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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1 WESTLANDS WATER DISTRICT, SAN)
 LUIS & DELTA-MENDOTA WATER)
 2 AUTHORITY, and SAN BENITO COUNTY)
 WATER DISTRICT,)
 3)
 Plaintiffs,)
 4)
 SACRAMENTO MUNICIPAL UTILITY)
 5 DISTRICT,)
)
 6 Plaintiff-Intervenor,)
)
 7 NORTHERN CALIFORNIA POWER)
 ASSOCIATION,)
 8)
 Plaintiff-Intervenor)
 9)
 v.)
 10)
 UNITED STATES DEPARTMENT OF THE)
 11 INTERIOR, ET AL,)
)
 12 Defendants,)
)
 13 HOOPA VALLEY TRIBE,)
)
 14 Defendant-Intervenor,)
)
 15 YUROK TRIBE,)
)
 16 Defendant-Intervenor.)
)
 17)

CIV-F-00-7124 OWW DLB
 MEMORANDUM DECISION AND
 ORDER RE: CROSS-MOTIONS FOR
 SUMMARY JUDGMENT (DOCS.
 233, 238, 243, 247, 252)

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Before the court are cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Oral argument was heard August 20, 2002.

Plaintiffs Westlands Water District, San Luis & Delta Mendota Water Authority and San Benito County Water District were represented by Daniel O'Hanlon, Esq. Plaintiff Intervenor, Sacramento Municipal Utility District, was represented by Steve

1 Saxton, Esq., and David Lindgren, Esq. Northern California Power
2 Association, Plaintiff Intervenor, was represented by T. Ronald
3 Lapheimer, Esq. Defendant United States Department of the
4 Interior and all other named Federal defendants,¹ were
5 represented by Charles Shockey, Esq. The Hoopa Valley Tribe,
6 Defendant-Intervenor, was represented by Thomas Schlosser, Esq.
7 The Yurok Tribe was represented by Scott Williams, Esq.
8

9 I. FACTUAL AND PROCEDURAL BACKGROUND

10 This suit involves the United States Department of
11 Interior's ("Interior") administration of the Trinity River
12 Division ("TRD")² of the Central Valley Project ("CVP") and
13 Interior's implementation of Section 3406(b)(23)³ of the Central
14

15 ¹ The "federal defendants" include: The Department of the
16 Interior; the Secretary of the Department of the Interior; the
17 Bureau of Reclamation; the Commissioner of the Bureau of
18 Reclamation; the Regional Director of the Mid-Pacific Region of
19 the Bureau of Reclamation; the U.S. Fish and Wildlife Service;
20 the Director of the Fish and Wildlife Service; the Operations
21 Manager of the California/Nevada Operations Office of the Fish
22 and Wildlife Service; the Department of Commerce; the Secretary
of the Department of Commerce; the Assistant Administrator for
23 Fisheries of the U.S. National Marine Fisheries Service; and the
24 Regional Administrator for the Southwest Region of the U.S.
25 National Marine Fisheries Service.

26 ² The TRD consists of: the Trinity and Lewiston dams and
27 their reservoirs; Trinity and Lewiston powerplants; Clear Creek
28 tunnel; Judge Francis Carr powerhouse; Whiskeytown dam and lake;
Spring Creek tunnel and powerplant; Spring Creek debris dam and
reservoir; and related pumping and distribution facilities.

³ CVPIA §§ 3406(b) and (b)(23) read:

The Secretary, immediately upon the enactment of this

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3 title, shall operate the Central Valley Project to meet
4 all obligations under State and Federal law, including
5 but not limited to the Federal Endangered Species Act,
6 16 U.S.C. § 1531, et seq., and all decisions of the
7 California State Water Resources Control Board
8 establishing conditions on applicable licenses and
9 permits for the project. The Secretary, in
10 consultation with other State and Federal agencies,
11 Indian tribes, and affected interests, is further
12 authorized and directed to:

13 . . .

14 (23) in order to meet Federal trust responsibilities to
15 protect the fishery resources of the Hoopa Valley
16 Tribe, and to meet the fishery restoration goals of the
17 Act of October 24, 1984, Public Law 98-541, provide
18 through the Trinity River Division, for water years
19 1992 through 1996, an instream release of water to the
20 Trinity River of not less than three hundred and forty
21 thousand acre-feet per year for the purposes of fishery
22 restoration, propagation, and maintenance and,

23 (A) by September 30, 1996, the Secretary, after
24 consultation with the Hoopa Valley Tribe, shall
25 complete the Trinity River Flow Evaluation Study
26 currently being conducted by the United States Fish and
27 Wildlife Service under the mandate of the Secretarial
28 Decision of January 14, 1981, in a manner which insures
the development of recommendations, based on the best
available scientific data, regarding permanent instream
fishery flow requirements and Trinity River Division
operating criteria and procedures for the restoration
and maintenance of the Trinity River fishery; and

(B) not later than December 31, 1996, the Secretary
shall forward the recommendations of the Trinity River
Flow Evaluation Study, referred to in subparagraph (A)
of this paragraph, to the Committee on Energy and
Natural Resources and the Select Committee on Indian
Affairs of the Senate and the Committee on Interior and
Insular Affairs and the Committee on Merchant Marine

1 Valley Project Improvement Act ("CVPIA"),⁴ to restore and
2 maintain the Trinity River fishery.

3
4 II. UNDISPUTED FACTS

5 The TRD was authorized by an Act of Congress on August 12,
6 1955.⁵ Among the purposes of the TRD Act are that the Secretary
7 provide necessary and beneficial services such as water supply
8 and power and that the Secretary operate the TRD to effectuate
9 the fullest, most beneficial and most economic utilization of the
10 River and adopt appropriate measures to protect fish and wildlife
11 in the Trinity River basin. Trinity River Act of 1955 §2.
12 Construction of the TRD was completed and operations commenced in
13

14
15 and Fisheries of the House of Representatives. If the
16 Secretary and the Hoopa Valley Tribe concur in these
17 recommendations, any increase to the minimum Trinity
18 River instream fishery releases established under this
19 paragraph and the operating criteria and procedures
20 referred to in subparagraph (A) shall be implemented
21 accordingly. If the Hoopa Valley Tribe and the
22 Secretary do not concur, the minimum Trinity River
23 instream fishery releases established under this
24 paragraph shall remain in effect unless increased by an
25 Act of Congress, appropriate judicial decree, or
26 agreement between the Secretary and the Hoopa Valley
27 Tribe. Costs associated with implementation of this
28 paragraph shall be reimbursable as operation and
maintenance expenditures pursuant to existing law.

Central Valley Project Improvement Act, Pub. L. No. 102-575, §
3406(b)(23), 106 Stat. 4600, at 4720-21.

⁴ Pub. L. No. 102-575, § 3401-12, 106 Stat. 4600, 4706
(Oct. 30, 1992).

⁵ Pub. L. No. 84-386 (August 12, 1955).

1 1964. The TRD transfers water from the Klamath River Basin,
2 which includes the Trinity River, in Trinity County, California,
3 to the Sacramento River Basin. Its primary function is to store
4 Trinity River water for regulated diversion to California's
5 Central Valley for agricultural, municipal, and industrial uses.
6 It also produces electrical power. The TRD accounts for twenty-
7 five percent (25%) (500 megawatts (Mw)) of the 2000 Mw of CVP-
8 generated electric power.

9 The Trinity River Basin is home to protected fish species:

10 The native anadromous salmonid species of interest in
11 the mainstem Trinity River and its tributaries include
12 chinook salmon, coho salmon, and steelhead. Of the
13 three species, there are two spawning populations of
14 chinook salmon (spring and fall) and two spawning
15 populations of steelhead (winter and summer). All
16 anadromous species begin their life in fresh water,
17 then migrate to the ocean to mature, and return to
18 spawn in fresh water.

19 DEIS at 3-151 to 3-152. The spring-run chinook migrates in the
20 spring to summer, spawns in the early fall, rears in winter-
21 spring-summer, and makes its habitat for feeding in shallow,
22 slow-moving waters adjacent to higher water velocities. The
23 fall-run chinook migrates in the fall, spawns in the fall, rears
24 in winter-spring-summer, and makes its habitat in the same areas
25 as the spring-run chinook. The winter steelhead migrates in the
26 fall to winter, spawns between February and April, rears year-
27 round, and makes its habitat in areas of clean cobble where there
28 is refuge from high river flow velocities. The summer steelhead
migrates in the spring to summer, spawns between February and
April, rears year-round, and makes its habitat in the same area
as its related species.

The Hoopa Valley and Yurok Reservations were established in

1 those Tribes' aboriginal lands in the Klamath and Trinity River
2 basins. Since prehistoric times, the fishery resources of the
3 Klamath and Trinity Rivers have been the mainstay of Native
4 American culture and life in the area.

5 The TRD's construction and operation resulted in the
6 diversion of up to ninety percent (90%) of the average annual
7 discharge into the Trinity River at Lewiston Dam (1,234,000 AF of
8 the 1,396,000 AF inflow), and blocked access to 109 miles of
9 steelhead and salmon spawning and rearing habitat. In response
10 to declining fisheries and degraded habitat conditions, Interior
11 decided in 1981 to increase flows into the Trinity River ranging
12 from 140,000 AF to 340,000 AF annually.⁶ In addition, the United
13 States Fish and Wildlife Service ("USFWS") was directed to
14 undertake a Flow Evaluation Study to assess fish habitat at
15 various flows, summarize the effectiveness of other instream and
16 watershed restoration activities, and recommend appropriate flows
17 and other measures necessary to better maintain favorable habitat
18 conditions. The study began in October 1984 and was completed by
19 a June 1999 report.

20 In October 1984, Congress enacted the Trinity River Basin
21 Fish and Wildlife Management Act⁷ ("1984 Act") to restore fish
22

23 ⁶ An Environmental Impact Statement analyzing the impacts
24 of increasing the instream flow of the Trinity River to 340,000
25 AF was issued on December 5, 1980.

26 ⁷

26 SECTION 1: The Congress finds that --

27 (1) the construction of the Trinity River division of
28 the Central Valley project in California, authorized by
the Act of August 12, 1955 (69 Stat. 719), has

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3 substantially reduced the streamflow in the Trinity
4 River Basin thereby contributing to damage to pools,
5 spawning gravels, and rearing areas and to a drastic
6 reduction in the anadromous fish populations and a
7 decline in the scenic and recreational qualities of
8 such river system;

9 (2) the loss of land areas inundated by two reservoirs
10 constructed in connection with such project has
11 contributed to reductions in the populations of deer
12 and other wildlife historically found in the Trinity
13 River Basin;

14 (3) the Act referred to in paragraph (1) of this
15 section directed the Secretary of the Interior
16 (hereinafter in this Act referred to as the
17 "Secretary") to take appropriate actions to ensure the
18 preservation and propagation of such fish and wildlife
19 and additional authority was conferred on the Secretary
20 under the Act approved September 4, 1980 (94 Stat.
21 1062), to take certain actions to mitigate the impact
22 on fish and wildlife of the construction and operation
23 of the Trinity River division;

24 (4) activities other than those related to the project
25 including, but not limited to, inadequate erosion
26 control and fishery harvest management practices, have
27 also had significant adverse effects on fish and
28 wildlife populations in the Trinity River Basin and are
of such a nature that the cause of any detrimental
impact on such populations cannot be attributed solely
to such activities or to the project;

(5) a fish and wildlife management program has been
developed by an existing interagency advisory group
called the Trinity River Basin Fish and Wildlife Task
Force; and

(6) the Secretary requires additional authority to
implement a basin-wide fish and wildlife management
program in order to achieve the long-term goal of
restoring fish and wildlife populations in the Trinity
River Basin to a level approximating that which existed
immediately before the start of the construction of the
Trinity River division.

TRINITY RIVER BASIN FISH AND WILDLIFE MANAGEMENT

1 and wildlife populations to pre-TRD levels. The 1984 Act found
2 that the TRD had contributed to a "drastic reduction in the
3 anadromous fish populations." Public Law 98-541, Section 1(1).

4 It directed that the restoration program include:

5 (1) The design, construction, operation, and
6 maintenance of facilities to --

7 (A) rehabilitate fish habitats in the Trinity River
8 between Lewiston Dam and Weitchpec;

9 (B) rehabilitate fish habitats in tributaries of such
10 river below Lewiston Dam and in the south fork of such
11 river; and

12 (C) modernize and otherwise increase the effectiveness
13 of the Trinity River Fish Hatchery.

14 (2) The establishment of a procedure to monitor (A) the

15 PROGRAM

16 SEC. 2. (a) Subject to subsection (b), the Secretary
17 shall formulate and implement a fish and wildlife
18 management program for the Trinity River Basin designed
19 to restore the fish and wildlife populations in such
20 basin to the levels approximating those which existed
21 immediately before the start of the construction
22 referred to in section 1(1) and to maintain such
23 levels. The program shall include the following
24 activities:

25 (1) The design, construction, operation, and
26 maintenance of facilities to --

27 (A) rehabilitate fish habitats in the Trinity River
28 between Lewiston Dam and Weitchpec;

(B) rehabilitate fish habitats in tributaries of such
river below Lewiston Dam and in the south fork of such
river; and

(C) modernize and otherwise increase the effectiveness
of the Trinity River Fish Hatchery.

