). But,  
Reclamation chose to implement the RPA, rather than any of these  
alternatives, during the 2008-09 water year.

1 allow agencies to share NEPA responsibility if more than one  
2 agency is involved in the same action or a group of related  
3 actions," Doc. 245-2 at 25 (citing *Sierra Club v. U.S. Army*  
4 *Corps of Engineers*, 295 F.3d 1209, 1215 (11th Cir. 2002); 40  
5 C.F.R. § 1501.5), and that "when more than one federal agency  
6 has authority over an action, NEPA does not explicitly specify  
7 which agency is responsible for preparing an EIS," *id.* (citing  
8 *Sierra Club v. U.S. Army Corps of Eng.*, 701 F.2d 1011, 1041  
9 (2d Cir. 1983)). NEPA permits the relevant federal agencies  
10 to decide between themselves which will act as lead agency,  
11 subject to reasonable constraints. 40 C.F.R. § 1501.5(c);  
12 *Westlands*, 850 F. Supp. at 1422; see also *NRDC v. Callaway*,  
13 524 F.2d 79, 86 (2d Cir. 1975). This is reasonable agency  
14 interpretation of law; it makes little sense to have two  
15 agencies prepare separate NEPA documents for the same agency  
16 action.  
17  
18

19 If there is a disagreement among several agencies  
20 involved in a project as to which is the lead agency, the  
21 following factors "shall determine lead agency designation":  
22

- 23 (1) Magnitude of agency's involvement.
- 24 (2) Project approval/disapproval authority.
- 25 (3) Expertise concerning the action's environmental effects.
- 26 (4) Duration of agency's involvement. (5) Sequence of  
27 agency's involvement.

28 40 C.F.R. § 1501.5(c).

1 Plaintiffs maintain that application of these factors  
2 demonstrates that FWS is the appropriate lead agency, arguing:

3 FWS is the agency that researched, drafted, and  
4 approved the 2008 BiOp and, thus, has the most  
5 involvement in the action. See AR 4-7; see also  
6 Bennett, 520 U.S. at 161, 178 (a biological opinion  
7 is FWS's decision document). FWS has the sole  
8 approval authority over the 2008 BiOp, and its ITS  
9 and RPA, while other entities will be liable for  
10 incidental take of a listed species if they do not  
11 comply with it. AR 300-01. FWS has expertise in  
12 assessing the environmental effects of actions such  
13 as the instant action. FWS was involved throughout  
14 the development process of the BiOp and RPA, so FWS  
15 is the agency with authority to shape the 2008 BiOp  
16 and its recommendations. See AR 4-7. And finally,  
17 FWS was involved from the beginning of the 2008 BiOp  
18 development process and is the final decision-maker  
19 and sole issuing agency, making it the logical agency  
20 to develop useful environmental analysis before  
21 approval, rather than mere post hoc "review" of  
22 actions that are too late to be altered. See AR 4-7;  
23 Doc. 94, Findings of Fact, at p. 40, ¶ 30.

24 Doc. 245-2 at 26-27

25 This argument assumes that the BiOp itself, rather than  
26 the operation of the Projects under the BiOp is the relevant  
27 action in need of NEPA evaluation. Federal Defendants and  
28 Defendant Intervenors maintain that this is not the  
appropriate focus for the "lead agency" inquiry. Rather, it  
is Reclamation's planned coordinated operation of the Projects  
that creates the jeopardy found by the BiOp. This coincides  
with FWS's Consultation Handbook, which indicates that FWS  
should "assist the action agency or applicant in integrating  
the formal consultation process into their overall

1 environmental compliance" for a particular project.  
2 Consultation Handbook at 4-11 (emphasis added).  
3

4 The appropriate focus is "Project operations," and  
5 Reclamation is the appropriate lead agency. Reclamation  
6 proposed the action (in the form of the Operations and  
7 Criteria Plan ("OCAP")) to FWS, which triggered the  
8 preparation of the BiOp. Reclamation has the ongoing  
9 statutory authority to implement project operations as  
10 prescribed by the OCAP. See, e.g., AR at 10262 (BA at 1-1)  
11 ("The Bureau of Reclamation (Reclamation) and the California  
12 Department of Water Resources (DWR) propose to operate the  
13 Central Valley Project (CVP) and State Water Project (SWP) to  
14 divert, store, and convey CVP and SWP (Project) water  
15 consistent with applicable law and contractual obligations.");  
16 AR at 10263-64 (BA at 1-2 - 1-3) (identifying certain laws  
17 authorizing Bureau operation of CVP); AR at 10270-71 (BA at 1-  
18 9 - 1-10) (Coordinated Operation Agreement ("COA") and P.L.  
19 99-546 impose a "Congressional mandate to Reclamation to  
20 operate the CVP in conjunction with the SWP FWS's involvement  
21 with regard to future Project operations is limited,  
22 consisting primarily of its obligation to ensure that those  
23 operations do not impair protection and recovery of threatened  
24 and endangered species, an obligation that it shares with  
25 Reclamation. 16 U.S.C. § 1536(a)(2).").  
26  
27  
28

