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7 AUTHORITY; WESTLANDS WATER DISTRICT

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

11 SAN LUIS & DELTA-MENDOTA
12 WATER AUTHORITY; WESTLANDS
13 WATER DISTRICT,

14 Plaintiffs,

15 v.

16 KENNETH LEE SALAZAR, as Secretary
of the Department of the Interior; UNITED
STATES DEPARTMENT OF THE
17 INTERIOR; UNITED STATES FISH
AND WILDLIFE SERVICE; ROWAN
18 GOULD, as Acting Director of the United
States Fish and Wildlife Service, United
19 States Department of the Interior; REN
LOHOEFENOR, as Regional Director of
20 the United States Fish and Wildlife
Service, Pacific Southwest Region, United
21 States Department of the Interior; UNITED
STATES BUREAU OF RECLAMATION;
22 J. WILLIAM McDONALD, as Acting
Commissioner of the United States Bureau
23 of Reclamation, United States Department
of the Interior; DONALD GLASER, as
24 Director of the United States Bureau of
Reclamation, Mid-Pacific Region, United
25 States Department of the Interior,

26 Defendants.

CASE NO. 1:09-CV-00407-OWW-DLB

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

DATE: May 22, 2009
TIME: 12:30 p.m.
COURTROOM: 3
Hon. Oliver W. Wanger

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I.

INTRODUCTION

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3 The people on the west side of the San Joaquin Valley are suffering. They are suffering
4 from a lack of water, water needed to sustain farming and to sustain the employment of farm
5 workers. Farmers do not have water to irrigate crops, and farm workers have lost their jobs. The
6 severe downturn in farming because of unprecedented water supply shortages has spread damage
7 throughout west side businesses, homes, schools and communities, and people are going hungry.
8 The human environment on the west side of the valley is deteriorating as crops and orchards are
9 abandoned, fields are fallowed, groundwater is overdrafted, city services are unfunded, and
10 houses and commercial buildings are left vacant. They are suffering from a disaster that if caused
11 by nature would demand immediate actions by federal and state emergency agencies.

12 The current water supply crisis has been brought upon this region both by natural
13 conditions and by overzealous regulation. Defendant Fish and Wildlife Service (“FWS”), acting
14 through its biological opinion issued on December 15, 2008 regarding the delta smelt (“BiOp”), is
15 a primary source of this overzealous regulation. So far this year, restrictions imposed by FWS
16 under the BiOp have reduced combined export pumping by the Central Valley Project (“CVP”)
17 and the State Water Project (“SWP”) by nearly 300,000 acre-feet of water. Additional
18 restrictions beginning May 18 under the BiOp threaten to further worsen the water shortage.

19 On April 21, the Bureau of Reclamation (“Reclamation”) announced that the contract
20 allocation for south-of-Delta agricultural water service contractors has been increased from 0% to
21 10%. If pumped and delivered, this allocation of CVP water will help to mitigate and avoid some
22 of the worst damage from the water shortage. But this badly needed water supply is at risk of
23 being lost due to the BiOp.

24 On May 18, 2009, a thirty-day period of limited export pumping imposed under water
25 quality standards will expire. Beginning on May 18, but for the BiOp, the CVP could
26 significantly increase its rate of export pumping consistent with applicable water quality
27 standards. An increased rate of pumping beginning on May 18 will be essential to providing
28 desperately needed CVP water supplies. But absent injunctive relief, that pumping will likely be

1 severely constrained under a “protectiveness criterion” in the BiOp which will limit the allowable
2 reverse flows in Old and Middle Rivers (“OMR”) from May 18 through June 30, 2009. Under
3 that criterion, and based on entrainment as projected by a model—not real time data—FWS will
4 set OMR flows to limit entrainment to a *small percentage* of the *small percentage* of the *overall*
5 *delta smelt population* that will likely reside in the Central and South Delta in May and June
6 2009. The best available data indicate that the great majority of delta smelt will be beyond the
7 range of influence of the pumps at that time. Loss of these CVP supplies due to OMR limits
8 would worsen the already serious harm occurring on the west side from the water shortage while
9 providing little benefit to the overall delta smelt population.

10 For the reasons explained below, Plaintiffs are likely to succeed on their claims that the
11 BiOp is unlawful and invalid. Plaintiffs therefore seek a preliminary injunction against
12 application of the OMR flow restrictions in the BiOp through June 30, 2009. Absent a
13 preliminary injunction, the west side region will suffer irreparable harm through further loss of
14 the already limited CVP water supplies available this year. The risk of harm to farmers and to
15 human health and safety posed by further water supply cuts outweighs the potential harm from
16 increased, but still minimal in relation to the overall population, entrainment of juvenile delta
17 smelt. The Plaintiffs are likely to succeed on the merits of their challenge to the BiOp, because
18 among other failings, FWS failed to determine the effects of future CVP operations in the manner
19 required by law, and failed to do any analysis of the environmental impacts of the BiOp as
20 required by the National Environmental Policy Act (“NEPA”). Accordingly, the Court should
21 issue a preliminary injunction.

22 II.

23 SUMMARY OF FACTS

24 A. The Water Shortage Has Created A Crisis On The West Side Of The San Joaquin 25 Valley

26 On February 27, 2009, the Governor of California declared a state-wide drought
27 emergency, based on his finding that “conditions of extreme peril to the safety of persons and
28 property exist in California caused by the current and continuing severe drought conditions and

1 water delivery restrictions.” (Plaintiffs’ Request For Judicial Notice (“RJN”) Ex. B.) The
2 drought is being felt most harshly in the western San Joaquin Valley. In June 2008, the County of
3 Fresno declared a drought emergency that remains in effect today. On April 14, 2009, the Fresno
4 County Board of Supervisors adopted a proclamation declaring an emergency and requesting
5 federal and state assistance to address soaring unemployment and shortages of food. Due to
6 water shortages “thousands of people who once relied on employment in the agricultural sector
7 are now unemployed and struggling to meet their most basic needs, such as providing food for
8 their family.” (RJN Ex. E at 2:8-10.) The increased unemployment has “caused significant
9 hardship on families’ ability to purchase adequate food and other necessities.” (*Id.* at 2:17-18.)
10 The Community Food Bank has inadequate capacity to meet the overwhelming increase in need.
11 (*Id.* at 2:21-3:2.)

12 With little or no CVP water available this year, farmers must try to compensate with
13 groundwater. (Diedrich Decl. ¶¶ 4, 7; Coburn Decl. ¶ 4; Harris Decl. ¶¶ 2-3; Nelson Decl. ¶¶ 3,
14 7; Freeman Decl. ¶¶ 7, 11, 12.)¹ However, groundwater supply is often inadequate to meet all
15 crop demands, and contains high levels of salinity and other minerals. (*Id.*; Allen Decl. ¶ 2.)
16 Pumping of groundwater also entails increased energy usage. (Freeman Decl. ¶ 17.) Lacking an
17 adequate groundwater supply or other sources of water, farmers’ only other option is to fallow
18 land. (Harris Decl. ¶¶ 4-5; Diedrich Decl. ¶ 4; Freeman Decl. ¶ 11, 12.) Farmers’ inability to
19 obtain suitable water has resulted in loss of on-farm employment, reductions in production,
20 destruction of some permanent crops and may require some farmers to sell their land and abandon
21 farming altogether. (Coburn Decl. ¶¶ 5-7; Allen Decl. ¶ 5; Harris Decl. ¶ 8; Diedrich Decl. ¶ 8.)
22 Within the Westlands Water District alone, 220,000 to 250,000 acres are expected to be fallowed
23 this year. (Freeman Decl. ¶ 11.) Substantial fallowing is expected as well in other districts that
24 depend upon CVP water deliveries for irrigation. (Nelson Decl. ¶¶ 10-11; Harrison Decl. ¶ 11.)