(2) The establishment of a procedure to monitor (A)
the fish and wildlife stock on a continuing basis, and

(B) the effectiveness of the rehabilitation work.

(3) Such other activities as the Secretary determines
to be necessary to achieve the long-term goal of the
program.

. . . .

Public Law 98-541, 98 Stat. 2721.

1 fish and wildlife stock on a continuing basis, and (B)
2 the effectiveness of the rehabilitation work.
3 (3) Such other activities as the Secretary determines
4 to be necessary to achieve the long-term goal of the
5 program.

6 Public Law 98-541, Section 2(a).

7 In 1991, the Secretary of the Interior increased the minimum
8 flows in the Trinity River to 340,000 AF/year until the Trinity
9 River flow study was completed. The 340,000 AF number was the
10 third-lowest unregulated flow on record.

11 In 1992, Congress enacted the CVPIA to annually redirect
12 part of the CVP's water to the environment. CVPIA § 3406(b)(23)
13 specifically authorizes and directs Interior to restore the
14 Trinity River. It requires that not less than 340,000 AF of
15 water be released into the Trinity River each year for water
16 years 1992-1996 in order to meet federal trust responsibilities
17 to the Hoopa Valley Tribe and to meet the restoration goals of
18 the 1984 Act. CVPIA § 3406(b)(23). It directs the Secretary of
19 the Interior ("Secretary"), after consultation with the Hoopa
20 Valley Tribe to complete the Trinity River Flow Evaluation Study
21 ("TRFES"), which had already begun pursuant to the January 14,
22 1981 Secretarial Decision, no later than September 30, 1996.
23 CVPIA § 3406(b)(23)(A). The TRFES was to be performed "in a
24 manner which insures the development of recommendations, based on
25 the best available scientific data, regarding permanent instream
26 fishery flow requirements and Trinity River Division operating
27 criteria and procedures for the restoration and maintenance of
28 the Trinity River fishery." *Id.* Section 3406 then directs the
Secretary to forward the TRFES recommendations to several
congressional committees no later than December 31, 1996. CVPIA

1 § 3406(b)(23)(B). If the Secretary and the Hoopa Valley Tribe
2 concurred in the TRFES recommended increases for Trinity River
3 instream fishery flow releases established under CVPIA
4 §3406(b)(23)(B), such restoration flows were to be implemented
5 accordingly. *Id.* If they did not concur, the 340,000 AF minimum
6 flows must remain in effect unless increased by an act of
7 Congress, appropriate judicial decree or agreement between the
8 Secretary and the Hoopa Valley Tribe. *Id.*

9 In 1996, Congress amended the 1984 Act by the Trinity River
10 Basin Fish and wildlife Management Reauthorization Act of 1995,
11 Pub. L. No. 104-408, 110 Stat. 1338 (1996). The TRFES was not
12 timely completed. Congress directed that Trinity River
13 restoration be measured not only by returning adult anadromous
14 fish spawners, but also by the ability of dependant tribal,
15 commercial, and sport fisheries to participate fully, through in-
16 river and ocean harvest opportunities, in the benefits of the
17 restoration. Pub. L. No. 104-408. Congress also included
18 language amending the activities to be undertaken by the
19 Secretary. *Id.* The original language directed the Secretary to
20 "modernize and otherwise increase the effectiveness of the
21 Trinity River fish hatchery. The 1996 Act adds "so that it can
22 best service its purpose of mitigation of fish habitat loss above
23 Lewiston Dam while not impairing efforts to restore and maintain
24 naturally reproducing anadromous fish stocks within the basin."
25 *Id.*

26 In January 1998, the draft Trinity River Flow Evaluation
27 Report (TRFER) was released. In June 1999, Interior, in
28 consultation with the Hoopa Valley Tribe, published the Trinity

1 River Flow Evaluation Final Report ("TRFEFR"). The TRFEFR
 2 recommends permanently increasing the Trinity River fish flows
 3 from the statutorily mandated 340,000 AF/year to between 368,900
 4 and 815,200 AF/year, as follows:

RECOMMENDED WATER RELEASES		
Water-Year Class	Instream Volume (x 1000 acre-feet)	Probability of Occurrence
Extremely Wet	815.2	0.12
Wet	701.0	0.28
Normal	646.9	0.20
Dry	452.6	0.28
Critically Dry	368.6	0.12
Weighted Average	594.5	

14 TRFEFR § 8.1, p. 241.

15 On October 19, 1999, the United States Bureau of Reclamation
 16 ("Bureau") and the USFWS released the draft "Trinity River
 17 Mainstem Fishery Restoration Environmental Impact
 18 Statement/Report" ("DEIS"), which described alternate approaches
 19 for restoring and maintaining the Trinity River fishery.

20 Interior published the availability of the draft EIS/EIR and the
 21 commencement of a public comment period scheduled to end on
 22 December 8, 1999. 64 Fed. Reg. 56364, 1999 WL 827447 (Oct. 19,
 23 1999). The public comment period was extended until January 20,
 24 2000. 64 Fed. Reg. 67584, 1999 WL 1078497 (Dec. 2, 1999); 64
 25 Fed. Reg. 72357, 1999 WL 1247501 (Dec. 27, 1999).

26 On January 20, 2000, San Luis & Delta-Mendota Water
 27
 28

1 Authority ("San Luis") submitted written comments⁸ criticizing
2 the DEIS, noting, *inter alia*, that the DEIS failed to analyze the
3 preferred alternative's potential adverse environmental impacts
4 on federally listed endangered or threatened fish species within
5 the Sacramento River system and the Sacramento-San Joaquin Delta
6 ("Delta"), and also failed to analyze how these adverse impacts,
7 if any, could be minimized or avoided. Doc. 35 at ¶¶ 39-40 & Ex.
8 A.

9 On March 10, 2000, Westlands Water District ("Westlands")
10 and San Luis sent a sixty-day notice of intent to sue to
11 Interior, threatening suit if Interior did not undertake a formal
12 ESA consultation on the TRFEFR. On March 29, 2000, Interior
13 forwarded the TRFEFR to Congress, pursuant to CVPIA § 3406(b)(23)
14 ("the Secretary shall forward the recommendations of the Trinity
15 River Flow Evaluation Study . . . to the Committee on Energy and
16 Natural Resources and the Select Committee on Indian Affairs of
17 the Senate and the Committee on Interior and Insular Affairs and
18 the Committee on Merchant Marine and Fisheries of the House of
19 Representatives. If the Secretary and the Hoopa Valley Tribe
20 concur in these recommendations, any increase to the minimum
21 Trinity River instream fishery releases established under this
22 paragraph and the operating criteria and procedures referred to
23 in subparagraph (A) shall be implemented accordingly.").

24 On May 8, 2000, Interior responded to San Luis' letter,
25

26 ⁸ "Comments of the San Luis & Delta-Mendota Water Authority
27 on the Trinity River Mainstem Fishery Restoration Environmental
28 Impact Statement/Environmental Impact Report," dated January 19,
2000.

1 acknowledging that ESA "§ 7 consultation over potential effects
2 to species listed as either threatened or endangered under the
3 ESA . . . must be accomplished as part of the process of making a
4 decision on the Program." It reassured that "no final decision
5 on the Program will be made until both the USFWS and NMFS have
6 issued biological opinions regarding implementation of the
7 Program, and that these opinions will be taken into consideration
8 in making such decisions."

9 On October 12, 2000, the National Marine Fishery Service
10 ("NMFS") formally issued the "Biological Opinion for the Trinity
11 River Mainstem Fishery Restoration EIS and Its Effects on
12 Southern Oregon/Northern California Coast Coho Salmon, Sacramento
13 River Winter-run Chinook Salmon, Central Valley Spring-run
14 Chinook Salmon, and Central Valley Steelhead" ("BioOp."). This
15 BioOp recognizes that implementation of the report will affect
16 many aspects of the river, including decreased water flows, and
17 discusses reasonable and prudent measures ("RPMS") to minimize or
18 avoid the preferred alternative's impacts on "federally listed"
19 fish.

20 Also on October 12, 2000, the USFWS issued "Re[-]initiation
21 of Formal Consultation: Biological Opinion of the Effects of
22 Long-term Operation of the Central Valley Project and State Water
23 Project as Modified by Implementing the Preferred Alternative in
24 the Draft Environmental Impact Statement/Environmental Impact
25 Report for the Trinity River Mainstem Fishery Restoration
26 Program" ("USFWS BioOp"). On November 17, 2000, Interior
27 published notice of the availability of the final EIS/EIR
28 ("FEIS"). 65 Fed. Reg. 69512, 2000 WL 1711646 (Nov. 17, 2000).

1 On December 14, 2000, Westlands filed suit against
2 defendants, alleging three claims:

- 3 (1) "maladministration" of the Endangered Species Act
4 ("ESA") by the USFWS;
5 (2) maladministration of the ESA by NMFS; and,
6 (3) violation of NEPA by all defendants.

7 Doc. 1 at 15-24. That same day, Westlands sought an emergency
8 court order to enjoin the defendant, Bruce Babbitt (as Secretary
9 of the Interior), from executing a Record of Decision ("ROD")
10 with the Hoopa Valley Tribe, scheduled to be signed on Tuesday,
11 December 19, 2000. On December 15, the Hoopa Valley Tribe
12 intervened as a defendant in the case.

13 The motion for a Temporary Restraining Order ("TRO") was
14 denied in open court on the afternoon of December 15, 2000, and
15 the confirming written order was entered on January 30, 2001.
16 Doc. 85. The application for a TRO was denied because at the
17 time of the December 15 hearing, Secretary Babbitt had not yet
18 signed the ROD. The signing was scheduled for December 19, 2000.
19 Until the ROD was signed, there was no "final agency action" that
20 Westlands could challenge and no authority existed to enjoin the
21 Executive from implementing the statutory function of reaching
22 agreement with the Indian Tribes on the Trinity River Restoration
23 Plan. *Id.* at 4-5.

24 On December 18, 2000, the Hoopa Valley Tribe concurred in
25 the TRFES recommendations. On December 19, 2000, Secretary
26 Babbitt and the Senior Chairman of the Hoopa Valley Tribal
27 Council signed the ROD. The ROD directs Interior's agencies "to
28 implement the Preferred Alternative as described in the FEIS/EIR

1 and as provided below," and "to implement the reasonable and
2 prudent measures described in the NMFS and [USFWS] Biological
3 Opinions."

4 The ROD's stated purpose is: restoration and perpetual
5 maintenance of Trinity River's fishery resources by
6 rehabilitating the river and restoring attributes of a healthy,
7 functioning alluvial river system. AR 17694-95. The essential
8 components to do so are:

- 9 1. Permanently increase variable annual flows for the
10 Trinity River;
- 11 2. Rehabilitate physical channels, remove riparian berms
12 and establish side channel habitat;
- 13 3. Sediment management to increase spawning gravels and
14 reduce fine sediments;
- 15 4. Restore the watershed damage by land use practices;
- 16 5. Improve infrastructure, including bridges and other
17 structures affected by peak flows.

18 On January 5, 2001, Westlands and two new plaintiffs, the
19 San Luis and Delta-Mendota Water Authority, and the San Benito
20 County Water District (collectively "water districts"), filed a
21 first amended complaint against the federal defendants, alleging
22 four causes of action:

- 23 (1) maladministration of the ESA by the USFWS, claiming that by
24 "issuing a non-jeopardy biological opinion that requires a
25 major change in CVP operations [*i.e.*, preventing any
26 upstream movement of 0.5 km or more of the X2 water quality
27 standard], the USFWS has exceeded its authority under the
28 Endangered Species Act;"

1 (2) maladministration of the ESA by NMFS, claiming that NMFS
2 acted arbitrarily and capriciously and in excess of its
3 authority under the ESA by issuing a biological opinion that
4 internally conflicts, because it states on one hand that
5 "NMFS does not anticipate that implementation of the
6 proposed flow schedules will incidentally take any SONCC
7 coho salmon," and on the other hand, prescribes RPMs to deal
8 with incidental take;

9 (3) violation of NEPA by all defendants, claiming that: (a) the
10 draft and final EIS/EIRs do not analyze the impacts of
11 implementing the requirements of the USFWS and NMFS
12 biological opinions; (b) the final EIS/EIR does not
13 adequately describe what CVP operational changes will occur
14 to protect or mitigate the adverse effect upon listed fish,
15 upon which the draft EIS/EIR acknowledges implementation of
16 the preferred alternative may have a significant adverse
17 impact, and simply defers mitigation consideration until
18 later; (c) because the biological opinions modified the
19 proposed action by creating new environmental impacts (or
20 new circumstances and information), the defendants failed to
21 supplement the EIS/EIRs to analyze these impacts and publish
22 the analysis for public comment; (d) the draft and final
23 EIS/EIR do not fairly evaluate alternatives, and are in
24 essence a "post hoc rationalization to justify a course of
25 action decided upon before NEPA review even began;" (e) the
26 EIS/EIRs utilize improper definitions of proper purpose by
27 using the "healthy river" standard rather than an objective
28 standard; and, (f) the final EIS/EIR, or a supplement

1 thereto, does not analyze the impact of implementation of
2 the preferred alternative on California's current energy
3 crisis; and,

4 (4) violation of the Administrative Procedure Act ("APA"),
5 claiming that the TRFEFR's recommendations adopted by the
6 ROD are not based on the best available scientific data in
7 violation of CVPIA § 3406(b)(23)(A), and its conclusions are
8 arbitrary and capricious.