1 Reclamation has greater expertise concerning the alleged  
2 adverse environmental effects. The impacts identified by  
3 Plaintiffs allegedly occur as a result of reduced water  
4 deliveries under Reclamation's water supply contracts. See,  
5 e.g., Doc. 292, San Luis First Amended Complaint ("SLFAC") at  
6 ¶44 ("Water supply shortages resulting from [sic] the 2008  
7 Biological Opinion ... threaten numerous adverse environmental  
8 effects including ... worsening of groundwater basin  
9 overdraft, land subsidence, decreased groundwater recharge,  
10 threatened violation of state-adopted basin plan water quality  
11 objectives, reductions in crop yields, reduced agricultural  
12 employment, endangerment of permanent crops, and decreased air  
13 quality."). Reclamation routinely examines these and related  
14 impacts as the lead or co-lead agency on NEPA reviews of  
15 proposed CVP-SWP operations<sup>10</sup> and frequently has the ability  
16 and authority to propose ways to mitigate these impacts.<sup>11</sup> FWS

19  
20 <sup>10</sup> See, e.g., 66 Fed. Reg. 50,213 (Oct. 2, 2001) (San Luis Unit  
21 Feature Reevaluation); 70 Fed. Reg. 68,475 (Nov. 10, 2005) (South Delta  
22 Improvements Program); 69 Fed. Reg. 71,424 (Dec. 9, 2004) (San Luis Unit  
23 Long-Term Contract Renewals); 58 Fed. Reg. 7,242 (Feb. 5, 1993) (Central  
24 Valley Project Improvement Act implementation).

25 <sup>11</sup> See, e.g., 74 Fed. Reg. 37,051 (July, 27, 2009) (Madera Irrigation  
26 District Water Supply Enhancement Project proposed "[t]o increase water  
27 storage, enhance water supply reliability and flexibility for current and  
28 future water demand and reduce local overdraft"); 74 Fed. Reg. 34,031  
(July 14, 2009) (Delta-Mendota Canal-California Aqueduct Intertie proposed  
"to improve the DMC conveyance conditions that restrict the CVP Jones  
Pumping Plant to less than its authorized pumping capacity of 4,600 cubic  
feet per second."); 73 Fed. Reg. 29,534 (May 21, 2008) (Red Bluff  
Diversion Dam); 72 Fed. Reg. 42,428 (Aug. 2, 2007) (San Joaquin River  
Restoration Program); 69 Fed. Reg. 71,424 (Dec. 9, 2004) (Mendota Pool  
Ten-Year Exchange Agreements proposed "to provide water to irrigable lands  
on Mendota Pool Group properties in Westlands Water District and San Luis  
Water District to offset substantial reductions in contract water supplies  
attributable to the Central Valley Project Improvement Act (CVPIA), the

1 has little to no expertise in or authority over many of these  
2 matters.<sup>12</sup>

3 In the final analysis, FWS was asked for its "opinion"  
4 whether Reclamation's operations plans would jeopardize the  
5 smelt. FWS provided that opinion, as required by law.  
6 Reclamation was not "bound" by the BiOp until it chose to  
7 proceed with the OCAP and implement the RPA. Once Reclamation  
8 did so, operation of the Projects became the relevant agency  
9 "action," and Reclamation, as action agency, is the more  
10 appropriate lead agency under NEPA. The adaptive management  
11 protocol prescribed in the RPA leaves FWS with the final word  
12 on exactly what flow requirements will be imposed.  
13 Reclamation accepted this arrangement as a constraint upon its  
14 operations when it provisionally accepted the RPA. FWS played

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17 Endangered Species Act listings and regulations, and new Bay-Delta water  
18 quality rules.").