25 The effects of soaring unemployment on area communities are described in the

26 ¹ In this memorandum, Plaintiffs cite to the declarations filed in support of this motion using the
27 declarant’s surname followed by the paragraph in the declaration where the relevant testimony is
28 found. For example, the “Declaration of Todd Allen in Support of Plaintiffs’ Motion for
Preliminary Injunction” is cited as “Allen Decl. ¶ ____.”

1 declarations of Robert Silva, Mayor of the City of Mendota, and Marcia Sablan, Mayor of the
2 City of Firebaugh. The current unemployment rate in Mendota and Firebaugh is 40 percent.
3 (Silva Decl. ¶ 3; Sablan Decl. ¶ 4.) The reductions in employment and farm and farmworker
4 incomes has resulted in a loss of tax revenue available to fund municipal services, leading to a
5 reduction in staffing and vital public services including potentially impacting police and fire
6 protection. (Silva Decl. ¶ 4; Sablan Decl. ¶ 6.)

7 People are going hungry. The CEO of the Community Food Bank confirms that it has
8 struggled to meet soaring demand from unemployed farm workers. (Wilkie Decl. ¶¶ 4-7.) Food
9 distribution centers have recently served record numbers of people and have distributed a record
10 amount of food. (*Id.*) Local schools suffer as well. (Hernandez Decl. *passim*; Sablan Decl. ¶ 7.)
11 Families of displaced workers are often forced to combine households resulting in crowded and
12 stressful conditions impacting academic performance. (*Id.*) Additionally, as families and
13 students relocate from rural areas due to a lack of employment, the rural school districts lose
14 much needed revenue from the State. (*Id.*)

15 The harm to the people of the west side of the San Joaquin Valley extends beyond their
16 jobs, hunger, and community dislocation. It extends to their environment. Lack of CVP water
17 supplies has forced increased reliance upon groundwater, leading to unsustainable overdraft of the
18 groundwater basin and subsidence that causes damage to soil, wells and facilities. (Freeman
19 Decl. ¶¶ 13-15.) Increased fallowing causes increased dust emissions in the air. (*Id.* at ¶ 21.)

20 **B. FWS May Worsen The Water Shortage Through Further Pumping Restrictions**

21 In the BiOp, FWS concludes that CVP and SWP operations, as proposed, would
22 jeopardize the continued existence of the delta smelt, and would adversely modify its critical
23 habitat. (RJN Ex. 1 (“BiOp”) at 276-79.) The BiOp includes a “reasonable and prudent
24 alternative” to the proposed operation of the CVP and SWP. (*Id.* at 279-285.) The BiOp finds
25 that with changes to proposed CVP and SWP operations, in accordance with the “reasonable and
26 prudent alternative,” CVP and SWP operations would not jeopardize the continued existence of
27 the delta smelt or adversely modify its critical habitat. (*Id.* at 285.)

1 **1. The BiOp Limits Negative OMR Flows Through June 30**

2 The reasonable and prudent alternative includes five components, numbered 1 through 5.
3 In this motion, Plaintiffs seek to restrain only application of Component 2.² Component 2 is
4 intended to protect larval and juvenile delta smelt in the Central and South Delta from
5 entrainment at the project pumps after spawning commences in March. (*Id.* at 282.) Under
6 Component 2, FWS is to specify to Reclamation and DWR the allowable level of negative OMR
7 flows in a range between 1,250 cfs and 5,000 cfs. (*Id.*) This restriction is in effect now, and will
8 continue in effect until the water temperatures at Clifton Court reach 25° C, or June 30, 2009,
9 whichever occurs first. (*Id.*)

10 As is detailed in Attachment B to the BiOp, the allowable level of negative flows in OMR
11 under Component 2 (aka Action 3)³ is to be set using an adaptive management process.
12 According to FWS, “[d]uring most conditions, it is expected that maximum negative OMR flows
13 will range between -2000 and -3500. During certain years of higher or lower predicted
14 entrainment risk, requirements as low as -1,250 or -5,000 will be recommended to the Service by
15 the SWG.” (*Id.* at 357, fn. 10; see also 360, 363.) FWS will set negative OMR flows in a range
16 between 1,250 cfs and 5,000 cfs, depending upon whether entrainment risk is deemed “low,”
17 “lesser,” or something greater. (*Id.* at 359.)

18 If “available physical and biological real-time monitoring data” indicate a “low-
19 entrainment risk scenario,” then OMR flows can be as negative as -5,000 cfs. (*Id.* at 358.)
20 “Low” entrainment risk apparently is indicated only when “there has been no evidence of delta

21 ² Component 1 is intended to protect pre-spawning adult delta smelt from entrainment at the
22 project pumps, beginning December 1 through March. (BiOp at 280-282.) The period for
23 Component 1 has expired. Under Component 3, in some years Reclamation and DWR will be
24 required to maintain the location of X2 no more eastward than specified locations in the Delta,
25 and potentially make additional releases from reservoirs in November and December. (*Id.* at 282-
26 283.) Based on recent precipitation, FWS will not be implementing Component 3 this year.
27 Component 4 requires DWR to restore 8,000 acres of intertidal and associated subtidal habitat in
28 the Delta and Suisun Marsh. (*Id.* at 283-284.) Component 5 requires Reclamation and DWR to
29 perform monitoring and reporting of information to implement and potentially revise the other
30 components based on results. (*Id.* at 284-285.)

31 ³ Attachment B to the BiOp, titled “Supplemental Information Related To The Reasonable And
32 Prudent Alternative,” is found at pages 324-381 of the BiOp. Confusingly, in Attachment B,
33 Component 2 of the reasonable and prudent alternative is called “Action 3.”

1 smelt in the South and Central Delta or larval delta smelt are not yet susceptible to entrainment.”
2 (*Id.*) Thus, “low-entrainment risk” means a low risk of entrainment of any adults, and no risk at
3 all of entraining larvae. Why negative OMR flows should be capped at all under such
4 circumstances, where there is little or no risk of any entrainment, is not apparent. The BiOp’s
5 “high-entrainment risk scenario” arises when any delta smelt have been found in the South and
6 Central Delta from the Spring Kodiak Trawl or the 20 mm survey, or when there is ongoing
7 entrainment at the pumps. (BiOp at 358.) The “high-entrainment risk” referred to here is a
8 “high” risk of *any* entrainment at all, not a high *level* of entrainment. In these conditions where
9 *any* entrainment might occur, the BiOp says FWS will be more restrictive than -5,000 cfs.

10 **2. The BiOp Requires OMR Flows To Be Set Based On A Highly Restrictive**
11 **“Protectiveness Criterion” Intended To Limit Entrainment To A Small**
12 **Fraction Of The Total Population**

12 In years of typical geographic distribution, most larval and juvenile delta smelt are not
13 subject to entrainment at the export pumps at all; “[i]n recent years, the densest concentrations of
14 both spawners and larvae have been recorded in the Cache Slough/Sacramento Deepwater Ship
15 Channel complex in the North Delta.” (BiOp at 148.) Component 2 (aka Action 3) is designed to
16 “minimize the entrainment of larval/juvenile delta smelt in the Central and South Delta.” (BiOp
17 at 360.) FWS is thus seeking to “minimize” entrainment of that portion of the larval/juvenile
18 population that is in the Central and South Delta, while the bulk of the larval/juvenile population
19 is usually elsewhere, beyond the influence of the pumps.