9 Doc. 35. The Yurok Tribe intervened as a defendant on January
10 19, 2001. On February 8, 2001, the Northern California Power
11 Agency ("NCPA") and the Sacramento Municipal Utility District
12 ("SMUD") intervened as plaintiffs over the opposition of the
13 Hoopa Valley and Yurok Tribes.⁹

14 The water districts filed a motion for preliminary
15 injunction on January 5, 2001 and NCPA and SMUD moved for a
16 preliminary injunction on February 6, 2001. A preliminary
17 injunction issued on March 22, 2001 limiting the amount of water
18 releases under the ROD to a total of 368,600 AF. All other
19 aspects of the ROD's Trinity River restoration plan were not
20 enjoined. The decision, made without a complete administrative
21 record, found plaintiffs were likely to succeed on the merits of
22 their claim because the two BioOps imposed significant
23 environmental impacts that were not analyzed in a supplemental
24 EIS/EIR ("SEIS") and the California energy crisis was a changed

25
26 ⁹ NCPA's complaint-in-intervention, previously lodged on
27 January 5, 2001, was filed on February 6, 2001. Doc. 105.
28 SMUD's complaint-in-intervention, previously lodged on January 5,
2001, was filed on February 6, 2001. Doc. 109.

1 circumstance that should have been evaluated, but was not.

2 On September 7, 2001, the United States, the water
3 districts, NCPA, and SMUD, but not the Tribes, entered into and
4 filed a stipulation to stay the proceedings in this case until
5 Interior issued a revised ROD following completion of an SEIS.
6 The federal defendants and plaintiffs agreed that the preliminary
7 injunction would remain in place unless otherwise ordered by the
8 court. The defendant-intervenor Tribes did not oppose the stay
9 order, but did not join the stipulation because of paragraphs
10 eight¹⁰ and nine¹¹ which they believed demanded actions not

11
12 ¹⁰ Paragraph eight states:

13 The SEIS will address, among other topics, the issues
14 identified by this Court as requiring further analysis,
15 including impacts from the ROD or changes to Trinity
16 River flows on the provision of electrical power to the
17 Central Valley Project and the power grid serving the
18 State of California, along with the effects of the
19 Endangered Species Act § 7 biological opinions issued
20 by the U.S. Fish and Wildlife Service (FWS) and the
21 National Marine Fisheries Service (NMFS).

22 ¹¹ Paragraph Nine states:

23 The federal defendants have advised the parties to this
24 litigation that, through the SEIS scoping process, any
25 person or party will have the opportunity to present
26 other issues that they believe should be included in
27 the SEIS and that the federal defendants will carefully
28 consider all such presentations. In addition to the
formal scoping and public comment processes under NEPA
and the CEQ regulations, the federal defendants will
use the available legal procedures to invite and
consider technical information and expert advice from
all sources. These procedures will allow scientific
and technical discussion among the scientists and
technical experts of the federal defendants,
plaintiffs, plaintiff-intervenors, and defendant-
intervenors, and others having such expertise, so as to

1 required by law. However, they found the proposed order
2 "unobjectionable." On October 8, 2001, the court signed the stay
3 order.

4 On March 14, 2002, the Tribes moved to modify the
5 preliminary injunction for water year 2002 alleging changed
6 circumstances. On April 19, 2002, the preliminary injunction was
7 modified to authorize the release of 468,600 AF of water into the
8 Trinity River for the purposes of fishery protection and
9 restoration for water year 2002. All other aspects of the
10 Trinity River restoration plan were not subject to the
11 injunction. The order modifying the preliminary injunction also
12 vacated the stay and set a schedule for disposition of the case
13 on the merits. To the court's knowledge, work on the SEIS
14 ceased.

15 On June 11, 2002 the water districts, NCPA, SMUD, the
16 federal defendants, and the Hoopa Valley Tribe filed cross-
17 motions for summary judgment. The Yurok Tribe did not file a
18 cross-motion for summary judgment but opposed the water
19 districts', NCPA's, and SMUD's motions.

21 maximize the value of the scientific and technical
22 input from non-federal sources. The goal of these
23 procedures is to make the SEIS a thorough,
24 comprehensive, and scientifically sound document, as
25 required by NEPA and the CEQ regulations. When
26 completed, the federal defendants will prepare a
27 revised ROD. In conjunction with the SEIS and revised
28 ROD, the federal defendants will consult with FWS and
NMFS under ESA § 7, as appropriate. The SEIS, revised
ROD, and any biological opinions will be subject to
legal challenge on any legally cognizable grounds in
this or independent litigation by any party.

1 III. LEGAL STANDARD

2 Summary judgment is warranted only "if the pleadings,
3 depositions, answers to interrogatories, and admissions on file,
4 together with the affidavits, if any, show that there is no
5 genuine issue as to any material fact." Fed. R. Civ. P. 56(c);
6 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). The
7 evidence must be viewed in light most favorable to the nonmoving
8 party. *Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood*
9 *Products, Inc.*, 268 F.3d 639, 644 (9th Cir. 2001), amended by
10 2001 WL 1490998 (9th Cir. 2001).

11 The moving party bears the initial burden of demonstrating
12 the absence of a genuine issue of fact. *Devereaux v. Abbey*, 263
13 F.3d 1070, 1076 (9th Cir. 2001). If the moving party fails to
14 meet this burden, "the nonmoving party has no obligation to
15 produce anything, even if the nonmoving party would have the
16 ultimate burden of persuasion at trial." *Nissan Fire & Marine*
17 *Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th
18 Cir. 2000). However, if the nonmoving party has the burden of
19 proof at trial, the moving party must only show "that there is an
20 absence of evidence to support the nonmoving party's case."
21 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

22 Once the moving party has met its burden of proof, the non-
23 moving party must produce evidence on which a reasonable trier of
24 fact could find in its favor viewing the record as a whole in
25 light of the evidentiary burden the law places on that party.
26 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.
27 1995). The nonmoving party cannot simply rest on its allegations
28 without any significant probative evidence tending to support the

1 complaint. *Devereaux*, 263 F.3d at 1076.

2 [T]he plain language of Rule 56(c) mandates the entry
3 of summary judgment, after adequate time for discovery
4 and upon motion, against a party who fails to make a
5 showing sufficient to establish the existence of an
6 element essential to the party's case, and on which
7 that party will bear the burden of proof at trial. In
such a situation, there can be "no genuine issue as to
any material fact," since a complete failure of proof
concerning an essential element of the nonmoving
party's case necessarily renders all other facts
immaterial.

8 *Celotex Corp.*, 477 U.S. at 322-23.

9
10 IV. DISCUSSION

11 Plaintiffs and plaintiff-intervenors¹² move for summary
12 judgment on five NEPA issues: 1) the Preferred Alternative's
13 impact on the ESA-listed species in the Sacramento River and
14 Delta were not adequately assessed; 2) the impacts of mitigation
15 measures mandated by the BioOps were not properly assessed; 3)
16 the impact of the Preferred Alternative on power system
17 reliability was not adequately assessed; 4) Interior improperly
18 applied an unreasonably narrow definition of EIS purpose and
19 artificially restricted the range of alternatives considered
20 under NEPA; and 5) Interior's environmental assessment was too
21 late. They also move for summary judgment on two ESA issues: 1)
22 the USFWS BioOp unlawfully mandates major changes to CVP
23 operations; 2) the NMFS BioOp arbitrarily mandates implementation

24
25 _____
26 ¹² The water districts and plaintiff-intervenors divided
27 the arguments among themselves and then joined each others'
28 motions. The water districts and plaintiff-intervenors, SMUD and
the power generators, will be referred to jointly as
"plaintiffs."

1 of the ROD flows in the absence of the lethal take of Trinity
2 River fish. Finally, plaintiffs move for summary judgment
3 arguing the Secretary's actions in authorizing the ROD flows were
4 arbitrary and capricious in that there was no adequate basis in
5 experience or science for determining that the adopted permanent
6 flows are necessary or beneficial.

7 The Hoopa Valley Tribe opposes Plaintiffs' summary judgment
8 motions arguing: 1) further NEPA review is irreconcilable with
9 the CVPIA; and 2) the ROD is neither arbitrary, capricious, nor
10 contrary to law. The Tribe also argues that the CVPIA and equity
11 principles limit the available remedies.

12 The federal defendants move for summary judgment arguing
13 they have complied: 1) with NEPA; and, 2) with the ESA. The
14 Yurok Tribe argues that the federal government's trust
15 responsibility requires restoration be given "paramount
16 consideration."

17
18 A. APPLICABILITY OF FURTHER NEPA REVIEW UNDER CVPIA §3406(b)(23)

19 The Hoopa Tribe contends that the Secretary has no
20 discretion to delay implementing the flow study recommendations
21 because the Tribe formally concurred in those recommendations in
22 December 2000 and under CVPIA § 3406(b)(23) the Secretary no
23 longer has discretion after such a concurrence.

24 NEPA requires federal agencies, to the fullest extent
25 possible, to "include in every recommendation or report on
26 proposals for legislation and other major Federal actions
27 significantly affecting the quality of the human environment," an
28 environmental impact statement that includes the impacts of and

1 alternatives to the proposed action. 42 U.S.C. § 4332(2)(C).
2 NEPA is given the broadest possible interpretation. *Westlands*
3 *Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457,
4 460 (9th Cir. 1994). The phrase "to the fullest extent possible"
5 is not "accidental nor hyperbolic." *Flint Ridge Dev. Co. v.*
6 *Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787 (1976).
7 Instead it directs that environmental factors be considered and
8 "not be shunted aside in the bureaucratic shuffle." *Id.*

9 There are however, exceptions to this rule. Where there is
10 a clear and unavoidable conflict in statutory authority, NEPA
11 gives way. *Id.* at 788. The test is "whether, assuming an
12 environmental impact statement would otherwise be required in
13 this case, requiring the Secretary to prepare such a statement
14 would create an irreconcilable and fundamental conflict with the
15 Secretary's duties." *Id.*; *Westlands*, 43 F.3d at 460 ("Only if
16 there is an 'irreconcilable' conflict between the statute and
17 NEPA will the requirements of NEPA not apply.").

18 The Hoopa Valley Tribe contends that there are two ways in
19 which NEPA is irreconcilable with CVPIA § 3406(b)(23): 1) the
20 statutorily mandated time period is too short to allow
21 compliance; and 2) the Secretary lacks discretion.

22 23 1. Statutorily Mandated Time Frame

24 There is an irreconcilable conflict when a statute mandates
25 a fixed time period for implementation and this time period is
26 too short to allow the agency to comply with NEPA. *Flint Ridge*,
27 426 U.S. at 791; *Westlands*, 43 F.3d at 460. In *Flint Ridge*, the
28 Supreme Court found that a 30-day window within which the

1 Secretary of Housing and Urban Development had to act, was too
2 short to allow compliance with NEPA and this caused
3 irreconcilable conflict. In *Westlands*, the Ninth Circuit held
4 CVPIA §§ 3406(b)(2) and (d)(1) were irreconcilable with NEPA
5 because upon enactment, the statute directed the Secretary to
6 take immediate action. *Westlands*, 43 F.3d at 460.

7 Section 3406(b)(23) of the CVPIA provides:

8 (A) by September 30, 1996, the Secretary, after
9 consultation with the Hoopa Valley Tribe, shall
10 complete the Trinity River Flow Evaluation Study
11 currently being conducted by the United States Fish and
12 Wildlife Service under the mandate of the Secretarial
13 Decision of January 14, 1981 . . . ; and
14 (B) not later than December 31, 1996, the Secretary
15 shall forward the recommendations of the Trinity River
16 Flow Evaluation Study, referred to in subparagraph (A)
17 of this paragraph, to [Congress]. If the Secretary and
18 the Hoopa Valley Tribe concur in these recommendations,
19 any increase to the minimum Trinity River instream
20 fishery releases established under this paragraph and
21 the operating criteria and procedures referred to in
22 subparagraph (A) shall be implemented accordingly. If
23 the Hoopa Valley Tribe and the Secretary do not concur,
24 the minimum Trinity River instream fishery releases
25 established under this paragraph shall remain in effect
26 unless increased by an Act of Congress, appropriate
27 judicial decree, or agreement between the Secretary and
28 the Hoopa Valley Tribe.

19 Pub. L. No. 102-575, § 3406(b)(23), 106 Stat. 4600, at 4720-21.¹³

20 The Hoopa Tribe concedes that the four years between the 1992
21 enactment of the CVPIA and the 3406(b)(23)(A) September 30, 1996
22 deadline provide sufficient time for the Secretary to comply with
23

24 ¹³ The Tribe argues that as a native tribe, the statute
25 should be construed in its favor. Generally statutes are to be
26 construed liberally in favor of tribes and ambiguities should be
27 decided in their favor. *Montana v. Blackfeet Tribe of Indians*,
28 471 U.S. 759, 766 (1985). The rule of statutory construction to
which the Tribe refers does not apply in this situation because
the statute is clear.