19 <sup>12</sup> Federal Defendants and Defendant Intervenors' position that  
20 Reclamation is the appropriate lead agency is supported by *Pac. Coast*  
21 *Fed'n of Fishermen's Ass'ns v. Gutierrez*, Case No. 1:06-CV-245 OWW LJO  
22 ("PCFFA"), in which plaintiffs alleged that Reclamation's approval of the  
23 2004 OCAP was a major federal action that required compliance with NEPA.  
24 2007 WL 1752289 (E.D. Cal. June 15, 2007). The Court determined that the  
25 OCAP was not reviewable as a "final agency action" under the APA but noted  
26 that, after ESA consultation on the OCAP was completed, Reclamation "may  
27 decide to take certain actions and, if those actions []rise to the level  
28 of a 'final agency action' under the APA, steps could be reviewable." *Id.*  
at \*13 (emphasis in original). PCFFA recognized that Reclamation stated  
in the OCAP that "NEPA compliance is being accomplished on all new  
projects or actions that may change CVP/State Water Project operations  
such that there is a significant effect on the environment." *Id.* at \*18.  
The district court concluded:

It is explicit that if and when Reclamation ultimately decides to  
take a new action that is not within the scope of historical  
operations that could have a significant impact on the environment,  
Reclamation will undertake NEPA analysis.

*Id.* (emphasis added).

1 a key role in formulation, planning, and implementation of the  
2 RPA, with full knowledge that no NEPA compliance had been  
3 undertaken. This is not a shell game in which the agencies  
4 may leave the public to guess which agency has taken major  
5 federal action. It is a close call whether FWS's issuance of  
6 the BiOp and its RPA under these circumstances is major  
7 federal action under NEPA. This call need not be made,  
8 because Reclamation, the agency with the ultimate authority to  
9 implement the RPA, is now joined as a party, whose actions  
10 must be evaluated under NEPA.  
11

12  
13 2. A NEPA Claim Against Reclamation Has Been Pled and Is  
14 Ripe for Adjudication.

15 On September 4, 2009, shortly after the opening briefs in  
16 this round of motions for summary judgment were due, the  
17 Authority and Westlands ("San Luis Parties") amended its  
18 complaint to include NEPA claims against the Bureau. Doc.  
19 292, *San Luis First Amended Complaint* ("SLFAC").  
20 Specifically, the SLFAC alleges that Reclamation's decision to  
21 provisionally accept and implement the 2008 BiOp is arbitrary,  
22 capricious, and contrary to law, because, among other things,  
23 "Reclamation did not ... perform[] NEPA analysis of the  
24 impacts to the human environment from, or alternative actions  
25 to, the 2008 Biological Opinion...." SLFAC ¶114. The parties  
26 were offered an opportunity and did supplement their briefing  
27 to fully consider the amended complaint. See Docs. 336 (Order  
28

1 Re further NEPA briefing); 357 & 358 (Defendant Intervenors'  
2 supplemental NEPA filings); 360 (Federal Defendants'  
3 supplemental NEPA filing); 361 (Plaintiffs' supplemental NEPA  
4 filing).

5  
6 Federal Defendants object to summary adjudication of any  
7 NEPA claim against Reclamation that has "neither been pled nor  
8 argued." Doc. 360 at 5. The objection is overruled, because  
9 such a claim has been pled in the SLFAC. In addition, Federal  
10 Defendants addressed Reclamation's liability under NEPA in  
11 their original briefs, see Docs. 290 at 21-23 (Federal  
12 Defendants' Opposition) & 290-2 (Fujitani Declaration), at  
13 oral argument, and have been given further opportunity to  
14 supplement those briefs to fully address Reclamation's role  
15 and actions.

16  
17 Federal Defendants also suggest that Reclamation should  
18 be permitted the opportunity to "assemble an administrative  
19 record" on the NEPA issue before it is adjudicated. Doc. 360  
20 at 5. However, the parties previously agreed that NEPA claims  
21 against FWS related to the issuance of the BiOp could be  
22 adjudicated without reference to the administrative record.  
23 See Doc. 120 at 6-7. Federal Defendants fail to explain why  
24 NEPA claims against the Bureau related to implementation of  
25 the BiOp should be treated any differently.  
26  
27  
28

1           3.   Reclamation's Provisional Acceptance and  
2           Implementation of the BiOp and its RPA Constitute  
3           Major Federal Action Because they Represent a  
4           Significant Change to the Operational Status Quo.