20 The BiOp provides that “[w]hen the distribution of delta smelt is in the North or
21 North/Central Delta,” minimization will be accomplished “by holding entrainment to ~1 percent
22 of the individuals utilizing the Central and South Delta (south and east [upstream] of Station 815,
23 see Map 2) across a 14-day particle modeling interval.” (BiOp at 360.)⁴ FWS calls this 1%
24 entrainment standard based on a particle tracking model its “protectiveness criterion.” (*Id.*)
25 Under this criterion, FWS will seek to limit entrainment to approximately 1% of the larvae and
26 juveniles at Station 815 in the Central Delta, even if only a small portion of the overall population

27 ⁴ A map depicting the location of Station 815 within the Delta is at page 361 of the BiOp.
28 Station 815 is also shown in exhibits to Dr. Hanson’s declaration.

1 of larvae and juvenile delta smelt is in the Central and South Delta. For example, if 10% of the
2 overall population is in the South and Central Delta, FWS will regulate OMR flows so as to limit
3 entrainment to 1% of that 10% (based on Station 815), or to 0.1% of the overall population.
4 There is no justification in the BiOp explaining why, as in the example above, limiting
5 entrainment to 0.1% of the overall population would be necessary to prevent jeopardy.

6 The 1% criterion imposed in the BiOp is based on a hypothetical, that is, on a computer
7 model. It rests upon the modeled movement of a particle inserted at a single location in the
8 Central Delta, at Station 815. It fails to account for actual delta smelt distribution within the
9 Delta overall, including what proportion is within the Central and South Delta. These data are
10 known and readily available, but are not to be considered. Furthermore, because the
11 “protectiveness criterion” is based on the movement of a molecule of water, it fails to account for
12 the volitional movement of larval and juvenile fish. For this reason, the 1% criterion is even
13 further removed from actual conditions.

14 **C. CDFG Surveys Show That Most Of The Delta Smelt Population Is Distributed Away**
15 **From The Pumps**

16 As detailed in the Declaration of Dr. Charles Hanson, delta smelt abundance remains low,
17 despite the severe OMR restrictions imposed in 2008. The Fall Midwater Trawl index for 2008
18 was 23, the lowest index ever recorded. (Hanson Decl. ¶ 7.) This compares to an index of 28 in
19 2007, 41 in 2006 and 27 in 2005. (*Id.*)

20 The BiOp acknowledges that “currently published analysis of long-term associations
21 between delta smelt salvage and subsequent abundance do not support the hypothesis that
22 entrainment is driving population dynamics year in and year out (Bennett 2005; Manly and
23 Chotkowski 2006; Kimmerer 2008).” (BiOp at 210.) Instead, the BiOp asserts “[t]he population-
24 level effects of delta smelt entrainment vary; delta smelt entrainment can best be characterized as
25 a sporadically significant influence on population dynamics.” (*Id.*) As support for this
26 “sporadic” importance, the BiOp cites only studies regarding years of particularly high
27 entrainment of the estimated population. But the distribution data available so far in 2009
28 indicates that this will not be one of those years.

1 The Spring Kodiak Trawl surveys completed by the California Department of Fish and
2 Game in January, February, March and April of 2009 reflect the distribution of adult spawning
3 delta smelt. (Hanson Decl. ¶ 8.) The results of these surveys indicate that this year most of the
4 adult delta smelt spawned in the northern and western reaches of the Delta, away from the zone of
5 influence of the CVP and SWP export pumps. (*Id.*) This distribution is consistent with the low
6 salvage of adults at the export pumps in 2009. A total of 16 adult delta smelt have been counted
7 as salvage at the export pumps since January 1, 2009. (*Id.* at ¶ 9.)

8 The 20 mm survey for juvenile delta smelt is now underway, and will be conducted at
9 approximately two week intervals through mid-June. The most recent such survey, conducted
10 April 6 through April 9, shows that the majority of larval and juvenile delta smelt are distant from
11 the pumps, in the northern Delta near Cache Slough and the Sacramento Deepwater Ship
12 Channel, and in the north Central Delta near Jersey Point on Sherman Island. (*Id.* at ¶ 11.)

13 The protectiveness criterion in the BiOp seeks to limit entrainment to a small percentage
14 of that portion of the population in the Central and South Delta, as represented by a particle
15 inserted at Station 815 in the Central Delta. (*Id.* at ¶ 15.) In Dr. Hanson's opinion, any
16 management of OMR flows should instead be based on the overall distribution of the entire delta
17 smelt population, as indicated by the ongoing 20 mm surveys. (*Id.* at ¶¶ 16-20.)

18 **D. Restricting Pumping In Late May And In June Through OMR Restrictions Would**
19 **Result In Loss Of Desperately Needed CVP Water Supplies**

20 Pursuant to the Water Quality Control Plan, combined pumping at the CVP and SWP
21 export pumps is currently limited to 1,500 cfs, or a rate equal to flow on the San Joaquin River at
22 Vernalis, whichever is greater. (Snow Decl. ¶ 11.) This limitation began on April 17, and will
23 continue through May 17. (*Id.*) During this period, therefore, OMR restrictions under the BiOp
24 are not expected to control export pumping operations.

25 Under Reclamation's April forecast of operations, released April 21, south-of-Delta CVP
26 water service agricultural contractors are projected to receive a 10 % contract allocation, instead
27 of the zero allocation indicated by the March forecast. (*Id.* at ¶¶ 13-14; Exs. B, C.) How much
28 water will actually be delivered, however, will depend largely upon how FWS regulates negative

1 OMR flows from May 18 through June 30. (*Id.* at ¶¶ 15-19.)

2 Reclamation’s April 2009 forecast of CVP operations, on which the 10% allocation is
3 based, indicates a CVP export pumping for the period beginning May 18 through May 31 of
4 about 65,000 acre-feet. (*Id.* at ¶ 15.) The forecast indicates an expected volume of CVP pumping
5 of about 150,000 acre-feet during the month of June. (*Id.*) Reclamation’s forecast further
6 indicates that OMR flows will be at about -3,000 cfs during late May, and -3,900 cfs during June.
7 (*Id.*) If the CVP were free to pump water at rates unrestricted by the criteria for negative OMR
8 flows prescribed by the BiOp, the allocation of water for south-of-Delta CVP contractors could be
9 increased by approximately 60,000 acre-feet. (Snow Decl. ¶ 16.) This is equivalent to about an
10 additional 5% allocation. (*Id.*)

11 If FWS restricts OMR flows in late May and June more tightly than is indicated in the
12 April forecast, then Reclamation may not be able deliver even the 10% allocation. (*Id.* ¶ 18.)
13 The assumed pumping in late May and June is vital to the allocation, because under the forecast
14 the CVP pumps will already be at maximum capacity beginning on July 1. (*Id.* ¶ 19.) Hence,
15 there would be no opportunity to make up for lost May and June pumping using the CVP facility
16 beginning in July. (*Id.*) While sometimes the SWP pumps can pump CVP water under the “joint
17 point” provisions of Decision 1641, whether that is feasible in 2009 is very uncertain. It is
18 subject to a number of contingencies including Reclamation’s ability to hold water in storage for
19 pumping after June 30, whether the SWP will have available capacity at the Banks Pumping
20 Plant, and whether the projects would be able to meet water quality requirements. (*Id.* ¶ 19.) The
21 more capacity at the Jones Pumping Plant the CVP can use before June 30, the better the water
22 supply situation will be for uses south of the Delta. (*Id.*)