1 NEPA. The Tribe argues that implementation of restoration action
2 cannot be further postponed for additional NEPA review because:
3 1) the deadlines in Section 3406(b)(23) have already passed; and
4 2) Congress directed that review should end once the Tribe
5 concurred in the recommendation.¹⁴

6 In *Flint Ridge*, the Supreme Court held the phrase "to the
7 fullest extent possible" in 42 U.S.C. § 4332 was not to be used
8 to shunt aside consideration of environmental factors "in the
9 bureaucratic shuffle." *Flint Ridge*, 426 U.S. at 787. "The
10 purpose of the new language is to make it clear that each agency
11 of the Federal Government shall comply with the directives set
12 out in (§ 102(2)) Unless [sic] the existing law applicable to
13 such agency's operations expressly prohibits [sic] or makes full
14 compliance with one of the directives impossible [T]he
15 language in section 102 is intended to assure that all agencies
16 of the Federal Government shall comply with the directive set out
17 in said section 'to the fullest extent possible' under their
18 statutory authorizations and that no agency shall utilize an
19 excessively narrow construction of its existing statutory
20 authorizations to avoid compliance." *Id.* at 787-88 (quoting 115
21 Cong.Rec. 39703 (1969) (House conferees)).

22 Section 3406(b)(23), enacted in 1992, gave the Secretary
23

24 ¹⁴ At oral argument the Tribe also argued that there were
25 two deadlines in Section (b)(23) and the three-month period
26 between the first deadline and second deadline was too short for
27 NEPA review. Section (b)(23) requires the TRFES to be completed
28 by September 30, 1996 and that not later than December 31, 1996
the recommendations in the TRFES must be forwarded to Congress.
Separate NEPA analyses were not required, however, Interior did
not comply with either deadline.

1 four years to complete and present to Congress a flow and
2 restoration study of the Trinity River originally called for by
3 1984 legislation, which had been in progress for eleven years
4 (since 1981 when the original restoration studies commenced). By
5 the 1996 statutory deadline, the Secretary had taken 15 years to
6 prepare for and complete the NEPA process.¹⁵ As the federal
7 defendants admitted at oral argument, CVPIA § 3406(b)(23) does
8 not "irreconcilably and fundamentally conflict" with NEPA nor is
9 there a clear or unavoidable conflict. See *Jones v. Gordon*, 792
10 F.2d 821, 826 (9th Cir. 1986) ("*Flint Ridge* applies only when a
11 conflict is 'clear and unavoidable' and 'irreconcilable and
12 fundamental.'"). Compliance with both statutes was entirely
13 possible. The delay or inactions of the federal defendants
14 cannot create a statutory conflict. See *Forelaws on Board v.*
15 *Johnson*, 743 F.2d 677, 683-85 (9th Cir. 1984) (holding that
16 agency's failure to initiate EIS within 9-month statutory
17 deadline for action did not excuse NEPA compliance under *Flint*
18 *Ridge*).

19 If the requirements of NEPA are to have meaning, federal
20 agencies cannot be excused from compliance simply because they
21 move at glacial speed. To apply the *Flint Ridge* exception to
22 this case, where the federal agency had four years to comply with
23 NEPA and there was well-known statutory concern for compliance
24

25
26 ¹⁵ It was eighteen years from the time the study was
27 conceived until the TRFES was published, it was another year
28 before the Secretary presented the recommendations to Congress,
sought the Hoopa Valley Tribe's concurrence and was prepared to
act upon the recommendations.

1 with environmental laws,¹⁶ would negate NEPA review whenever
2 there is a statutory time deadline for action. Federal agencies
3 could avoid NEPA compliance simply by waiting long enough. This
4 defeats the congressional public scrutiny and participation
5 purposes embodied in NEPA. The *Flint Ridge* exception does not
6 apply.

7 The Hoopa Tribe argues that once it concurred in the
8 recommendations, immediate implementation was mandatory, and
9 under *Westlands* there was no more time to comply with the NEPA
10 requirements. Section 3406(b)(23) is not directly analogous to
11 Sections 3406(b)(2) and (d)(1). Sections (b)(2) and (d)(1)
12 require the Secretary to take action to operate the CVP as
13 directed immediately upon enactment. Section (b)(23) gave the
14 Secretary four years to act. The Tribe argues that the correct
15 performance time period is not the time between enactment and the
16 deadline, but between the Tribe's concurrence, signing of the ROD
17 and implementation of the flow and restoration recommendations.
18 This argument ignores that the Secretary had ample time to
19 complete the NEPA analysis within the statutorily allotted time.
20 If it was possible for the Secretary to perform a NEPA analysis,

21
22 ¹⁶ "The Secretary, immediately upon the enactment of this
23 title, shall operate the Central Valley Project to meet all
24 obligations under State and Federal law, including but not
25 limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et
26 seq. . . . " Pub. L. No. 102-575, § 3406(b). *Westlands*, holds
27 that the subsections of Section 3406(b) control over its general
28 statements. *Westlands*, 43 F.3d at 461. However, Section 3406(b)
is not quoted here for the purpose of determining which section
is controlling, but merely to note that at the time Section 3406
was passed, Congress was concerned about compliance with other
federal environmental laws.

1 NEPA and *Flint Ridge* require it be done. That the deadline
2 passed does not abrogate this duty. See *Forelaws*, 743 F.2d at
3 683-86 (holding EIS required despite the fact that the statutory
4 deadline for action had passed).¹⁷ *Flint Ridge* does not apply to
5 this case. Section (b)(23) requires both the Hoopa Valley
6 Tribe's and the Secretary's concurrence. If the Secretary did
7 not lawfully concur, the prerequisites for increasing flows under
8 (b)(23) were not met, whether or not the Hoopa Valley Tribe
9 concurred. Even if (b)(23) did preclude further NEPA analysis
10 after concurrence, joint concurrence was required.

11
12 2. Secretarial Discretion

13 The Tribe maintains the Secretary has no discretion not to
14 implement the flow recommendations after the Tribe concurred.
15 Where a federal agency lacks the ability to meaningfully
16 influence a particular action, the procedural requirements of
17 NEPA do not apply. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512-13
18 (9th Cir. 1995). "[NEPA's] procedural requirements are triggered
19 by a discretionary federal action." *Id.* at 1512.

20 Section 3406(b)(23) has several requirements: 1) the TRFES
21

22
23 ¹⁷ The Tribe argues that "the fact that the statute [sic]
24 did provide some time for NEPA review, and the fact that Interior
25 did engage in extensive NEPA review, is to conclude that the
26 statute allows for limited NEPA compliance." Hoopa Valley
27 Tribe's Reply, Doc. 285 at 6:14-16 (emphasis in original). The
28 Ninth Circuit in *Forelaws* disapproved a similar argument. It
found that an agency's environmental review that did not comply
with NEPA was not sufficient even though the agency only had a
statutorily mandated 9-month period in which to act. *Forelaws*,
743 F.2d at 683-85.

1 had to be completed by September 30, 1996; 2) not later than
2 December 31, 1996 the Secretary had to forward the TRFES
3 recommendations to several congressional committees; 3) if the
4 Secretary and the Hoopa Valley Tribe concurred in the
5 recommendations they were to be implemented accordingly. The
6 automatic, non-discretionary language was only operative after
7 both the Hoopa Valley Tribe and the Secretary concurred. The
8 Secretary had full discretion under Section 3406(b)(23), before
9 any concurrence, to scope, analyze, and decide what flow
10 recommendations to make to Congress. During the four year
11 statutorily authorized period for study and formulation of such
12 recommendations there was ample time to conduct a NEPA review.
13 The TRFER was not completed until June 1999. The EIS process
14 commenced in 1986. The DEIS was released October 19, 1999;
15 public comment was extended through January 20, 2000. The TRFER
16 was forwarded to Congress March 10, 2000; Biological Opinions
17 were issued October 12, 2000, and the FEIS/R was completed and
18 published November 17, 2000. The tribe signed the ROD December
19 19, 2000. The lack of discretion exception to NEPA compliance
20 does not apply. The Secretary was required to comply with NEPA
21 before making flow recommendations, a major federal action which
22 had the potential to adversely effect the environment.

23 There was adequate time to complete NEPA review before the
24 ROD was signed. The TRFER could not be implemented before that
25 time. The Hoopa Valley Tribe's motion for summary judgment, on
26 the issue that compliance with NEPA is not required because
27 §3406(b)(2) is irreconcilably inconsistent with NEPA, is DENIED.

28

1 B. NEPA CLAIMS

2 NEPA is the "the basic national charter for protection of
3 the environment." *Churchill County v. Norton*, 276 F.3d 1060,
4 1072 (9th Cir. 2001), amended by 282 F.3d 1055 (9th Cir. 2002)
5 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161
6 F.3d 1208, 1215 (9th Cir. 1998)). It is designed to ensure that
7 federal agencies will have available, and carefully consider,
8 detailed information concerning significant public impacts. *Id.*
9 It "guarantees that the relevant information will be made
10 available to the larger public audience." *Id.* (quoting *Robertson*
11 *v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).
12 "NEPA also 'emphasizes the importance of coherent and
13 comprehensive up-front environmental analysis to ensure informed
14 decision making to the end that the agency will not act on
15 incomplete information, only to regret its decision after it is
16 too late to correct.'" *Id.* at 1072-73 (quoting *Blue Mountains*,
17 161 F.3d at 1216)(internal citation omitted).

18 NEPA requires federal agencies to prepare an EIS for "every
19 recommendation or report on proposals for legislation and other
20 major Federal actions significantly affecting the quality of the
21 human environment." 42 U.S.C. § 4332(2)(C). Because NEPA does
22 not contain a judicial review provision, an agency's compliance
23 with NEPA is reviewed under the Administrative Procedure Act
24 ("APA"), 5 U.S.C. § 706(2)(A). *Ka Makani `O Kohala Ohana Inc. v.*
25 *Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002). A decision not
26 to prepare an EIS is reviewed under the arbitrary-and-capricious
27 standard, unless the agency does not perform an environmental
28 assessment. *Id.*; *Churchill County*, 276 F.3d at 1071. If there

1 is no environmental assessment, the reasonableness standard is
2 used. *Ka Makani*, 2002 WL 1401978A at *2.

3 The adequacy of an EIS is reviewed under the "rule of
4 reason" standard. *Churchill County*, 276 F.3d at 1071. "Under
5 this standard, we ask 'whether an EIS contains a reasonably
6 thorough discussion of the significant aspects of the probable
7 environmental consequences.'" *Id.* (quoting *Trout Unlimited v.*
8 *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). To determine
9 whether an EIS was reasonably thorough courts must make "a
10 pragmatic judgment whether the EIS's form, content and
11 preparation foster both informed decision-making and informed
12 public participation." *Id.* (quoting *California v. Block*, 690
13 F.2d 753, 761 (9th Cir. 1982)).

14 When deciding NEPA claims, a court may not impose its own
15 notion of which procedures are best. *Id.* at 1072. Instead, a
16 court's role is to take "a hard look." *Id.* "[NEPA] is not meant
17 to 'mandate particular results' but to provide a process to
18 ensure that federal agencies take a 'hard look' at the
19 environmental consequences of proposed acts. When an agency
20 makes a decision subject to the NEPA's procedural requirements,
21 'the only role for a court is to insure that the agency has
22 considered the environmental consequences; it cannot interject
23 itself within the area of discretion of the executive....'"
24 *Tillamook County v. U.S. Army Corps of Engineers*, 288 F.3d 1140,
25 1143-44 (9th Cir. 2002) (quoting *Strycker's Bay Neighborhood*
26 *Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980)). Courts must
27 strictly interpret the procedural requirements of NEPA "'to the
28 fullest extent possible' consistent with the policies embodied in

1 NEPA." *Churchill*, 276 F.3d at 1072.

2 Plaintiffs move for summary judgment on six NEPA issues: 1)
3 the Preferred Alternative's impact on the ESA-listed species in
4 the Sacramento River and Delta was not adequately assessed; 2)
5 the impacts of mitigation measures mandated by the BioOps were
6 not properly assessed; 3) the impacts of the Preferred
7 Alternative on power system reliability were not adequately
8 assessed; 4) Interior improperly applied a wrongfully narrowed
9 EIS purpose to artificially restrict the range of alternatives
10 considered under NEPA; 5) Interior failed to consider and adopt
11 an integrated management alternative; and, 6) the EIS was
12 performed too late.

13
14 1. Assessment of Sacramento River and Delta ESA-Listed
15 Species

16 The claim the DEIS does not analyze the effects of the
17 Preferred Alternative on endangered fish species in the
18 Sacramento River and Delta, and that the issuance of the BioOps
19 did not cure the violation, centers on the contention the public
20 did not have an opportunity to review and comment on the BioOps'
21 analyses. The Preferred Alternative recognizes two overriding
22 objectives: increasing anadromous natural fish production and
23 allowing continued water exports and flood control. EIS 2-3.
24 One screening opportunity adopted as part of the Preferred
25 Alternative is to balance environmental and social beneficial and
26 adverse impacts across the Trinity River Basin, Lower Klamath
27 River Basin, Coastal Area, and Central Valley Basin. *Id.*
28 Plaintiffs advance three contentions: 1) the DEIS did not discuss

1 the Preferred Alternative's direct effects and significance on
2 the Sacramento River and Delta ESA-listed species; 2) when
3 notified of the deficiency, Interior failed to recirculate or
4 adequately supplement the DEIS; and, 3) the addition of language
5 from the BioOps to the FEIS did not cure the DEIS' deficiencies.
6 The federal defendants and the Hoopa Tribe argue the DEIS
7 contained adequate analysis of the Preferred Alternative's impact
8 on the Sacramento ESA-listed species, that the DEIS did not need
9 to be recirculated, and that the inclusion of additional
10 information in the FEIS was sufficient.