5           Projects such as the CVP and SWP, constructed prior to  
6           the date on which NEPA became effective, January 1, 1970, are  
7           not retroactively subject to NEPA. See *Upper Snake River*  
8           *Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234 (9th  
9           Cir. 1990). "However, if an ongoing project undergoes changes  
10          which themselves amount to major Federal actions, the  
11          operating agency must prepare an EIS." *Id.* at 234-35 (citing  
12          *Andrus v. Sierra Club*, 442 U.S. 347, 363 n. 21  
13          (1979) (explaining that major federal actions include the  
14          "expansion or revision of ongoing programs")). The critical  
15          inquiry is whether the BiOp causes a change to the operational  
16          status quo of an existing project. *Upper Snake River*, 921  
17          F.2d at 235.

18          *Upper Snake River* concerned Reclamation's decision to  
19          reduce flows below Palisades Dam and Reservoir to below 1,000  
20          cfs "[d]ue to lack of precipitation ... to increase water  
21          stored for irrigation...." 921 F.2d at 234. Although it had  
22          been standard operating procedure since 1956 to maintain flows  
23          below that dam above 1,000 cfs, during previous dry periods,  
24          the average flow had "been lower than 1,000 cfs for 555 days  
25          (or 4.75% of the total days in operation)." *Id.* at 233.  
26          Because the challenged flow fluctuations were within historic  
27          28

1 operational patterns, no NEPA compliance was required:

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

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

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

20 *Westlands* specifically distinguished *Upper Snake River*,  
21 and reasoned that whether or not an EIS was required "will, of  
22 necessity, depend heavily upon the unique factual  
23 circumstances of each case." 850 F. Supp. at 1415 (citing  
24 *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1224  
25 (9th Cir. 1979)).

26 To some extent, the finding is based on whether the  
27 proposed agency action and its environmental effects  
28 were within the contemplation of the original project

1 when adopted or approved. See [*Port of Astoria, Or.*  
2 *v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)];  
3 *Robinswood Community Club [v. Volpe]*, 506 F.2d 1366  
4 [(9th Cir. 1974)]. The inquiry requires a  
5 determination of whether plaintiffs have complained  
of actions which may cause significant degradation of  
the human environment. [*City and County of San*  
*Francisco v. United States*, 615 F.2d 498, 500 (9th  
Cir. 1980)].

6 *Westlands*, 850 F. Supp. at 1415. In *Westlands* "the taking of  
7 water for non-agricultural purposes [was] alleged to have  
8 changed the operational requirements of the CVP, imposed new  
9 standards for reverse flows in the Western Delta, carryover  
10 storage in the Shasta reservoir, and caused closure of the  
11 Delta cross-channel. Such actions and the environmental  
12 effects alleged are not routine managerial changes." *Id.* at  
13 1421.

14  
15 Plaintiffs contend that the present circumstances are  
16 more like those in *Westlands* than in *Upper Snake River*.  
17 First, quoting page 280 of the BiOp, Plaintiffs argue that  
18 "the 2008 BiOp greatly 'decreas[es] the amount of ... the  
19 projects' export pumping plants operations prior to, and  
20 during, the critical [delta smelt] spawning period.'" Doc.  
21 245-2 at 20 (quoting BiOp 280). Plaintiffs' partial quotation  
22 is not fully accurate, as the entire quoted sentence concerns  
23 effects to critical habitat, not pumping rates: "Overall, RPA  
24 Component 1 will increase the suitability of spawning habitat  
25 for delta smelt by decreasing the amount of Delta habitat  
26 affected by the projects' export pumping plants' operations  
27  
28

1 prior to, and during, the critical spawning period.”

2 Nevertheless, the RPA will be implemented by altering flow  
3 patterns, which will substantially reduce water availability  
4 for water service contractors.<sup>13</sup>

5  
6 Plaintiffs argue that the various components of the RPA  
7 call for more restrictive OMR flows than under the status quo:

8 RPA Component 1, Action 2 for January and February  
9 calls for much more restrictive OMR flows of -1,250  
10 cfs to -5,000 cfs rather than the -5,000 cfs  
11 permitted under D-1641. AR 22, 1867. As recognized  
12 by a DWR comment letter on the BiOp, this is a  
13 considerable change from the previous regimen because  
14 “to meet a -1,250 cfs OMR flow during June, the  
15 Project could cut pumping to zero and still not meet  
16 the OMR target.” AR 6995-96. In addition, the  
17 proposed take limits for adult delta smelt have been  
18 significantly lowered such that they would have been  
19 exceeded 19 out of 28 years of historic operations  
20 from 1981 to 2007. AR 1867.