23 III.

24 ARGUMENT

25 A. Standard For Preliminary Injunctive Relief

26 Plaintiffs seek a preliminary injunction as authorized by Rule 65 of the Federal Rules of
27 Civil Procedure. In *Winter v. NRDC*, __U.S.__, 129 S.Ct. 365 (2008) (“*Winter*”), the Supreme
28 Court held that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to

1 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
2 relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”
3 *Winter* at 374 (citing *Munaf v. Geren*, 553 U.S. ----, ----, 128 S.Ct. 2207, 2218-2219 (2008);
4 *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*,
5 456 U.S. 305, 311-312 (1982).) “A presently existing actual threat must be shown. However,
6 the injury need not have been inflicted when application is made or be certain to occur; a strong
7 threat of irreparable injury before trial is an adequate basis.” *United States v. Emerson*, 270 F.3d
8 203, 262 (5th Cir. 2001) (quoting 9 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND
9 PROCEDURE: CIVIL 2D § 2948.1 at 153-56).

10 In *Winter*, the Supreme Court reversed the Ninth Circuit in a case involving a preliminary
11 injunction against sonar testing by the Navy that adversely affected marine mammals off the coast
12 of southern California. In doing so, the *Winter* court expressly rejected aspects of the Ninth
13 Circuit’s law on injunctive relief. Prior to *Winter*, the Ninth Circuit had specified two different
14 formulations of the criteria for preliminary injunctive relief. Under the traditional test, “a plaintiff
15 must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable
16 injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the
17 plaintiff, and (4) advancement of the public interest (in certain cases).” *Taylor v. Westly*, 488
18 F.3d 1197, 1200 (9th Cir. 2007). The “alternative” Ninth Circuit test required that “a plaintiff
19 demonstrate either a combination of probable success on the merits and the possibility of
20 irreparable injury or that serious questions are raised and the balance of hardships tips sharply in
21 his favor.” *Id.* In the *Winter* case, both the district court and the Ninth Circuit applied these
22 standards, and held that preliminary injunctive relief could be entered against the Navy based on a
23 “possibility” of irreparable harm. *Winter* at 375. In *Winter*, the Supreme Court “agree[d] with
24 the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient” and that instead plaintiffs
25 seeking preliminary injunctive relief must “demonstrate that irreparable harm is *likely* in the
26 absence of an injunction.” *Id.*

27 Plaintiffs here seek injunctive relief based on violations of both the Endangered Species
28 Act (“ESA”) and NEPA. The plaintiffs in *Winter* brought claims under the ESA, NEPA and the

1 Coastal Zone Management Act. *Winter*, 129 S.Ct. at 372. In *Winter* the preliminary injunction
2 entered against the Navy by the lower courts was based upon a likelihood of success on the
3 NEPA claims, but not the ESA claims. *Winter*, 129 S.Ct. at 374 fn.4. The Ninth Circuit’s
4 opinion explains, however, that the sonar had adverse effects on individual members of ESA-
5 listed species, albeit not effects that would jeopardize the continued existence of these species.
6 *NRDC v. Winter*, 518 F.3d 658, 691-692 (9th Cir. 2008).⁵ The *Winter* court reversed the Ninth
7 Circuit for failing to adequately weigh the burden of the injunction on the Navy, and the public
8 interest in national defense, against the adverse effects of sonar on the marine mammals,
9 including the ESA-listed species. *Winter*, 129 S. Ct. at 377. The *Winter* court explained that “[i]n
10 each case, courts ‘must balance the competing claims of injury and must consider the effect on
11 each party of the granting or withholding of the requested relief.’” *Winter* at 376 (emphasis
12 added) (citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396 (1987)).
13 That is, notwithstanding adverse impacts of the Navy’s sonar activity on ESA-listed species, the
14 Supreme Court held that the district court was required to balance the equities and consider the
15 public interest.

16 This Court summarized Ninth Circuit jurisprudence regarding injunctive relief in ESA
17 cases in its July 18, 2008 order in the *Gutierrez* case (“*Gutierrez* Order”).⁶ As the Court
18 explained, the Ninth Circuit has held that “[t]he traditional preliminary injunction analysis does
19 not apply to injunctions issued pursuant to ESA.” *National Wildlife Federation v. NMFS*, 422
20 F.3d 782, 793-794 (9th Cir. 2005). The Ninth Circuit has concluded that in the ESA “Congress
21 removed from the courts their traditional equitable discretion in injunction proceedings of
22 balancing the parties’ competing interests.” *Id.* at 793. As the Court observed, “[i]t appears that
23 the Ninth Circuit is the only circuit to articulate a standard that arguably completely precludes the
24 balancing of relative harms.” *Gutierrez* Order at 17, fn.6. After *Winter*, however, it is now clear

25 ⁵ The six ESA-listed listed species adversely affected by the Navy sonar testing were: the fin
26 whale, humpback whale, sea whale, sperm whale, and Guadalupe fur seal. *NRDC v. Winter*, 518
F.3d at 692 fn.52.

27 ⁶ *Pacific Coast Federation of Fishermen’s Associations v. Gutierrez*, Case No. 1:06-CV-00245
28 OWW GSA, Doc. 367 (Findings of Fact and Conclusions of Law)

1 that adverse effects to ESA-listed species, at least short of effects that would likely cause
2 jeopardy, must be balanced against competing interests and the public interest. It is therefore
3 necessary and appropriate for the Court to consider evidence of “risks to health and safety
4 (including evidence regarding the health and safety effects of secondary adverse impacts like land
5 subsidence, land fallowing leading to air quality impacts, and community dislocations arising
6 from job losses)” as well as “the ‘water costs’ of various remedial actions, as resulting water
7 unavailability related to impacts on endangered species, safety consequences to communities
8 (including emergency services), and effects upon the structural integrity of Project facilities.”
9 *Gutierrez* Order at 34-35.

10 The Ninth Circuit has held that ultimately, “the test for determining if equitable relief is
11 appropriate is whether an injunction is necessary to effectuate the congressional purpose behind
12 the statute.” *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002); *National*
13 *Wildlife Federation v. NMFS*, 422 F.3d 782, 795 (9th Cir. 2005); *Gutierrez* Order at 14. The
14 general purpose of the ESA is to “provide a means whereby the ecosystems upon which
15 endangered species and threatened species depend may be conserved” and “a program for the
16 conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).
17 However, as the Supreme Court explained in *Bennett v. Spear*, 520 U.S. 154, 176 (1997), to
18 understand the congressional purposes behind the ESA, a court cannot simply refer to its general
19 purpose. Instead, it must refer to the purpose of the specific provisions of the ESA at issue. The
20 provision requiring FWS to base a biological opinion on the best available data, for example, is
21 for the benefit of the regulated community as well as listed species:

22 The obvious purpose of the requirement that each agency “use the best scientific
23 and commercial data available” is to ensure that the ESA not be implemented
24 haphazardly, on the basis of speculation or surmise. While this no doubt serves to
25 advance the ESA’s overall goal of species preservation, we think it readily
apparent that another objective (if not indeed the primary one) is to avoid needless
economic dislocation produced by agency officials zealously but unintelligently
pursuing their environmental objectives.