11
12 a. DEIS Analysis on Sacramento ESA-Listed Species

13 Plaintiffs claim, "while the DEIS admits that the Preferred
14 Alternative could cause 'significant impacts' associated with the
15 'increased frequency of Sacramento basin temperature and
16 carryover storage violations,' the DEIS does not analyze those
17 impacts. 18 AR 10653. Rather, it states that these impacts
18 'would need to be evaluated by the NMFS pursuant to ESA.'" 18 AR
19 10653." Doc. 244 at 5:3-6 (NCPA P & A's). Defendants point to
20 numerous sections of the DEIS that analyze these impacts.

21 There is some merit to each position. The DEIS does analyze
22 the impact of the Preferred Alternative on the ESA-listed species
23 in the Sacramento River and Delta. DEIS at 3-167-169 3-172-173,
24 3-175-177, 3-179-184, B-60-61, B-65, B-74-75, B-77-78, B-89-90.
25 "Compared to existing conditions, the Preferred Alternative would
26 adversely affect fall, winter, and spring chinook salmon by
27 significantly increasing mortality of early life stages of these
28 species within the upper Sacramento River." DEIS, at 3-178.

1 "[D]uring all months from February through June, Delta outflows
2 were greater than 10 percent of the years simulated (Table 3-16).
3 Those reductions in Delta outflow may be significant and may
4 adversely affect habitat for Delta species." DEIS, at 3-184.
5 The DEIS does not consider or identify mitigation measures for
6 the admitted significant impacts to those species, except to
7 specify "mitigation for impacts to the Delta smelt and Sacramento
8 splittail would consist of consulting with the Service on impacts
9 and implementing any 'required conservation measures.'" DEIS, at
10 3-184.¹⁸ This defers consideration of mitigation efforts to the
11 BioOps.¹⁹ "In that the potential adverse effects to listed
12 species identified in the DEIS/EIR are the subject of
13

14 ¹⁸ See also DEIS 3-178:

15 Significant impacts requiring mitigation for adverse
16 effects to anadromous salmonids in the Sacramento River
17 system associated with the Maximum Flow, Flow
18 Evaluation, and Percent Inflow Alternatives would
19 include reconsultation with NMFS under the 1993
20 Biological Opinion for Winter Chinook Salmon. In those
21 years (primarily drought conditions) when carryover
22 storage in Shasta Reservoir is less than 1.9 maf,
23 Reclamation and NMFS would re-initiate consultation in
24 an attempt to minimize losses of winter chinook salmon.
25 Reclamation would re-operate Shasta Dam in an effort to
26 reduce losses of winter chinook salmon to less than
27 that resulting in a jeopardy opinion.

28 No mention is made of what the re-operation of Shasta Dam would
entail or what effects it would have.

¹⁹ Under the Water Quality section of the DEIS, some
possible mitigation measures are discussed for the increased
number of temperature and carryover storage violations that are
expected to occur as a result of implementing the Flow Evaluation
Alternative. DEIS, at 3-149.

1 consultation under Section 7 of the Endangered Species Act (ESA),
2 with both the U.S. Fish and Wildlife Service (Service) and
3 National Marine Fisheries Service (NMFS), it was entirely
4 appropriate to defer describing specific minimization actions
5 until the consultations had been completed." FEIS, D2-65.
6 Consideration of the impacts, not only on Delta species, but all
7 other secondary impacts which would result, were necessarily
8 deferred to future analysis.

9 The Council on Environmental Quality (CEQ) regulations,
10 which implement NEPA, require a DEIS be prepared and circulated
11 prior to the issuance of an FEIS. 40 C.F.R. 1502.9(a). The DEIS
12 "must fulfill and satisfy to the fullest extent possible the
13 requirements established for final statements." *Id.* "If a draft
14 statement is so inadequate as to preclude meaningful analysis,
15 the agency shall prepare and circulate a revised draft of the
16 appropriate portion." *Id.* The CEQ regulations further direct
17 that a DEIS or FEIS be supplemented if "there are significant new
18 circumstances or information relevant to environmental concerns
19 and bearing on the proposed action or its impacts." 40 C.F.R. §
20 1502.9(c)(ii). CEQ regulations provide that "[t]o the fullest
21 extent possible, agencies shall prepare draft environmental
22 impact statements concurrently with and integrated with
23 environmental impact analyses and related surveys and studies
24 required by . . . the Endangered Species Act of 1973, and other
25 environmental review laws and executive orders." 40 C.F.R. §
26 1502.25(a).

27 The question here is whether the DEIS's deferral to future
28 BioOps, rather than identifying impacts and discussing mitigation

1 measures in the DEIS, fails to provide "meaningful analysis." An
2 EIS must contain a discussion of possible mitigation measures.
3 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52
4 (1989); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468,
5 473 (9th Cir. 2000); *Neighbors of Cuddy Mountain v. U.S. Forest*
6 *Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). "Implicit in
7 NEPA's demand that an agency prepare a detailed statement on 'any
8 adverse environmental effects which cannot be avoided should the
9 proposal be implemented,' is an understanding that the EIS will
10 discuss the extent to which adverse effects can be avoided."
11 *Robertson*, 490 U.S. at 351-52 (quoting 42 U.S.C. § 4332(C)(ii))
12 (internal citations omitted). "Without such a discussion,
13 neither the agency nor other interested groups and individuals
14 can properly evaluate the severity of the adverse effects." *Id.*
15 Failure to discuss possible mitigating measures precludes the
16 parties from meaningful analysis and Interior did not circulate a
17 revised draft.²⁰

18
19 b. Timing of the EIS

20 Plaintiffs' assertion that a final EIS should have been
21 completed before the Trinity River flow study was submitted to
22 countered is answered by Interior's position that the EIS was
23 programmatic and project specific and centered on the

24
25 ²⁰ Interior argues section 1502.25 directs a DEIS be
26 prepared concurrently with studies required under other
27 environmental laws. However, the consultation that resulted in
28 the BioOps in this case did not occur until approximately seven
months after the DEIS was circulated. The discussion of
mitigation measures was left up to an unspecified future study.

1 recommendations for restoring Trinity River flows and related
2 measures to rehabilitate the fishery, which in turn had to be
3 reviewed by Congress and then concurred in by the Hoopa Valley
4 Tribe. FEIS pp. 1-3. Title 40 C.F.R. §1508.25(a)(2) authorizes
5 a programmatic EIS for "[cumulative actions, which, when viewed
6 with other proposed actions, have cumulatively significant
7 impacts and therefore should be discussed in the same impact
8 statement." Interior correctly maintains that the flow study was
9 one of several related actions appropriately discussed in a
10 single FEIS which incorporated all components of the Trinity
11 River restoration plan and culminated in the ROD, for which the
12 FEIS was prepared. Requiring a separate EIS for each component
13 of a single major federal action could unduly delay and overtax
14 governmental resources. *March v. Oregon Natural Resources*
15 *Council*, 490 U.S. 360-71 (1989).

16 However, where, as here, most of the Agency's discussion and
17 response to disputed issues of impacts is not presented until
18 long after the public comment period on the DEIS closed and
19 substantial issues were raised which were not subjected to
20 informed public participation, the NEPA process broke down.

21
22 c. Inclusion of Mitigation Factors in FEIS

23 Plaintiffs argue that the inclusion of mitigation factors in
24 the FEIS did not correct the deficiency in the DEIS because the
25 FEIS mitigation factors were taken from the two BioOps which were
26 excluded from public scrutiny and not subjected to public
27 comment. Plaintiffs request the ROD be set aside.

28 NEPA serves dual purposes: "It ensures that the agency, in

1 reaching its decision, will have available, and will carefully
2 consider, detailed information concerning significant
3 environmental impacts; it also guarantees that the relevant
4 information will be made available to the larger audience that
5 may also play a role in both the decisionmaking process and the
6 implementation of that decision." *Robertson*, 490 U.S. at 349
7 ("It gives the public the assurance that the agency has indeed
8 considered environmental concerns in its decisionmaking process,
9 and, perhaps more significantly, provides a springboard for
10 public comment.") (internal quotations and citations omitted);
11 *Northwest Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*,
12 56 F.3d 1060, 1064 (9th Cir. 1995) ("The purposes of an EIS are
13 to provide decisionmakers with sufficiently detailed information
14 to aid in determining whether to proceed with the action in light
15 of its environmental consequences and to provide the public with
16 information and an opportunity to participate in the information
17 gathering process.").

18 Inclusion of new information in the FEIS (bypassing public
19 input) does not automatically invalidate the FEIS. The CEQ
20 regulations provide a procedure by which new information in an
21 FEIS may be subjected to NEPA review. 40 C.F.R. § 1502.9(c).
22 That procedure determines whether information is significant
23 enough to warrant additional public comment, as part of the
24 flexibility agencies have in responding to public concerns. See
25 *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982) ("To
26 effectuate [the purpose of public comment], agencies must have
27 some flexibility to modify alternatives canvassed in the draft
28 EIS to reflect public input.").

1 Section 1502.9(c) provides that an agency shall prepare a
2 supplement to a draft or final EIS if: 1) there are substantial
3 changes in the proposed action that are relevant to the
4 environmental concerns; or 2) there are environmentally relevant,
5 significant,²¹ new circumstances or information that bear on the
6

7 ²¹ The CEQ regulations define significantly as:
8 "Significantly" as used in NEPA requires considerations
9 of both context and intensity:

10 (a) Context. This means that the significance of an
11 action must be analyzed in several contexts such as
12 society as a whole (human, national), the affected
13 region, the affected interests, and the locality.
14 Significance varies with the setting of the proposed
15 action. For instance, in the case of a site-specific
16 action, significance would usually depend upon the
17 effects in the locale rather than in the world as a
18 whole. Both short- and long-term effects are relevant.

19 (b) Intensity. This refers to the severity of impact.
20 Responsible officials must bear in mind that more than
21 one agency may make decisions about partial aspects of
22 a major action. The following should be considered in
23 evaluating intensity:

24 (1) Impacts that may be both beneficial and
25 adverse. A significant effect may exist even if the
26 Federal agency believes that on balance the effect will
27 be beneficial.

28 (2) The degree to which the proposed action
affects public health or safety.

(3) Unique characteristics of the geographic area
such as proximity to historic or cultural resources,
park lands, prime farmlands, wetlands, wild and scenic
rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality
of the human environment are likely to be highly
controversial.

(5) The degree to which the possible effects on
the human environment are highly uncertain or involve
unique or unknown risks.

(6) The degree to which the action may establish a
precedent for future actions with significant effects

1 proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1). "[A]n
2 agency need not supplement an EIS every time new information
3 comes to light after the EIS is finalized. To require otherwise
4 would render agency decisionmaking intractable, always awaiting
5 updated information only to find the new information outdated by
6 the time a decision is made." *Marsh v. Oregon Natural Res.*
7 *Council*, 490 U.S. 360, 373 (1989). However, "[i]f there remains
8 major Federal action to occur, and the new information is
9 sufficient to show that the remaining action will affect the
10 quality of the human environment in a significant manner or to a
11 significant extent not already considered a supplemental EIS must
12 be prepared." *Id.* at 374.

14 or represents a decision in principle about a future
15 consideration.

16 (7) Whether the action is related to other actions
17 with individually insignificant but cumulatively
18 significant impacts. Significance exists if it is
19 reasonable to anticipate a cumulatively significant
20 impact on the environment. Significance cannot be
21 avoided by terming an action temporary or by breaking
22 it down into small component parts.

23 (8) The degree to which the action may adversely
24 affect districts, sites, highways, structures, or
25 objects listed in or eligible for listing in the
26 National Register of Historic Places or may cause loss
27 or destruction of significant scientific, cultural, or
28 historical resources.

(9) The degree to which the action may adversely
affect an endangered or threatened species or its
habitat that has been determined to be critical under
the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of
Federal, State, or local law or requirements imposed
for the protection of the environment.

40 C.F.R. § 1508.27.

1 New information is significant where it "provides a
2 seriously different picture of the environmental landscape."
3 *City of Olmsted Falls, Ohio v. Fed. Aviation Admin.*, 292 F.3d
4 261, 274 (D.C. Cir. 2002); see also *Davis v. Latschar*, 202 F.3d
5 359, 369 (D.C. Cir. 2000) ("[O]nly those changes that cause
6 effects which are significantly different from those already
7 studied require supplementary consideration.") (internal
8 quotations omitted). "[T]he key to whether a Supplemental
9 Environmental Impact Statement is necessary is . . . whether the
10 proposed [work] will have a significant impact on the environment
11 in a manner not previously evaluated and considered." *South*
12 *Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d
13 658, 663 (3d Cir. 1999).

14 An agency decision to forego completing an SEIS will not be
15 set aside unless it is arbitrary and capricious. *Friends of the*
16 *Clearwater v. Dombeck*, 222 F.3d 552, 556 (9th Cir. 2000).
17 "Review under this standard is to be searching and careful, but
18 remains narrow, and a court is not to substitute its judgment for
19 that of the agency." *Id.* (quoting *Mt. Graham Red Squirrel v.*
20 *Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).