21  
22 <sup>13</sup> In addition, Plaintiffs quote BiOp page 281 to posit that the RPA  
23 “mandates even greater reductions in Delta water exports whenever ‘the  
24 Service [makes a] final determination as to OMR flows required to protect  
25 delta smelt.’” Doc 245-2 at 20 (quoting BiOp 281). Although the BiOp  
26 does contain a sentence that reads, “[t]hroughout the implementation of  
27 RPA Component 1, the Service will make the final determination as to OMR  
28 flows required to protect delta smelt.” The surrounding text does not  
state that the RPA “mandates even greater reductions” in export pumping  
whenever FWS makes a final determination as to OMR flows. This partial  
quotation is inaccurate.

Plaintiffs also argue that a DWR comment letter included in the  
administrative record “demonstrates” that “the RPA mandates export  
restrictions well beyond routine Project managerial changes by imposing  
pumping restrictions in the fall months, viz., the ‘X2’ requirements  
purported to benefit delta smelt habitat, which have never previously  
served as the basis for export restrictions during that time period. AR  
6993.” Doc. 245-2 at 20. As noted by DWR in that letter, “relative to  
2008, the actions represent a substantial increase in the level of  
protection. The addition of a fall action is something new, though.  
Obviously, water supply would take a larger ‘hit.’” *Id.* Although the  
letter includes hearsay opinions, implementing such management actions  
constitutes a new and unprecedented change in project operations, which  
will have restrictive impacts that have the potential to be major and  
adverse.

1 Doc. 245-2 at 20. This argument is predominantly based on  
2 information in the administrative record, despite the fact  
3 that administrative record has not yet been finalized and the  
4 scheduling conference order in this case specifically limits  
5 the "early resolution" claims to those that do not depend on  
6 the administrative record.  
7

8 Federal Defendants maintain that whether the RPA causes a  
9 change to the status quo is an issue of fact, requiring  
10 evaluation of all of the evidence in the record. The parties  
11 previously agreed that issues requiring review of the  
12 administrative record were not to be decided at this stage in  
13 the case. See Doc. 120 at 6-7.<sup>14</sup> Federal Defendants present  
14 the Declaration of Paul Fujitani, Doc. 290-2, which includes a  
15 review of historic OMR flows and compares those flows to  
16 projected flows under the RPA. Based on Fujitani's  
17 declaration, Federal Defendants argue:  
18

19  
20 As the available historical data show ... average OMR  
21 flows in January have fluctuated from as high as -  
22 3,269 cfs (January 1998) to as low as -8,268 cfs  
23 (January 2003). Daily flows vary even more widely --  
24 for example, in January 1998, daily OMR flows ranged  
25 between 2,810 cfs and -9,530 cfs. See Ex. 1. The  
26 flows set forth in RPA Component 1, Action 2 are  
27 within these historic parameters. Similarly, the  
28 historical record shows average OMR flows in February  
have fluctuated from as high as 20,631 cfs (February

---

<sup>14</sup> Plaintiffs misconstrue Defendant-Intervenors' argument that these factual issues should not be decided at this time as an argument that they are not amendable to summary judgment at all. Plaintiffs' extensive discussion of why NEPA issues are amenable to summary judgment is misplaced. Issues that require a review of the administrative record are, by the parties' own stipulation, not to be decided at this stage of the case. Doc. 120 at 6-7.

1 1997) to as low as -9,086 cfs (February 2003). The  
2 February flows set forth in RPA Component 1, Action 2  
are also within these historic parameters.

3 RPA Component 2 provides that under certain  
4 conditions, OMR flows should be maintained between -  
1,250 and -5,000 cfs from the date Component 1 is  
5 completed until June 30 (or until water temperatures  
at Clifton Court Forebay reach 25 degrees Celsius).  
6 The available historic data shows a wide range of OMR  
flows between January and July, and the flow ranges  
7 set forth in RPA Component 2 are within these  
historic parameters. See Ex. 1.

8 Therefore, even after adopting the OMR flow  
9 restrictions, Reclamation continues to operate the  
CVP within existing law and the same overall flow  
10 parameters, as it has done for decades.

11 *Id.* at 22-23.