26 *Bennett v. Spear*, 520 U.S. 154, 177 (1997).

27 In section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), Congress struck a particular
28 balance. It prohibited federal agency action that would likely jeopardize the continued existence

1 of listed species, or adversely modify their critical habitat. 16 U.S.C. § 1656(a)(2). But it did not
2 prohibit all activity that would adversely affect a listed species. So long as an action is not likely
3 to cross the threshold of jeopardizing the continued existence of the species or adversely modify-
4 ing its critical habitat, a federal agency may proceed with the action without major changes,
5 despite adverse impacts to the species, including take. 16 U.S.C. § 1536(b)(4) [Secretary to
6 specify impacts of incidental taking]; 16 U.S.C. § 1536(o) [incidental take authorized if in
7 compliance with terms and conditions in incidental take statement]; 50 C.F.R. § 402.14(i)(2)
8 [terms and conditions for incidental take may not impose major changes on a project]; *Gutierrez*
9 Order at 24. A court may allow “[n]on-jeopardizing agency actions to continue during the ESA
10 consultation process.” *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d
11 1024, 1035 (9th Cir. 2005). Further, section 7 applies only to discretionary agency actions, not all
12 agency actions. 50 C.F.R. § 402.03. Finally, section 7 and the consultation regulations set out a
13 required process and standards for consultation, and it is only through compliance with those
14 provisions that the effects of an action may be lawfully determined and a section 7 jeopardy
15 determination may be made. 16 U.S.C. § 1536(a)-(d); 50 C.F.R. § 402.01 *et seq.*

16 Plaintiffs sue for violation of NEPA as well as the ESA. “[NEPA] ensures that the
17 agency, in reaching its decision, will have available, and will carefully consider, detailed
18 information concerning significant environmental impacts; it also guarantees that the relevant
19 information will be made available to the larger audience that may also play a role in both the
20 decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley*
21 *Citizens Council*, 490 U.S. 332, 349 (1989).

22 **Plaintiffs And The Water Users They Represent Will Likely Suffer Severe And**
23 **Irreparable Harm Absent Injunctive Relief Against Highly Restrictive OMR Limits**

24 Plaintiffs meet the *Winter* standard of proving that irreparable harm is likely absent
25 injunctive relief. The evidence amply demonstrates that the water shortage on the west side of the
26 San Joaquin Valley is having severe adverse consequences for farms and farmers. Lands are
27 fallowed, crops are being abandoned, and orchards and vines are suffering. The effects of water
28 shortage extend to harm to the environment including groundwater overdraft, increased soil

1 salinity, diminished air quality, subsidence and reduced water quality in San Luis Reservoir.

2 Reclamation's April 21 announcement of an increased CVP allocation from 0% to 10%
3 offers the prospect of at least some relief. But even that modest increase in water supply is
4 threatened by the OMR restrictions that FWS will likely impose under the BiOp. This harm can
5 be avoided through an injunction against application of the "protectiveness criterion" in the BiOp.

6 **C. The Public Interest And The Balance Of Hardships Favor Granting Injunctive**
7 **Relief**

8 Preventing further damage from yet more loss of CVP water supplies is strongly in the
9 public interest. As is detailed above, the water shortage is having a direct adverse impact on
10 human health and safety in the region, through loss of jobs, hunger, displacement of housing, and
11 undermining of local communities and services.

12 Balanced against these harms and the public interest is the potential for increased
13 entrainment of the delta smelt from more negative OMR flows. The survey data available so far
14 in 2009 suggest that only a relatively small portion of the overall delta smelt population will be in
15 the Central and South Delta this year. This does not appear to be a year in which entrainment
16 would rise to what the BiOp claims is a "sporadically significant" effect on overall population
17 abundance. (BiOp at 210.)⁷

18 The balance, then, is between worsening the severe adverse impact on agriculture and
19 human health and safety on the west side of the San Joaquin Valley that is already occurring and
20 will worsen further if recently allocated CVP supplies cannot be delivered, on the one hand, and
21 an undetermined but still minimal increase in the potential entrainment of what the available data
22 show to be a very small portion of the total juvenile delta smelt population, on the other.

23 Plaintiffs respectfully submit that this balance of hardships, and the public interest, strongly
24 supports injunctive relief.

25 **D. There Is A Strong Likelihood That Plaintiffs Will Prevail On The Merits**

26 Preliminary injunctive relief is further appropriate because there is a strong likelihood that

27 ⁷ Plaintiffs do not concede that entrainment has a significant effect on overall population
28 abundance, sporadically or otherwise.

1 Plaintiffs will prevail on the merits of their claims. While there are numerous flaws in the BiOp
2 and the process FWS used to develop the BiOp that require a remand, in this motion Plaintiffs
3 focus upon only a few defects that are readily apparent from the BiOp itself and other easily
4 referenced documents. Other defects, including many based upon FWS’s failure to use the best
5 available scientific data, or its misuse of the data, would benefit from a full record. While the
6 claims briefed here are sufficient to support injunctive relief, Plaintiffs reserve and intend to raise
7 additional arguments and claims on summary judgment.⁸

8 **1. The BiOp Fails To Determine Project Effects And Jeopardy In The Manner**
9 **Required By Law**

10 In the BiOp, FWS failed to assess the effects of proposed CVP and SWP operations in the
11 manner required by ESA section 7 and the consultation regulations. FWS failed to identify and
12 distinguish between the effects of CVP operations that are discretionary—and hence subject to
13 section 7—and those CVP operations which are non-discretionary and hence not subject to
14 section 7. Further, FWS failed to adequately identify and analyze cumulative effects and other
15 future conditions to which the effects of discretionary project operations would be added. FWS’s
16 determination of jeopardy and adverse modification was therefore based on a flawed analysis and
17 is invalid.

18 In a biological opinion, FWS is required to “detail[] how the agency action affects the
19 species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). Under the consultation regulations, the
20 “effects” of the federal agency action are defined as “the direct and indirect effects of an action on
21 the species or critical habitat, together with the effects of other activities that are interrelated or
22 interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R.
23 § 402.02. The environmental baseline “includes the past and present impacts of all Federal, State,
24 or private actions in the action area, the anticipated impacts of all proposed Federal projects in the
25 action area that have already undergone formal or early section 7 consultation, and the impact of

26 ⁸ The threat of likely harm beginning on about May 18 necessitates filing the motion prior to
27 lodging of the administrative record by Defendants. Plaintiffs respectfully submit that the Court’s
28 rulings on this motion should not foreclose further consideration of any claims or issues based on
the administrative record once it becomes available.

1 State or private actions which are contemporaneous with the consultation in process.” *Id.*
2 Cumulative effects are “those effects of future State or private activities, not involving Federal
3 activities, that are reasonably certain to occur within the action area of the Federal action subject
4 to consultation.” 50 C.F.R. § 402.02.