21 Here, as discussed below, Interior decided all the "new"
22 information was not significant enough to warrant a supplemental
23 EIS or "recirculation." "Normally, an agency rule would be
24 arbitrary and capricious if the agency has relied on factors
25 which Congress has not intended it to consider, entirely failed
26 to consider an important aspect of the problem, offered an
27 explanation for its decision that runs counter to the evidence
28 before the agency, or is so implausible that it could not be

1 ascribed to a difference in view or the product of agency
2 expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*
3 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *O'Keefe's,*
4 *Inc. v. U.S. Consumer Product Safety Comm'n*, 92 F.3d 940, 942
5 (9th Cir. 1996). "[T]he agency must examine the relevant data
6 and articulate a satisfactory explanation for its action
7 including a rational connection between the facts found and the
8 choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43;
9 *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1525 (9th
10 Cir. 1995).

11 In this case, Interior discussed in the FEIS whether an SEIS
12 was necessary based on the new information. It concluded without
13 analysis or factual support, that the new information in the FEIS
14 was "mainly for clarification purposes and does not represent
15 significant new information requiring recirculation." FEIS D2-
16 71. Evaluating the significance of the new information under the
17 "seriously different picture" standard, Interior concluded that
18 "none of the new information in the Final EIS rises to that
19 level." FEIS D2-72. This legal conclusion is wrong for the DEIS
20 as to Delta-Sacramento River species, BioOp RPMs, range and
21 substance of a reasonably integrated management alternative, and
22 hydropower impacts, and because the DEIS deferred all these
23 issues, the public notice and comment period closed January 20,
24 2000, and the FEIS issued November 17, 2000, does not take a hard
25 look at any of the issues raised. Interior does not discuss why
26 it believes that the "new information" is not significant and
27 none of its responses in the FEIS analyzes the merits of new
28

1 mitigation measures;²² instead it offers an argumentative
2 justification for avoiding supplemental considerations by its
3 legal conclusion that all the issues raises are insignificant.
4 Plaintiffs gave notice of concerns about impacts on such species
5 and related issues in the public comment period. 18 AR 10653, 29
6 AR 17492-93, 19537-38. Because Interior did not critically
7 examine the relevant data or articulate the basis for its
8 decision not to supplement the EIS, which did not identify any
9 specific mitigation measures or probable secondary effects of
10 flow increases on Sacramento River and Delta species, but rather
11 deferred to future BioOps and/or ESA reconsultations, the
12 significance of this failure must be analyzed.²³

13 *Block v. California* analyzes the need for a supplemental
14 DEIS to address information discussed for the first time in an
15 FEIS and holds that although agencies must have some flexibility
16

17 ²² After describing the legal standard for determining
18 whether an SEIS is required, the entirety of the FEIS' analysis
19 of whether the new information requires supplementation is:

20 The new information included in the EIS/EIR does not
21 include anything that triggers recirculation under
22 these standards. In particular, the final document
23 does not reveal any new significant effects, or
24 substantial increases in previously identified
25 significant effects. Nor can any reviewer credibly
26 assert that the DEIR portion of the Draft environmental
27 document was "so fundamentally and basically inadequate
28 and conclusory in nature that meaningful public review
and comment were precluded."

FEIS at D2-72.

26 ²³ In the thematic response "Mitigation to Listed
27 Species/ESA Consultation," Interior again simply stated that it
28 was appropriate to "defer discussion of mitigation matters."
FEIS, at D2-65.

1 in modifying alternatives contained in a DEIS, an EIS must
2 provide the public with sufficient information to permit
3 meaningful consideration. *Block*, 690 F.2d at 771-72. "The EIS
4 process should serve both to alert the public of what the agency
5 intends to do and to give the public enough information to be
6 able to participate intelligently in the EIS process." *Id.* at
7 772.

8 Here the additional information, added after the DEIS was
9 circulated, addressed mitigation factors. The DEIS does not
10 discuss mitigation factors related to the Sacramento River and
11 Delta ESA-listed species nor the secondary effects of increased
12 flows on other CVP-water users. An EIS must contain a discussion
13 of possible mitigation measures. *Robertson*, 490 U.S. at 351-52;
14 *Okanogan*, 236 F.3d at 473; *Neighbors of Cuddy Mountain*, 137 F.3d
15 at 1380; see also 40 C.F.R. § 1502.14(f) (mitigation measures
16 shall be included in discussion of alternatives); 40 C.F.R. §
17 1502.16(h) (mitigation measures required). "Implicit in NEPA's
18 demand that an agency prepare a detailed statement on 'any
19 adverse environmental effects which cannot be avoided should the
20 proposal be implemented,' is an understanding that the EIS will
21 discuss the extent to which adverse effects can be avoided."
22 *Robertson*, 490 U.S. at 351-52 (quoting 42 U.S.C. § 4332(C)(ii))
23 (internal citations omitted). "[O]mission of a reasonably
24 complete discussion of possible mitigation measures would
25 undermine the 'action-forcing' function of NEPA. Without such a
26 discussion, neither the agency nor other interested groups and
27 individuals can properly evaluate the severity of the adverse
28 effects." *Id.*

1 *Block* requires that a supplemental EIS be prepared if the
2 public was not given sufficient information to intelligently
3 participate in the NEPA process. *Block*, 690 F.2d at 771-72.
4 *Robertson* holds that failure to include mitigation measures
5 prevents the public from properly evaluating the proposed action.
6 *Robertson*, 490 U.S. at 351-52. Under the *Block* test, the
7 inclusion of previously undisclosed mitigation measures is
8 significant enough to require an SEIS.

9 Courts have also determined that an SEIS is required if the
10 changes cause effects which are significantly different from
11 those already studied. *Davis*, 202 F.3d at 369. Here, the DEIS
12 recognized that the impact on Sacramento River and Delta ESA-
13 listed species, salmon, Sacramento splittail, and Delta smelt,
14 was significant, but deferred determination of any mitigation
15 measures for future consideration. The failure to analyze, or
16 even identify, mitigation measures to address changes that will
17 be caused by the new flow regime and their effects, have an
18 undetermined potential to be different from those already
19 studied. See *Robertson*, 490 U.S. at 352 ("An adverse effect that
20 can be fully remedied by, for example, an inconsequential public
21 expenditure is certainly not as serious as a similar effect that
22 can only be modestly ameliorated through the commitment of vast
23 public and private resources."). The omission of discussion of
24 mitigation measures foreclosed any public input on the issues of
25 whether and what CVP operations management alternatives existed
26 and were feasible; and whether alternate water sources existed or
27 if reduced flows could reduce the impact on species and other CVP
28 users.

1 Two of the factors listed in 40 C.F.R. § 1508.27, that
2 affect whether action is significant, are the likelihood that the
3 action will be highly controversial, 40 C.F.R. § 1508.27(b)(4),
4 and the degree to which the action may adversely affect an
5 endangered species, 40 C.F.R. § 1508.27(b)(9). Interior knew
6 that any decision it made relating to increased permanent Trinity
7 River flow releases and its effects on the Sacramento and Delta
8 ESA-listed species and secondary effects on power generators,
9 municipal, industrial, and agricultural water users, was going to
10 be controversial and significant within the meaning of 40 C.F.R.
11 §1502.9(b)(2), (3), (4), and (7). Prior to the issuance of the
12 BioOps or the FEIS, San Luis submitted comments criticizing the
13 DEIS on these grounds and Westlands sent a 60-day notice of
14 intent to sue unless formal ESA Section 7 consultation was
15 undertaken. Interior also had specific knowledge that the new
16 information was related to how Sacramento river and south of the
17 Delta endangered species would be affected by increased TR flows.

18 Defendants' collective response in contending Interior was
19 not arbitrary or capricious, is to ignore the absence of
20 consideration of mitigation measures in the DEIS: their identity,
21 significance, effectiveness, effects, and controversy over their
22 substance and range. Any discussion was included for the first
23 time in the FEIS without public input and used as a post hoc
24 rationalization for the decision not to supplement the EIS on the
25 grounds that species' and other impacts resulting from the
26 Preferred Alternative are not significant. Applicable NEPA
27 regulations require more, see 40 C.F.R. § 1502.9(c), and as to
28 revised portions of the DEIS, see 40 C.F.R. § 1502.9(a).

1 Anecdotal evidence indicates Interior chose to assume the
2 risk of apparent NEPA violations after the March 10, 2000, ESA
3 notice. 7 AR 3865, 3894, 10 AR 20174, (Ex. A to Robinson Dec.).
4 Interior as much as admits it could not cure the NEPA violations
5 that had occurred as of that time.

6
7 2. Effect of BioOps

8 Plaintiffs argue that the ROD should be set aside because:

9 1) Interior failed to assess the environmental impacts of the
10 BioOps' mitigation measures in the FEIS; and, 2) even if Interior
11 did analyze the RPMs, inclusion in the FEIS requires an SEIS.
12 Plaintiffs argument implicates two of the BioOps' reasonable and
13 prudent measures ("RPMs"):

14 1) The USFWS' RPM:

15 Reclamation shall minimize the effects of
16 reoperating the CVP resulting from the implementation
17 of the Preferred Alternative within the Trinity river
18 basin on listed fish in the Delta. . . . These terms
and conditions are non-discretionary. To implement
Reasonable and Prudent Measure number one Reclamation
must implement the following:

- If Reclamation in its annual operations
planning process detects that implementation
of the Preferred Alternative will result in
an upstream (eastward) movement of X2²⁴ in
any month between February 1 through June 30
of 0.5 km, Reclamation shall incorporate
within its operating plan measures that can
and will be implemented to minimize or
eliminate such upstream movements.

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²⁴ X2 is the water quality standard that measures salinity
by the number of kilometers upstream or eastward, of the Golden
Gate Bridge that water in the Sacramento-San Joaquin River Delta
has an electroconductivity of 2.64 mmhos/cm. Salinity improves
by moving westward when fresh water enters the Delta.

1 AR 17537-38 (footnote added).

2 2) The NMFS' RPM:

3 7. In dry and critically dry water year types,
4 Reclamation and USFWS shall work cooperatively with the
5 upper Sacramento River Temperature Task Group to
6 develop temperature control plans that provide for
7 compliance with temperature objectives in both the
8 Trinity and Sacramento rivers . . .

9 The USFWS and Reclamation must comply with the
10 following terms and conditions, which implement the
11 reasonable and prudent measures described above. These
12 terms and conditions are non-discretionary.

13
14 7.a. Be prepared to make use of auxiliary bypass
15 outlets on Trinity Dam as needed

16 AR 17493-94. These RPMs were incorporated into the FEIS, pages
17 2-43-45, and the ROD, AR 17703.

18 a. Assessment of BioOps in FEIS

19 Plaintiffs argue that the BioOps RPMs are "connected
20 actions" that had to be considered in an FEIS and are invalid
21 because Interior did not do so. Defendants respond that these
22 mitigation measures were analyzed in the FEIS and that the
23 actions are not connected.

24 i. Connected Actions

25 Section 1508.25 of Title 40, C.F.R. defines "connected
26 actions" as those that "are closely related and therefore should
27 be discussed in the same impact statement." 40 C.F.R.

28 § 1508.25(a). Actions are connected if they:

- 29 (i) Automatically trigger other actions which may
30 require environmental impact statements.
- 31 (ii) Cannot or will not proceed unless other actions
32 are taken previously or simultaneously.
- 33 (iii) Are interdependent parts of a larger action and
34 depend on the larger action for their justification.

35 *Id.* The federal defendants argue that the BioOps and the EIS are

1 not "connected actions," but are rather "a single federal action,
2 approval of the ROD to approve fishery restoration measures."²⁵
3 Doc. 258 at 20:16-21:1. Section 1502.4(a) provides that
4 "[p]roposals or parts of proposals which are related to each
5 other closely enough to be, in effect, a single course of action
6 shall be evaluated in a single impact statement." 40 C.F.R.
7 § 1502.4(a). Whether the actions are "connected actions" as
8 argued by NCPA, or "a single action" as argued by the federal
9 defendants, the result is the same: they should be evaluated in a
10 single EIS. The March 22, 2001 memorandum decision notes:
11 "There is no question that the two BioOps are 'interdependent
12 parts of a larger action,' . . . depending on implementation of
13 the preferred alternative for their justification, because the
14 only reason for the X2 measure is that the ROD's implementation
15 of the FEIS's preferred alternative . . . reduces the water now
16 flowing. . . ." Doc. 136 at 47 n.49. The "actions" which caused
17 the need for the BioOps are the increase of flows in the Trinity
18 River to re-establish and maintain the fishery which results in
19 less water reaching the Sacramento Delta. The ROD and the FEIS
20 adopted and incorporated the BioOps' RPMs as mitigation measures.
21 Whatever nomenclature is applied to the relationship between the
22 BioOps' RPMs, the EIS, and the ROD, the end result is that they
23 are inextricably intertwined as part of the same action to
24 restore Trinity River fishery, which in turn requires they be

25
26
27 ²⁵ It appears that this argument was made to respond to an
28 argument that separate EISS were required for the BiOps.
Plaintiffs no longer advance that argument.