12 Plaintiffs respond with the declaration of Thomas  
13 Boardman, Doc. 297-2, who opines that, under certain  
14 scenarios, the RPA constrains export pumping in a manner that  
15 departs from the status quo ante:

16 I reviewed historic data and considered how the 2008  
17 BiOp might affect operations as compared to the pre-  
existing criteria in D-1641. Based upon my review of  
18 those data, I found, in some circumstances, operating  
the CVP and SWP to meet pre-existing D-1641 criteria  
19 resulted in OMR flows more positive than -1,250 cfs.  
If those circumstances occur, the new OMR criteria in  
20 the 2008 BiOp would not control. I also found, in  
some circumstances, operating the CVP and SWP to meet  
21 the pre-existing D-1641 criteria resulted in OMR  
flows within the range specified by FWS pursuant to  
22 the 2008 BiOp. If those circumstances are presented  
again, the 2008 BiOp may control CVP and SWP  
23 operations, depending upon where in the range FWS  
sets the OMR limit. In still other circumstances,  
24 however, I found the pre-existing D-1641 criteria  
allowed OMR flows more negative than -5,000 cfs, the  
25 most negative flow rate allowed under the 2008 BiOp.  
If those circumstances occur, the new operating  
26 criteria in the 2008 BiOp will definitely control CVP  
and SWP operations. The changes in CVP and SWP  
27  
28

1 operations necessary to meet the new operating  
2 criteria in the 2008 BiOp will reduce availability of  
the CVP and SWP to supply water.

3 *Id.* at ¶9.

4 Boardman also concluded that "[i]n 2009, limits on OMR  
5 flows imposed by FWS under the 2008 BiOp resulted in lower  
6 rates of CVP and SWP pumping than otherwise would have been  
7 allowed if only the preexisting criteria in D-1641  
8 controlled." *Id.* at ¶10. Boardman estimates "that as a  
9 result of the 2008 BiOp limits on OMR flows from mid February  
10 to the end of March and from mid May to the end of June, the  
11 Jones Pumping Plant was unable to pump approximately 390,000  
12 acre-feet of water that it otherwise could have pumped and  
13 provided to water users south of the Delta, if only the pre-  
14 existing criteria in D-1641 controlled." *Id.*

15  
16  
17 Fujitani's and Boardman's conclusions are not  
18 inconsistent. Fujitani concludes that average and daily OMR  
19 flows under the RPA fall within historic average and daily  
20 flow ranges. Boardman opines that, even though any given  
21 post-RPA average or daily OMR flow figure may fall within  
22 historic ranges, under certain circumstances, pre-RPA  
23 constraints would permit even more negative flows, resulting  
24 in even more export capability. Although Fujitani's  
25 conclusion, that post-RPA operations fall within the range of  
26 historic operating conditions, may comply with the letter of  
27  
28

1 *Upper Snake River*, the RPA's operational changes violate the  
2 spirit and reasoning of *Upper Snake River*:

3 This circuit has held that where a proposed federal  
4 action would not change the status quo, an EIS is not  
5 necessary. "An EIS need not discuss the environmental  
6 effects of mere continued operation of a facility."  
7 *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d  
8 115, 116 (9th Cir. 1980) (holding EIS unnecessary for  
9 federal financial assistance in purchasing an  
10 existing airport since federal action would not  
11 change status quo), cert. denied, 450 U.S. 965  
(1981); see also *Committee for Auto Responsibility v.*  
*Solomon*, 603 F.2d 992 (D.C. Cir. 1979) (holding  
government lease of parking area to new parking  
management firm does not trigger EIS requirement  
since area already used for parking so no change in  
status quo).

12 We find the reasoning of the district court in *County*  
13 *of Trinity v. Andrus* particularly instructive. In  
14 *Trinity* the plaintiffs sought to enjoin the Bureau  
15 from lowering the level of a reservoir during the  
16 drought year of 1977 because of the potential damage  
17 to the fish population in the reservoir. The court  
18 explained that the issue was "not whether the actions  
19 are of sufficient magnitude to require the  
20 preparation of an EIS, but rather whether NEPA was  
21 intended to apply at all to the continuing operations  
22 of completed facilities." *Id.* at 1388. The court  
distinguished the case from cases "when a project  
takes place in incremental stages of major  
proportions," and from cases where "a revision or  
expansion of the original facilities is  
contemplated," *id.* Neither of these situations  
applied here, the court observed. Instead,

23 [t]he Bureau has neither enlarged its capacity to  
24 divert water from the Trinity River nor revised  
25 its procedures or standards for releases into the  
26 Trinity River and the drawdown of reservoirs. It  
27 is simply operating the Division within the range  
28 originally available pursuant to the authorizing  
statute, in response to changing environmental  
conditions.

*Id.* at 1388-89. The court then concluded that actions

1 taken in operating the system of dams and reservoirs  
2 (in particular, operational responses in a drought  
3 year) were not "major Federal actions" within the  
4 meaning of NEPA.