5 A determination regarding jeopardy is a projection regarding the likely future effect of a
6 proposed agency action. As the Court explained in its *Gutierrez* Order, “[t]he relevant inquiry is
7 whether the ‘action effects, when added to the underlying baseline conditions,’ in the present and
8 future human contexts, are cumulatively such that they would cause jeopardy as that term is
9 defined by law and agency regulation.” *Gutierrez* Order at 33:6-10. Under the consultation
10 regulations, “jeopardize the continued existence of” means “to engage in an action that
11 reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both
12 the survival and recovery of a listed species in the wild, by reducing the reproduction, numbers,
13 or distribution of that species,” 50 C.F.R. § 402.02, while prohibited “destruction or adverse
14 modification” is “any direct or indirect alteration that appreciably diminishes the value of critical
15 habitat for both the survival and recovery of a listed species.” *Id.* As this Court further explained
16 in the *Gutierrez* Order, these standards require more than some perceptible harm; to “appreciably
17 diminish” means to “considerably reduce.” *Gutierrez* Order at 24:6-25:22.

18 Causation is an essential element of the determination required by section 7. As the Ninth
19 Circuit has explained, “[t]o ‘jeopardize’—the action ESA prohibits—means to ‘expose to loss or
20 injury’ or to ‘imperil.’ Either of these implies causation, and thus some new risk of harm.”
21 *National Wildlife Federation v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008). Here, FWS was
22 required to determine whether the incremental effects of proposed, discretionary CVP operations,
23 when considered “in the present and future human and natural contexts,” would likely cause
24 jeopardy or adversely modify the delta smelt’s critical habitat.

25 **a. The BiOp Fails To Distinguish Between The Effects Of Future**
26 **Nondiscretionary CVP Operations And Future Discretionary CVP**
27 **Operations**

28 ESA section 7(a)(2) applies only to discretionary federal agency actions. 50 C.F.R.
§ 402.03; *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S. Ct. 2518,

1 2536 (2007). The Court summarized this rule and its application to the CVP in its *Gutierrez*
2 Order, as follows:

3 8. The Supreme Court recently upheld an NMFS/U.S. Fish and
4 Wildlife Service (“USFWS”) regulation interpreting ESA § 7(a)(2) as only
5 applying to actions “in which there is *discretionary* federal involvement or
6 control.” *Home Builders*, 127 S. Ct. 2518 (interpreting 50 C.F.R. § 402.03).
7 *Home Builders* addressed EPA’s decision to transfer to the State of Arizona its
8 National Pollutant Discharge Elimination System (“NPDES”) permitting power
9 under the Clean Water Act. The *Home Builders* Court held that this decision was
10 non-discretionary:

11 While the EPA may exercise some judgment in determining
12 whether a State has demonstrated that it has the authority to carry
13 out § 402(b)’s enumerated statutory criteria, the statute clearly does
14 not grant it the discretion to add another entirely separate pre-
15 requisite to that list. Nothing in the text of § 402(b) authorizes the
16 EPA to consider the protection of threatened or endangered species
17 as an end in itself when evaluating a transfer application. And to
18 the extent that some of the § 402(b) criteria may result in environ-
19 mental benefits to marine species, there is no dispute that Arizona
20 has satisfied each of those statutory criteria.

21 *Id.* at 2536; *see also NWF v. NMFS II*, 524 F.3d 917, 927-28 (9th Cir. 2008)
22 (applying *Home Builders*, holding that despite existence of broad, unquantified
23 statutory goals in applicable Reclamation statute, Bureau still retains discretion
24 over Project operations and those operations are still subject to the ESA).

25 9. Certain aspects of the management of the CVP/SWP are non-
26 discretionary as that term is utilized in *Home Builders*. Most importantly, in this
27 case, federal Reclamation law requires the Bureau to comply with non-conflicting
28 state water law. Reclamation Act of 1902, Pub. L. 57-161, 32 Stat. 288 at § 8
(June 17, 1902); Central Valley Project Improvement Act (“CVPIA”) § 3406(b),
Pub. L. 102-575, 106 Stat. 4600 (Oct. 30, 1992). Specifically, the Bureau must
comply with State Water Resources Control Board (“SWRCB”) water rights and
water quality decisions. *See* CVPIA § 3406(b) (“The Secretary . . . shall operate
the [CVP] to meet all obligations under State and Federal law, including . . . all
decisions of the California State Water Resources Control Board establishing
conditions on applicable licenses and permits for the project. . .”).

(*Gutierrez* Order at 8:22-10:2.)

In order to properly determine whether the effects of proposed CVP operations would
violate the prohibition in section 7(a)(2) against causing jeopardy or adverse modification, FWS
was therefore required to distinguish between the effects of discretionary and non-discretionary
CVP operations. In its BiOp, however, FWS failed to do so. The BiOp includes a description of
CVP and SWP facilities and operations. (BiOp at 159-177.) The BiOp likewise includes a
description of the supposed effects of proposed CVP and SWP operations on the delta smelt and

1 its critical habitat. (BiOp at 209-244.) But nowhere in the BiOp does FWS identify and
2 distinguish between the effects of discretionary and non-discretionary proposed CVP operations.
3 Instead, in the BiOp, FWS includes the effects of *all* CVP facilities and operations as effects of
4 the action.

5 As the Court explained in its *Gutierrez* Order, CVP operations to comply with State Water
6 Resources Control Board (“SWRCB”) water rights and water quality decisions are one example
7 of nondiscretionary action. Throughout the BiOp, FWS notes that CVP operations have affected
8 the delta smelt’s habitat by reducing variability in flows and changing the natural hydrograph.
9 But those operations are at least in part to meet the Bay Delta water standards implemented by
10 Decision 1641. (BiOp at 21-25.) Further, operation of the export pumps includes pumping of
11 water for “firm water supplies” for wildlife refuges, as mandated by section 3406(d)(1) of the
12 Central Valley Project Improvement Act. FWS should not have included the effects of these and
13 any other non-discretionary operations, such as flood control operations, within the effects of the
14 action. Because it made no distinctions between discretionary and non-discretionary operations,
15 FWS failed to consider an important aspect of consultation, and the BiOp thereby overstates the
16 effects on delta smelt that are properly attributable to future CVP operations under section 7.

17 **b. The BiOp Failed To Analyze Cumulative Effects And Other Future**
18 **Stressors On The Delta Smelt**

19 One of the striking aspects of the BiOp is its resolute focus upon the CVP and the SWP as
20 the ultimate source of all ills affecting the delta smelt. Other stressors are mentioned, but
21 sparingly, and there is little analysis or quantification of the effect of those stressors. There is
22 grudging acceptance that other factors, independent of project operations, have at least
23 contributed to the delta smelt’s decline, but the BiOp strains to tie these other stressors back to the
24 projects. (*See, e.g.*, BiOp at 202-203.)⁹ The relative importance of other factors is borne out by

25 _____
26 ⁹ FWS’s assertion that project operations exacerbate the effects of other adverse factors is not
27 supported by any analysis, or by citation to scientific studies. Plaintiffs anticipate that the lack of
28 scientific support for this assertion, and the issue whether these speculative effects are properly
deemed indirect effects under the law, will be addressed when the Court hears the full arguments
on the merits, based on the administrative record.

1 the failure of the delta smelt to show any sign of recovery despite the severe limits on pumping in
2 2008.

3 The Ninth Circuit has held that a determination of jeopardy from the effects of a proposed
4 agency action must be assessed “in the present and future human and natural contexts.” *Pac.*
5 *Coast Fed’n of Fishermen’s Assoc. v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir.
6 2005). In order to determine whether the effects of future project operations would jeopardize the
7 delta smelt, therefore, FWS was required to assess the likely future conditions the delta smelt will
8 experience from factors *other than* project operations to determine whether, in that context, the
9 additional effect of future project operations would appreciably diminish the likelihood of the
10 survival and recovery of the delta smelt. FWS neglected to do so.