1 analyzed in the same EIS.²⁶ Interior admits it was required to
2 comply with NEPA and the ESA in implementing §3406(b)(23), but
3 argues issuing the ROD, a single federal action, was not a series
4 of connected, independent actions which required two separate
5 FEISs. The distinctions made by the parties are without
6 meaningful difference. Interior rejoins that the FEIS, App. D-2
7 at pp. 65-66, discusses impact on species and ways to minimize
8 incidental takings. The ROD is the end result of an integrated
9 series of actions, which did not require a separate EIS for each
10 action.

11
12 ii. Central Valley Species

13 The October 12, 2000, Reinitiation of Formal Consultation
14 and Biological Opinion authored by USFWS focused on status of
15 species including Delta smelt (AR 17518) and Sacramento
16 splittail. (AR 17520). Analysis of the implementation of the
17 Preferred Alternative on Delta smelt and Sacramento splittail
18 appears at AR 17532-34 and its cumulative effects at AR 17535-36.
19 The effects analysis focuses on temperature changes, entrainment
20 by pumps during diversions of water, moving fish habitat upstream
21 in times of decreased outflows, effects of toxic substances on
22 spawning habitat, state or local levee maintenance, introduction
23 of exotic species, wave action in water channels, degrading banks
24

25
26 ²⁶ This does not mean that all BioOps necessarily require
27 NEPA review. Here the mitigation measures of the BioOps were
28 incorporated into the FEIS and the ROD and will expect major
federal action. It is the adequacy of the FEIS and the NEPA
review for the ROD that is disputed.

1 or channels, and changes in flow levels. The cumulative effects
2 are considered "not likely" to jeopardize continued existence of
3 the smelt or splittail or to result in the destruction or adverse
4 modification of critical habitat. The ITS recognizes Delta smelt
5 and Sacramento splittail may be harmed, harassed, injured, or
6 killed by direct entrainment, but implementation of the Preferred
7 Alternative flow levels on incidental take is expected to remain
8 at the level of the March 6, 1995, Biological Opinion. The USFWS
9 RPMs do not specify what CVP operational measures will be
10 implemented to minimize or eliminate upstream X2 movement greater
11 than .5km in any month between the period from February 1st
12 through June 30th. Reporting about take or suspected take will
13 be continuous.

14 The NMFS Biological Opinion of October 12, 2000, identifies
15 coho salmon, chinook salmon, and steelhead as Central Valley and
16 Sacramento River endangered or threatened species, and analyzes
17 effects of Preferred Alternative on these species at AR 17472 to
18 17489. Extended temperature analysis is performed using
19 temperature criteria and reservoir carryover storage. Increased
20 temperature violations are recognized at AR 17482 and use of
21 Trinity Dam auxiliary outlets to improve temperature conditions
22 by bypass operations from July to October are recommended. NFMS
23 concludes that with auxiliary bypasses, Trinity River temperature
24 criteria can be achieved 95% to 96% of the time without altering
25 the timing of exports to the Sacramento River. The analysis
26 opines that changes to X2 location under the proposed action are
27 not likely to adversely affect winter run chinook salmon in the
28 Delta, AR 17484, referring to Table 3-15 of the TRMFR DEIS, the

1 upper Sacramento River, AR 17485, and reaches the same conclusion
2 for Central Valley steelhead. AR 17485-86. The NMFS BioOp
3 summary finds no change to temperature-related mortality of
4 spring-run chinook salmon and steelhead, no effect in the Delta
5 on smelt survival, and no appreciable diminution of critical
6 habitat that affect fish mortality. The NMFS BioOp analyzes
7 cumulative effects on the Central Valley species at AR 17489 and
8 concludes at AR 17490, that the Preferred Alternative is not
9 likely to jeopardize continued existence of any salmon species
10 nor is it likely to destroy or adversely modify critical habitat.
11 What the NMFS BioOp does not do is to analyze what effect on
12 power generation the bypass alternative will have or whether
13 there will be related CVP reoperations such as reallocation of
14 additional CVP water.

15
16 iii. Were the RPMs Analyzed in the EIS?

17 Plaintiffs argue that the impacts of the mitigation measures
18 specified by the BioOps and incorporated by the FEIS were not
19 analyzed in the EIS nor subjected to public comment. They
20 maintain that it was impossible to do so, because the BioOps were
21 not issued until shortly before the FEIS was released.
22 Defendants rejoin that the mitigation measures were analyzed in
23 the FEIS,²⁷ albeit without public participation.

24
25 _____
26 ²⁷ Defendants also argue that the RPMs are not as
27 restrictive as plaintiffs imply and that the RPMs merely mandate
28 the process Interior must follow to mitigate harms to ESA-listed
species and not specific actions. This argument is addressed
below.

1 A. Auxiliary Bypass RPM

2 The impact of the mitigation measure to use the auxiliary
3 bypass outlets at Trinity Dam was discussed in the FEIS. The
4 "Powerplant Bypass" thematic response refers to temperature
5 control benefits and costs to CVP power customers of using the
6 auxiliary bypass outlets. FEIS at D2-79-90. Interior discussed
7 the relation of CVP power generation to total California powers
8 generation and demand, but does not break out Northern California
9 effects. *Id.* at D2-91-101. It concluded any CVP power supply
10 was not critical to the total California electrical demand. *Id.*
11 at D2-91-92. It is not disputed that the DEIS and public comment
12 phase did not analyze power impacts except from a socioeconomic
13 standpoint. 22 AR 13320.

14 As to temperature control ramifications, Interior relies on
15 the upper Sacramento River Temperature Task Group "to develop
16 future temperature controls and flows," without specific analysis
17 of what means will be utilized to achieve temperature objectives
18 or the resulting impacts. A nondiscretionary condition to "make
19 use of auxiliary bypass outlets on Trinity Dam, as needed" is
20 imposed. 27 AR 17492-494. No reference is made to whether
21 additional CVP water will be needed for any auxiliary bypass.

22 The applicable "rule of reason." *Churchill County*, 276 F.3d
23 at 1071, asks "whether an EIS contains a reasonably thorough
24 discussion of the significant aspects of the probable
25 environmental consequences." *Id.* (quoting *Trout Unlimited v.*
26 *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). There was no
27 public input in the discussion in the FEIS related to the impact
28 of using the auxiliary bypass outlets. The FEIS did not need to

1 specifically name the BioOps as plaintiffs contend, if it
2 discussed the subject matter of the impact of the BioOps RPMs
3 with reasonable thoroughness, however, the FEIS does not perform
4 such an analysis.

5
6 B. X2 RPM

7 As to the X2 RPM, the parties' arguments highlight different
8 understandings of what has to be analyzed. As defendants argue,
9 the FEIS discussed the impact of X2 movement on Delta ESA-listed
10 species. The Preferred Alternative does not mandate moving the
11 measurement location for X2, nor does it change the X2 standard.
12 It is not possible to know the effect that X2 RPM compliance will
13 have, because defendants did not identify or analyze the impact
14 of any mitigation measures which actually will be used to address
15 X2 effects. Rather, defendants respond, based on USFWS and FMS
16 input, that effects of X2 compliance are insignificant, and if X2
17 measures are needed, "ESA reconsultation will be reinitiated."
18 There is no discussion of where additional water will come from,
19 or what quantity will be needed to maintain the X2 standard
20 within or close to 0.5km of its required location.²⁸

21 Implementation of the Preferred Alternative admittedly will
22

23 ²⁸ An impact can be positive or negative and direct or
24 indirect. 40 C.F.R. § 1508.8 ("Effects includes ecological (such
25 as the effects on natural resources and on the components,
26 structures, and functioning of affected ecosystems), aesthetic,
27 historic, cultural, economic, social, or health, whether direct,
28 indirect, or cumulative. Effects may also include those
resulting from actions which may have both beneficial and
detrimental effects, even if on balance the agency believes that
the effect will be beneficial.").

1 affect the Sacramento River and Delta ESA-listed species to some
2 degree. The FEIS incorporates future unspecified mitigation
3 measures to lessen these effects. These mitigation measures in
4 turn cause effects; impacts, direct or indirect, and their
5 significance must be analyzed. 40 C.F.R. §§ 1502.16(a)-(b).

6 The RPMs only describe procedures not what specific actions
7 Interior will actually take, or what effects such actions will
8 have. Defendants argue that the X2 RPM "most emphatically did
9 not require that Reclamation take any and all measures to ensure
10 that the X2 location did not change. Instead, FWS instructed
11 Reclamation as part of the 'operations planning process,' to
12 'incorporate within its operating plan measures' that 'minimize
13 or eliminate' upstream movement.'" Doc. 258 at 16:14-17 (Fed.
14 Def.'s Opp'n). From this, defendants conclude, because (1) there
15 is no qualitative difference between the existing Water Quality
16 Control Plan ("WQCP") X2 standard and the X2 RPM and, (2) the X2
17 RPM only requires that Reclamation consult if there is a change
18 greater than 0.5 km, there are no significant impacts to analyze.

19 Whether this failure to assess the impact of the X2 RPM
20 violates NEPA is determined under the "rule of reason" standard;
21 *Churchill County*, 276 F.3d at 1071, which asks, "whether an EIS
22 contains a reasonably thorough discussion of the significant
23 aspects of the probable environmental consequences." *Id.*
24 (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir.
25 1974)). The thoroughness of an EIS is decided by "a pragmatic
26 judgment whether the EIS's form, content and preparation foster
27 both informed decision-making and informed public participation."
28 *Id.* (quoting *Block*, 690 F.2d at 761).

1 Plaintiffs maintain that X2 RPMs result in a de facto change
2 in the current X2 standard under the Water Quality Control Plan
3 ("WQCP"), which itself makes such RPMs significant. Defendants
4 rejoin that X2 RPMs do not change the current X2 standard. Their
5 experts say otherwise. Michael G. Thabault,²⁹ declares:

6 Section 7 of the endangered Species Act of 1973 (as
7 amended) (Act) requires the Service to evaluate the
8 effects of the actions of Federal agencies on species
9 listed pursuant to Section 4. As part of this
10 evaluation the Service must consider the direct,
11 indirect, interrelated, and interdependent effects of
12 the action, as well as including cumulative effects to
13 listed species. This analysis must be considered in
14 the context of the environmental baseline for the
15 species. The environmental baseline is defined at [50
16 CFR §402.02] as:

17 "the past and present impacts of all Federal,
18 State, or private actions and other human
19 activities in an action area, the anticipated
20 impacts of all proposed Federal projects in
21 an action area that have already undergone
22 formal or early section 7 consultation, and
23 the impact of State or private actions that
24 are contemporaneous with the consultation in
25 process."

26 It is essentially the status of the health of the
27 species at a snapshot in time. The current operation
28 of the CVP and SWP have resulted in an environmental
29 baseline condition that exceeds (i.e., is better for
30 the species) the standards established in the WQCP. . .
31 . The Service evaluated the effects of the Preferred
32 Alternative on listed species and how the action may
33 affect Reclamation's ability to maintain the
34 environmental baseline. The Service concluded that
35 there would be effects to the location of X2 which may
36 effect distribution, spawning, rearing, and foraging
37 abilities of the delta smelt. Also, reduction in flows
38 may, at times, effect the spawning and rearing

29 Consideration of extra-record materials is allowed in
four circumstances: 1) if the material is necessary to determine
whether an agency has considered all relevant factors and has
explained its decision; 2) when the agency relied on the extra-
record materials; 3) when supplementation is necessary to explain
complex or technical subject matter; and, 4) when plaintiffs make
a showing of bad faith. *Northcoast Env'tl. Ctr. v. Glickman*, 136
F.3d 660, 665 (9th Cir. 1998). The first exception applies here.

1 opportunities for the Sacramento splittail. The
2 Service subsequently developed a Term and Condition and
3 associated Reasonable and Prudent Measure (RPM) that
4 could minimize the effects, and in some instances
5 eliminate the effects of the action, within the
6 confines of Reclamation's CVP operations. (Emphasis
7 added.)

8 Doc. 75 at 5:6-28. According to Mr. Thabault, the baseline
9 against which the X2 RPM is measured exceeds the minimum X2
10 requirement under the WQCP. The X2 RPM provides: "If
11 Reclamation in its annual operations planning process detects
12 that implementation of the Preferred Alternative will result in
13 an upstream (eastward) movement of X2 in any month between
14 February 1 through June 30 of 0.5 km, Reclamation shall
15 incorporate within its operating plan measures that can and will
16 be implemented to minimize or eliminate such upstream movements."
17 AR 17493-94 (emphasis added). Implementation of this RPM is
18 nondiscretionary. *Id.*

19 Based on its plain wording, the X2 RPM requires Interior to
20 incorporate within its CVP operating plan measures that will
21 minimize or eliminate eastward movement of X2 exceeding 0.5km.
22 This requires more than consultation and goes beyond prescribing
23 the process to be followed; it requires affirmative federal
24 action. Mr. Thabault states that the X2 "term and condition does
25 not modify the already stated commitment of the Bureau of
26 Reclamation to avoid and minimize the effects to species
27 protected pursuant to the Act by minimizing the effect of
28 incidental take (water) as measured by X2. The term and
condition merely sets the threshold for when those actions
developed and committed to by the Bureau of Reclamation should be
implemented." That is precisely plaintiffs' point; the X2 RPM

1 creates an absolute standard defining when Reclamation must act.
2 Mr. Thabault's declaration recognizes that the present location
3 of the X2 from which movement is measured under the RPM already
4 exceeds the WQCB standard.