5 The Federal defendants in this case had been  
6 operating the dam for upwards of ten years before the  
7 effective date of the Act. During that period, they  
8 have from time to time and depending on the river's  
9 flow level, adjusted up or down the volume of water  
10 released from the Dam. What they did in prior years  
11 and what they were doing during the period under  
12 consideration were no more than the routine  
13 managerial actions regularly carried on from the  
14 outset without change. They are simply operating the  
15 facility in the manner intended. In short, they are  
16 doing nothing new, nor more extensive, nor other than  
17 that contemplated when the project was first  
18 operational. Its operation is and has been carried on  
19 and the consequences have been no different than  
20 those in years past.

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

921 F.2d at 235-36 (emphasis added).

Here, in contrast to the "routine" activities described  
in *Upper Snake River* and *Trinity* (cited in *Upper Snake River*),  
Reclamation's decision to implement the RPA is a "revis[ion]  
[of] its procedures or standards" for operating the Jones

1 pumping plant and other facilities significantly affecting OMR  
2 flows. This can be determined from the face of the BiOp and  
3 uncontroverted analyses of public data. Reclamation's and  
4 FWS's joint interest is pellucid: the Projects' water  
5 delivery operations must be materially changed to restrict  
6 project water flows to protect the smelt. Reclamation's  
7 implementation of the BiOp is major federal action because it  
8 substantially alters the status quo in the Projects'  
9 operations.  
10

11  
12 D. Significantly Affect the Human Environment

13 If the "major federal action" component is satisfied, an  
14 agency must prepare an EIS "where there are substantial  
15 questions about whether a project may cause significant  
16 degradation of the human environment." *Native Ecosystems*  
17 *Council*, 428 F.3d at 1239. Plaintiffs maintain that the 2008  
18 BiOp satisfies this standard because it "reallocates hundreds  
19 of thousands of acre-feet of water annually -- enough water to  
20 serve the needs of millions of people -- from the current  
21 reasonable and beneficial municipal, industrial, agricultural,  
22 and other uses." Doc. 245-2 at 22. In support of this and  
23 related assertions, Plaintiffs cite extensively to the AR. It  
24 has been agreed that this stage of the case will not rely on  
25 the AR, which was not finalized at the time the NEPA claims  
26 were presented.  
27  
28

1           However, certain, dispositive conclusions can be made  
2 without looking to the AR. First, it is undisputed that  
3 implementation of the RPA reduced pumping by more than 300,000  
4 AF in the 2008-09 water year. See Boardman Decl., Doc. 297-2  
5 at ¶10. FWS admitted in its Answer to the State Water  
6 Contractors' Complaint that such "reductions in exports from  
7 the Delta" may "place greater demands upon alternative sources  
8 of water, including groundwater." Doc. 141 at ¶¶ 4, 16. The  
9 potential environmental impact of groundwater overdraft is  
10 beyond reasonable dispute. See, e.g., *NRDC v. Kempthorne*,  
11 2008 WL 5054115, \*27 (E.D. Cal. Nov. 19, 2008) (noting that the  
12 final EIS covering renewal of the Sacramento River Settlement  
13 Contracts "predicts that reversion to the pre-settlement  
14 regime would have potential effects on the environment,  
15 because the Settlement Contractors would rely more heavily on  
16 local groundwater, leading to air quality and soil erosion  
17 problems, as well as impacts to local streams and wildlife.");  
18 *NRDC v. Kempthorne*, 2007 WL 4462395 (E.D. Cal. 2007)  
19 (acknowledging "[r]isks that will be created by implementation  
20 of [] interim remedial actions" designed to protect smelt  
21 "include, but are not limited to ... Adverse effects on  
22 agriculture including, but not limited to, loss of jobs,  
23 increased groundwater pumping, fallowed land, and land  
24 subsidence[;] [and] Air pollution resulting from heavier  
25  
26  
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1 reliance on groundwater pumping and decrease in surface  
2 irrigation...."). This, in and of itself, raises the kind of  
3 "serious questions" about whether a project may cause  
4 significant degradation of the human environment, requiring  
5 NEPA compliance. That the Bureau must comply with NEPA is  
6 established as a matter of law.  
7

8 **E. Miscellaneous Issues.**

9 1. **Will Application of NEPA to the Issuance of the BiOp**  
10 **Frustrate the Purposes of the ESA?**

11 Federal Defendants and Defendant Intervenors argue that  
12 application of NEPA to FWS's issuance of the BiOp will  
13 frustrate the purposes of the ESA. Doc. 290 at 15-20; Doc  
14 244-2 at 11-12. It is not necessary to address this argument  
15 because it is not necessary to decide whether NEPA applies to  
16 FWS's issuance of the BiOp. NEPA applies to Reclamation's  
17 acceptance and implementation of the BiOp and its RPA. This  
18 dispute over statutory priority is premature.  
19