11 The future context for the delta smelt will include effects that the consultation regulations
12 define as “cumulative effects.” 50 C.F.R. § 402.14(g)(4). Cumulative effects are “those effects
13 of future State or private activities, not involving Federal activities, that are reasonably certain to
14 occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02.
15 Despite FWS’s recognition that State and private activities such as entrainment and discharge of
16 contaminants have contributed to the smelt’s decline, and that these activities are reasonably
17 certain to occur in the Delta in the future, the BiOp includes only a cursory discussion of
18 cumulative effects. Indeed, the entire discussion of cumulative effects occupies just over one full
19 page of text in the BiOp. (BiOp at 244-246.) This Court held that a very similar, one page-long
20 assessment of cumulative effects in the previous OCAP biological opinion was inadequate.
21 *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 375-76 (E.D. Cal. 2007).
22 As the Court explained: “There is no quantitative and qualitative analysis of the potential impact
23 of these cumulative effects on the smelt and its habitat, except to identify the causes. . . .” *Id.* at
24 375; *Greenpeace v. NMFS*, 80 F.Supp.2d 1137, 1149 (W.D. Wash. 2000) [cumulative effects
25 discussion inadequate absent “meaningful analysis”]. The Court’s description of the cumulative
26 effects analysis in the previous OCAP biological opinion equally describes the discussion of
27 cumulative effects in the current BiOp. (BiOp at 244-246.) In the BiOp, FWS again fails to
28 provide a quantitative and qualitative analysis of the potential impact of cumulative effects.

1 FWS’s latest cursory treatment of cumulative effects is slightly longer but no better than the
2 previous version, and must be remanded again.

3 The future context for the delta smelt will also include adverse factors not directly related
4 to the cumulative effects from future State or private activities. In its discussion of environmental
5 baseline conditions, the BiOp includes mention of such factors, including the past and current
6 impacts of aquatic macrophytes (submerged aquatic vegetation), predators, competition, changes
7 in food supply, microcystis (a toxic algae), contaminants, and climate change. (BiOp at 182-188.)
8 Yet there is little to no effort in the BiOp to project the impacts of each of these stressors on the
9 delta smelt in the future, nor any analysis of what effect these factors will have in creating the
10 future context for the delta smelt.

11 A proper analysis of cumulative effects, and the future effects of other stressors, may
12 show that the effects of future, discretionary CVP operations will be relatively unimportant to the
13 survival and recovery of the delta smelt. Or, framed in the standard of section 7(a)(2), that the
14 effects of discretionary CVP operations will not “appreciably diminish” the likelihood of the
15 survival and recovery of the species. But in this case, it is not the Plaintiffs’ burden to prove, nor
16 the Court’s role to decide, that this will be so. FWS was bound to analyze the future context for
17 its jeopardy determination. FWS’s nearly total neglect of the numerous non-project factors that it
18 concedes will adversely affect the delta smelt in the future precluded FWS from making a
19 jeopardy determination consistent with law. That failure renders the BiOp legally deficient, and
20 requires a remand of the BiOp to FWS.

21 In sum, in the BiOp FWS failed to do the effects analysis required by law. FWS did not
22 distinguish between the effects of discretionary and nondiscretionary CVP operations, and failed
23 to adequately analyze the likely future context within which CVP impacts would occur, including
24 from cumulative effects. Because of these failings, FWS’s jeopardy determination is invalid.

25 **2. The BiOp Is Unlawful Because FWS Failed To Comply With NEPA**

26 An additional fatal defect in FWS’s issuance of the BiOp is its complete failure to comply
27 with NEPA. NEPA requires federal agencies to prepare an environmental impact statement
28 (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.”

1 42 U.S.C. § 4332(2)(C). As the Ninth Circuit has summarized this process,

2 Federal regulations permit an agency planning a major federal action to conduct an
3 Environmental Assessment in order to determine whether it must prepare an EIS.
4 40 C.F.R. §§ 1501.4 and 1508.9(a)(1). If the EA shows that the proposed action
5 will have no significant impact, “the agency may issue a finding of no significant
6 impact (‘FONSI’) and then execute the action.” *Sierra Club v. Babbitt*, 65 F.3d
7 1502, 1505 (9th Cir.1995); *California Trout v. Schaefer*, 58 F.3d 469, 472 (9th Cir.
8 1995). If however, the EA shows that the proposed activity will have a significant
9 impact, the federal agency must prepare an EIS *before* proceeding with the
10 proposed activity. 42 U.S.C. § 4332(2)(C); *Conner v. Burford*, 848 F.2d 1441,
11 1446 (9th Cir.1988) (“Section 102(2)(C) of NEPA requires Federal agencies to file
12 an EIS before undertaking ‘major Federal actions significantly affecting the
13 quality of the human environment.’”), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121,
14 103 L.Ed.2d 184 (1989).

15 *Ramsey v. Kantor*, 96 F.3d 434, 443-444 (9th Cir. 1996).

16 This Court discussed the applicability of NEPA to a NMFS biological opinion involving
17 major changes to CVP operations in *Westlands v. United States*, 850 F.Supp. 1388 (E.D. Cal.
18 1994). In denying the federal defendants’ motion to dismiss, this Court found that plaintiff had
19 stated a claim for violation of NEPA where NMFS failed to comply with NEPA before issuing its
20 biological opinion. *Id.* at 1420, 1422. The biological opinion required changes to CVP
21 operations, such as the taking of water for non-agricultural purposes and new flow requirements,
22 which were beyond routine managerial changes. *Id.* at 1421. Given the nature of these changes,
23 the Court distinguished *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232,
24 235 (9th Cir. 1990), which involved fluctuations in project operations within the range of
25 historical operations. *Id.* at 1421. Since the biological opinion, and its alternatives, were part of a
26 systematic and connected federal program resulting in the commitment of substantial federal
27 resources, i.e., CVP water, for a statutory program for salmon protection, the Court determined
28 that the complaint properly alleged a NEPA violation. *Id.* at 1422.

29 The BiOp, including its reasonable and prudent alternative and incidental take statement,
30 is a “major Federal action significantly affecting the quality of the human environment.” Like the
31 salmon biological opinion before the Court in *Westlands*, the BiOp is part of a systematic and
32 connected federal program which redirects CVP operations and results in the commitment of
33 substantial federal resources, i.e., CVP water, for a statutory program for smelt protection. The
34 Snow Declaration confirms that *already* this year the BiOp has resulted in the loss of

1 approximately 300,000 acre-feet of CVP and SWP water that could otherwise have been pumped
2 under water rights permits this year, and will likely result in further CVP losses after May 17.
3 (Snow Decl. at ¶¶ 10, 11-19.)

4 The reallocation of hundreds of thousands of acre-feet of CVP and SWP water pursuant to
5 the BiOp has significant adverse environmental and other impacts. These include increased
6 groundwater usage and related land subsidence and air quality impacts, increased soil salinity,
7 damage to vegetation, water quality problems in San Luis Reservoir, and increased energy usage.
8 (See, e.g., Freeman Decl. ¶¶ 11-24; Maher Decl. ¶¶ 14-26.) These impacts singularly and
9 cumulatively will have significant impacts on the quality of the human environment and therefore
10 require NEPA compliance. See *LaFlamme v. Federal Energy Regulatory Commission*, 852 F.2d
11 389, 397 (9th Cir. 1988) (“[I]f the plaintiff raises substantial questions whether a project may
12 have a significant effect, an EIS *must* be prepared.”).) FWS unreasonably and improperly failed
13 to prepare an EIS or an EA analyzing the environmental effects of the BiOp. *Ka Makani ‘O*
14 *Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002) (An agency’s decision not
15 to prepare an EIS or an EA is reviewed under a reasonableness standard.).

16 The applicability of NEPA to the BiOp is further supported by the Ninth Circuit’s holding
17 in *Kantor*. In that opinion, the Ninth Circuit held that NMFS was required to comply with NEPA
18 in the course of a section 7 consultation and issuance of an incidental take statement. *Ramsey v.*
19 *Kantor*, 96 F.3d at 442-445. The court found that a biological opinion authorizing take in
20 connection with commercial salmon fishing constituted “major federal action” triggering NEPA
21 compliance since

22 [i]t is clear . . . both from our cases and from the federal regulations, see 40 C.F.R.
23 § 1508.18, that if a federal permit is a prerequisite for a project with adverse
24 impact on the environment, issuance of that permit does constitute major federal
action and the federal agency involved must conduct an EA and possibly an EIS
before granting it.

25 *Id.* at 444. The court then determined that:

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

1 *Id.*

2 NEPA review could have usefully informed FWS's exercise of discretion in formulating
3 reasonable and prudent alternatives in the BiOp. *See Southwest Center of Biological Diversity v.*
4 *United States Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) (agency has discretion to
5 choose amongst various RPAs as long as such RPAs avoid jeopardy); *Thomas v. Peterson*, 753
6 F.2d 754, 760 (9th Cir. 1985) (a purpose of an EIS is to force the consideration of environmental
7 impacts in the decisionmaking process). Contrary to NEPA's goal of informed decisionmaking,
8 FWS opted to proceed without the information which could have been revealed by a full NEPA
9 analysis of a range of reasonable and prudent alternatives.

10 In sum, issuance of the BiOp, with a reasonable and prudent alternative that already has
11 significantly affected the quality of the human environment and will continue to do so, was a
12 major federal action taken without the benefit of NEPA compliance. This violation of NEPA, in
13 and of itself, supports issuance of a preliminary injunction. *See, e.g., High Sierra Hikers*
14 *Association v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) ("In the NEPA context, irreparable
15 injury flows from the failure to evaluate the environmental impact of a major federal action.").

16 **3. The OMR Protectiveness Criterion Is Not Based Upon The Best Available**
17 **Science**

18 As explained above, Component 2 in the reasonable and prudent alternative tightly limits
19 entrainment to a small percentage of that portion of the overall population found in the Central
20 and South Delta, regardless of how small the population in the Central and South Delta is in
21 relation to the overall population distributed elsewhere.

22 The BiOp never addresses why this tight limitation on entrainment every year is necessary
23 to prevent jeopardy to the species as a whole. To the contrary, the BiOp acknowledges that
24 "currently published analysis of long-term associations between delta smelt salvage and
25 subsequent abundance do not support the hypothesis that entrainment is driving population
26 dynamics year in and year out (Bennett 2005; Manly and Chotkowski 2006; Kimmerer 2008)."
27 The BiOp asserts that "[t]he population-level effects of delta smelt entrainment vary; delta smelt
28 entrainment can best be characterized as a sporadically significant influence on population

1 dynamics.” (BiOp at 210.)¹⁰ As the support for this “sporadic” importance idea, the BiOp cites
2 only studies regarding years of particularly high entrainment of the estimated population. (*Id.*)
3 Notably, there is no justification anywhere in the BiOp for a hard and fast criterion that restricts
4 pumping to limit entrainment to a minute fraction of the population in the Central and South
5 Delta, when the best available data show that in 2009 the large majority of the population is found
6 outside the Central and South Delta, well outside the zone of influence of the pumps.

7 FWS cannot require major changes to agency action unless those changes are necessary to
8 avoid jeopardy. Further, while FWS may impose conditions on a non-jeopardizing action to
9 minimize take, those conditions “cannot alter the basic design, location, scope, duration, or timing
10 of the action and may involve only minor changes.” 50 C.F.R. § 402.14(i)(2); *Westlands Water*
11 *District v. United States Dept. of the Interior*, 376 F.3d 853, 875-876 (9th Cir. 2004); 51 Fed.
12 Reg. 19926, at 19937 (June 3, 1986). In the litigation involving the Trinity River, this Court
13 found that an X2 term in the incidental take statement of a previous delta smelt biological opinion
14 was invalid, because it would have compelled major changes to project operations. *Westlands*
15 *Water District v. United States Dept. of the Interior*, 275 F.Supp.2d 1157, 1221-1222 (E.D. Cal.
16 2002). The Ninth Circuit affirmed this ruling. *Westlands Water District*, 376 F.3d at 875-876.

17 The OMR flow restrictions require major changes to project operations that significantly
18 reduce CVP water supplies. FWS has included the OMR flow restriction to minimize
19 entrainment of juvenile smelt in the reasonable and prudent alternative portion of the BiOp, rather
20 than in the BiOp’s incidental take statement. But the principle involved is the same—major
21 changes to project operations “are appropriate only for alternatives to avoid jeopardy.” Here, the
22 BiOp itself concludes that entrainment has population level effects only “sporadically” (BiOp at
23 210), and the best available scientific data show that, in 2009, the large majority of the delta smelt
24 population is located outside the influence of the CVP and SWP pumps. In these circumstances,
25 a criterion that is based on injection of a particle in a model that operates independently of real
26 time data, and always tightly limits take to an estimated 1% of the fish in the Central and South

27 ¹⁰ Plaintiffs do not agree or concede that FWS’s theory of even “sporadic” significance is
28 scientifically supported.

1 Delta, year in and year out, regardless of actual distribution of delta smelt, is contrary to the
2 requirement to base decisions on the best scientific data available and cannot be justified as
3 necessary to avoid jeopardy.

4 **IV.**

5 **CONCLUSION**

6 The water shortage in 2009 is destroying the livelihoods and communities of the people
7 on the west side of the San Joaquin Valley. The 10% allocation announced by Reclamation on
8 April 21 offers promise of alleviating some of that harm. But even that meager water supply is
9 hanging in the balance, pending action by FWS to limit pumping at the CVP pumps between
10 May 18 and June 30.

11 Irreparable injury to the west side of the San Joaquin Valley is already resulting and will
12 worsen if the export restrictions in the BiOp continue to deprive farms, farm workers and their
13 communities of CVP water. This harm is particularly egregious as, based on the data, 2009 does
14 not appear to be one of the only "sporadic" years in which the BiOp says entrainment may have a
15 population level effect on the delta smelt.

16 The BiOp is flawed, and even absent the benefit of a full record, Plaintiffs have shown a
17 strong likelihood of success on the claims briefed here. To prevent irreparable harm until the
18 time the Court can rule on the merits, the Court should issue a preliminary injunction against
19 FWS's imposition of OMR limits pursuant to the 1% protectiveness criterion. In place of that
20 criterion, the Court should allow pumping based upon the evidence of the distribution of delta
21 smelt this year, using the best survey information available up to the time of the hearing. The
22 Court should further retain ongoing jurisdiction to adjust its order as necessary to reflect evolving
23 conditions as additional survey information becomes available through June 30.

24 Dated: April 24, 2009

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