20 2. **Did the Timing of the Preparation of the BiOp**  
21 **Preclude Compliance with NEPA?**

22 Defendant Intervenors argue that the "expedited timeframe  
23 for FWS's completion of the [BiOp] in this case preclude[d]  
24 compliance with NEPA." Doc. 244-2 at 12.<sup>15</sup> This argument is  
25 directed at FWS's duty under NEPA for issuing the BiOp.  
26

27 <sup>15</sup> Federal Defendants discuss the timing issue, without directly  
28 asserting that they did not have enough time to comply with NEPA. Doc.  
290 at 17.

1 Because it is not necessary to determine whether FWS had to  
2 comply with NEPA before issuing the BiOp, it is not necessary  
3 to address this argument here.

4 Assuming, *arguendo*, resolution of this issue is necessary  
5 to resolution of these cross motions, Defendant Intervenors'  
6 argument is meritless. The ESA and its regulations allow the  
7 Service 135 days to complete a biological opinion (from the  
8 submission and review of the BA). See 16 U.S.C. § 1536(b)(1),  
9 50 C.F.R. § 402.14(e). In this case, FWS was ordered to issue  
10 the new BiOp by December 15, 2008. See *NRDC v. Kempthorne*,  
11 1:05-cv-1207, Docs. 560 (requiring BO by September 15, 2008),  
12 753 (extending, at FWS's request, deadline to December 15,  
13 2008). The initial BA submitted by the Bureau was  
14 insufficient, and FWS received a revised version August 20,  
15 2008. *Id.*, Doc. 712-2 at 3; AR at 2 (BiOp at i).

16 Defendant Intervenors insist that "FWS could not have  
17 prepared a NEPA document and still complied with its statutory  
18 and Court-ordered duty to issue the BO." Doc. 244-2. On the  
19 one hand, a 30-day or less statutorily mandated time-frame for  
20 completion of a process has been deemed insufficient to  
21 prepare an EIS. See *Flint Ridge Dev. Co. v. Scenic River*  
22 *Ass'n*, 426 U.S. 776 (1976) (30 day statutory mandate left  
23 insufficient time to comply with NEPA); *Westlands Water Dist.*  
24 *v. U.S.*, 43 F.3d 457, 460-61 (9th Cir. 1994) (where water  
25  
26  
27  
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1 delivery had to be completed "immediately upon enactment" of  
2 statute, there was no time for NEPA analysis); *Merrell v.*  
3 *Thomas*, 807 F.2d 776, 778 (9th Cir. 1986) (thirty days  
4 insufficient). However, absent such a short time frame, NEPA  
5 compliance is not excused unless the agency has demonstrated  
6 that compliance with NEPA was impossible. *Western Land Exch.*  
7 *Project v. U.S. Bureau of Land Management*, 315 F. Supp. 2d  
8 1068, 1082-83 (D. Nev. 2004). That has not occurred here.  
9 Federal Defendants expressly declined, when asked by the  
10 Court, to invoke the timing exception during the preliminary  
11 injunction hearing. Although they do mention timing in their  
12 opposition brief, they do not explain why any form of NEPA  
13 compliance was impossible during the more than three months  
14 that passed between receipt of Reclamations' final BA and the  
15 December 15, 2008 BiOp deadline. Nor do Federal Defendants or  
16 Defendant Intervenors suggest that compliance with NEPA was  
17 impossible before Reclamation's implementation of the BiOp and  
18 its RPA.  
19  
20  
21

#### 22 IV. CONCLUSION

23 For all the reasons set forth above:

24 Plaintiffs' are entitled to summary judgment on their  
25 claim against Reclamation and the Secretary of the Interior  
26 that Reclamation violated NEPA by failing to perform any NEPA  
27 analysis prior to provisionally adopting and implementing the  
28

1 2008 BiOp and its RPA.

2 Plaintiffs shall submit a form of order consistent with  
3 this memorandum decision within ten (10) days of electronic  
4 service.

5 A telephonic scheduling conference will be held on  
6 November 24, 2009 at 10:00 a.m. in Courtroom 3 (OWW) to  
7 discuss remedies issues. The parties may appear  
8 telephonically.  
9

10  
11 SO ORDERED

12 DATED: November 13, 2009

13 /s/ Oliver W. Wanger  
14 Oliver W. Wanger  
15 United States District Judge  
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