5 Chester Bowling, Operations Manager of the Central Valley
6 Operations Office for the Bureau, declares that Reclamation
7 determined that although implementation of the Preferred
8 Alternative would not violate the WQCP; simulations show that in
9 some years X2 will move upstream in excess of 0.5km. Doc. 290 at
10 ¶8. Other than ESA reconsultation no specific mitigation action
11 is identified.

12 Plaintiffs argue that this new standard is significant,
13 defendants argue that it is not. Mr. Bowling and plaintiffs'
14 expert, James Snow, agree that there are months in some years in
15 which computer simulations indicate that X2 will move upstream in
16 excess of 0.5km invoking the X2 RPM's requirement for action.
17 Doc. 281 at ¶10; Doc. 290 at ¶8. Specifically, the X2 will move
18 eastward more than 0.5km in 20 percent of all Junes, and in four
19 years, X2 will move 0.5km in more than one month. Doc. 281 at
20 ¶10.

21 Mr. Snow calculates the cost in water to comply with the RPM
22 in the four years where the X2 RPM standard is exceeded in more
23 than one month, at 410,000 AF; 370,000 AF; 270,000 AF and 260,000
24 AF. Doc. 281. In these calculations, Mr. Snow assumed that the
25 X2 movement was to be eliminated. However, the RPM does not
26 require elimination, it calls for minimization or elimination.
27 While it is possible the effect of the X2 RPM may be as great as
28 Mr. Snow opines, it is also possible that it would be

1 significantly less. Mr. Bowling expresses his understanding that
2 Reclamation must, in the event X2 moves upstream in excess of
3 0.5km, coordinate with the USFWS to determine what, if any,
4 action is required. Doc. 290 at ¶7.

5 If changes in operations, such as additional upstream
6 releases or reduced pumping, are necessary, Reclamation will
7 determine if the changes are "minor." *Id.* If they are more than
8 minor, Reclamation will request reinitiation of formal
9 consultation with the USFWS. Mr. Bowling notes that it "is
10 possible that the X2 RPM could require major changes in CVP
11 operations." *Id.* Plaintiffs rely on the USFWS conclusion, that
12 by using an Interagency team to evaluate and recommend changes in
13 operations, "the service has concluded there will not be an
14 adverse modification or destruction of habitat for Delta smelt."
15 USFWS BioOp, p. 30 (80-12-00). The defendants in substance say
16 "trust us." Yet Mr. Bowling declares, based on his experience,
17 changes necessitated by the RPM X2 measures could include major
18 changes in the dedication and management of (b)(2) water, in
19 actions implemented with CALFED EWA, and that could impact
20 available CVP operational flexibility. *Id.* at ¶8. Whether a
21 major change in CVP operations will further directly impact
22 south-of-delta water users through increased upstream releases
23 and reduced delta pumping, or will impact other environmental
24 programs or species through the use of the limited (b)(2) water
25 account, remains undetermined. However, it is certain that
26 potential major changes in CVP operations will occur in 20
27 percent of all Junes.

28 Water in the CVP is a limited resource, the right to which

1 is constantly disputed. There are sixteen pending lawsuits in
2 this court, alone, in which numerous CVP stakeholders dispute
3 their respective rights to annual CVP water allocations.
4 Whenever CVP water is diverted to a different use, an impact is
5 experienced throughout the system. The effects on the Preferred
6 Alternative from the X2 RPM pose potential unquantified but
7 significant environmental and other consequences. The conflict
8 between USFWS' "insignificance" opinion and the Bureau's views of
9 the FEIS's X2 RPM consequences expressed by Mr. Bowling, are not
10 addressed or resolved by defendants, making impossible a finding
11 that further analysis of X2 RPMs was not required. It was
12 arbitrary and capricious for the EIS and FEIS not to address
13 impacts of X2 RPMs and CVP re-operation.

14
15 b. Supplemental EIS

16 Plaintiffs argue that the ROD should be set aside because
17 Interior failed to prepare an SEIS assessing the BioOps'
18 mitigation measure impacts, which were incorporated into the ROD
19 and FEIS. An agency decision to forego completing an SEIS will
20 not be set aside unless it is arbitrary and capricious. *Friends*
21 *of the Clearwater*, 222 F.3d at 556. The applicable standard is
22 whether the decision not to complete an SEIS was "based on a
23 consideration of the relevant factors and whether there has been
24 a clear error of judgment." *Id.* "Review under this standard is
25 to be searching and careful, but remains narrow, and a court is
26 not to substitute its judgment for that of the agency." *Id.*
27 (quoting *Mt. Graham Red Squirrel*, 986 F.2d at 1571). "This is
28 especially appropriate where . . . the challenged decision

1 implicates substantial agency expertise." *Id.*

2 "Normally, an agency rule would be arbitrary and capricious
3 if the agency has relied on factors which Congress has not
4 intended it to consider, entirely failed to consider an important
5 aspect of the problem, offered an explanation for its decision
6 that runs counter to the evidence before the agency, or is so
7 implausible that it could not be ascribed to a difference in view
8 or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*,
9 463 U.S. at 43; *O'Keefe's*, 92 F.3d at 942. "[T]he agency must
10 examine the relevant data and articulate a satisfactory
11 explanation for its action including a rational connection
12 between the facts found and the choice made." *Motor Vehicle*
13 *Mfrs.*, 463 U.S. at 43; *Dioxin/Organochlorine Ctr.*, 57 F.3d at
14 1525.

15 Here, Interior did not articulate a satisfactory explanation
16 for its decision not to conduct an SEIS. After the October 12,
17 2000, BioOp Interior did not have time to do so. It simply
18 rationalized that the new information included in the FEIS was
19 "mainly for clarification purposes and does not represent
20 significant new information requiring recirculation." FEIS D2-
21 71. FEIS D2-72. Interior does not discuss why it believes that
22 the "new information" is not significant. The expected effects
23 of the X2 RPM and auxiliary bypass at the Trinity Dam RPM were
24 not considered and the reason for not doing so is implausible,
25 which makes the action arbitrary and capricious. These RPMs must
26 be considered in an SEIS which includes public participation.

27 Section 1502.9(c) provides that an agency shall prepare a
28 supplement to a draft or final EIS if: 1) there are substantial

1 changes in the proposed action that are relevant to the
2 environmental concerns; or 2) there are environmentally relevant
3 significant new circumstances or information that bear on the
4 proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1).

5 "[W]hether to prepare a supplemental EIS is similar to the
6 decision whether to prepare an EIS in the first instance: If
7 there remains 'major Federal actio[n] to occur, and if the new
8 information is sufficient to show that the remaining action will
9 'affec[t] the quality of the human environment' in a significant
10 manner or to a significant extent not already considered, a
11 supplemental EIS must be prepared." *Marsh*, 490 U.S. at 374.

12 "[T]he key to whether a Supplemental Environmental Impact
13 Statement is necessary is . . . whether the proposed [work] will
14 have a significant impact on the environment in a manner not
15 previously evaluated and considered." *South Trenton*, 176 F.3d at
16 663.

17 The Bureau recognizes the X2 RPM, as described by the FEIS
18 and the ROD, is a significant change. If the federal defendants
19 had attempted to change the X2 standard as a separate action, an
20 EIS would have been required. X2 has major environmental
21 consequences, which will require CVP reoperation if its limits
22 are exceeded under the RPM. Interior cannot circumvent the
23 requirement that an EIS recognize and analyze a major change by
24 inserting it into an FEIS without analysis of, or public input
25 on, its impacts. An SEIS must be completed analyzing all effects
26 of the X2 RPM. In at least twenty percent (20%) of all water
27 years, the X2 standard will be violated, necessitating CVP
28 reoperation. What will be the RPMs? Where will the water come

1 from to address the RPMs to mitigate the condition? How much CVP
2 water will be required and how will such water be managed? What
3 will be the likely impacts of required CVP reoperation on south-
4 of-Delta species and what will other impacts be on the human
5 environment and from reallocation of CVP water among other users?
6

7 C. Auxiliary Outlet Bypasses (Temperature and Power
8 Ramifications)

9 The impacts of the auxiliary outlet bypass RPM to assist
10 temperature control objectives were discussed in the FEIS,
11 Appendix D 29, 79-91, in response to NCPA's objection that the
12 original Appendix F (addressing power impacts) failed to address
13 power impacts of "auxiliary outlet releases at Trinity Dam." The
14 question is whether the information included in the FEIS
15 represented a "substantial change" or "significant new
16 circumstances or information" that "provides a seriously
17 different picture of the environmental landscape." *City of*
18 *Olmsted Falls, OH v. F.A.P.*, 292 F.3d 261, 274 (D.C. Cir. 2002);
19 "[A]n agency need not supplement an EIS every time new
20 information comes to light after the EIS is finalized. To
21 require otherwise would render agency decisionmaking intractable,
22 always awaiting updated information only to find the new
23 information outdated by the time a decision is made." *Marsh v.*
24 *Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).
25 Plaintiffs argue that the impact of the auxiliary outlet bypass
26 RPM was not sufficiently analyzed because the effect of the loss
27 of energy on reliability of the California grid was not
28 discussed. Plaintiffs are mistaken in part. The FEIS did cover

1 and analyze "CVP Generation in Relation to Total California
2 Generation and Demand." Appendix D2, 91-101. It did not do so
3 specifically for the effect of Trinity Dam bypasses on Northern
4 California CVP power supply and reliability.

5 Interior addressed the related issue of water temperature
6 impacts from bypass operations to protect Trinity and Sacramento
7 River fisheries. NCPA's concern about bypassing the Trinity
8 powerplant is specifically mentioned in Appendix D2, p. 81. An
9 SEIS is required for the Trinity Dam bypass RPM because Interior
10 did not analyze or address the measure and its impacts on
11 Northern California power supply and reliability in the DEIS.
12 Although the FEIS mentions the issue, it concludes without
13 analysis, such operations will not cumulatively have adverse
14 impacts, the unsupported conclusion is a post hoc
15 rationalization. A hard look was required but not taken.

16
17 3. Analysis of Preferred Alternative Effect on Power
18 System Reliability

19 The DEIS was published in October 1999 and the public
20 comment period extended through January 20, 2000. All plaintiffs
21 submitted comments. No public comments were permitted by
22 Interior in the NEPA process after January 20, 2000. On June 28,
23 2000, the California Independent System Operator ("ISO") declared
24 a Stage One Electrical Emergency³⁰ for the third consecutive day.

25
26 _____
27 ³⁰ A Stage One Electrical Emergency occurs when operating
28 reserves fall below 7 percent. A Stage Two Electrical Emergency
occurs when operating reserves fall below 5 percent. A Stage
Three Electrical Emergency occurs when operating reserves fall

1 On August 3, 2000, the ISO declared a Stage Two Electrical
2 Emergency for the fourth consecutive day, as part of a California
3 energy crisis.

4 On August 23, 2000, the U.S. Department of Energy's Western
5 Area Power Administration ("WAPA") wrote to Interior providing
6 notice that Interior's impact analysis for the Trinity River EIS
7 and the CVPIA Programmatic EIS ("PEIS") only "focused on the
8 potential economic impacts to CVP power." AR 3923. It went on
9 to state that "[t]hese impacts were studied with the implicit
10 assumption that long-term power system reliability would not be a
11 concern." *Id.* WAPA communicated its "belief it was prudent to
12 re-examine the work conducted in order to assess potential
13 reliability impacts." *Id.* WAPA's letter evaluated reliability
14 impacts: from June to October of an average year, on-peak energy
15 reductions would range from 27,000 MWh to 47,000 MWh compared to
16 the No-Action alternative; in a dry year the reduction ranged
17 from 2,000 MWh in October to 79,000 MWh in July. *Id.* at 3923-24.
18 WAPA concluded: "During the critical summer months, the data
19 indicates that as much as 124 MW of capacity supported with
20 energy may be lost in September (of an average year) and up to
21 324 MW may be lost in July (of a dry year), as a result of
22 reoperating the CVP to meet the requirements associated with both
23 the PEIS and the Trinity River EIS/EIR." *Id.* at 3924. This
24 power impact was characterized as "striking" by the Department of
25 Energy. *Id.* at 3924.

26 _____
27 below 1.5 percent. Rolling blackouts can occur during Stage
28 Three Electrical Emergencies.

1 On October 20, 2000 Interior published the FEIS. Five days
2 later Interior rescinded the FEIS Notice of Availability and
3 republished the FEIS November 17, 2000. On December 7, 2000 the
4 California ISO declared a Stage Three Electrical Emergency. On
5 December 10 and 11, 2000 the ISO declared Stage Two Electrical
6 Emergencies. On December 14, 2000, the Department of Energy
7 ("DOE") declared an energy emergency in California and ordered
8 electrical generation facilities to generate and transmit
9 electric energy when and in such amounts as requested by the
10 ISO.³¹ On December 19, 2000 the ISO declared a Stage Two
11 Electrical Emergency and invoked its powers under the December
12 14, 2000 DOI order. On the same day, the Secretary of the
13 Interior signed the ROD implementing the Preferred Alternative.

14 On January 17, 2001, the ISO declared a Stage Three
15 Electrical Emergency followed by rolling blackouts January 17,
16 18, and March 19 and 20, 2001. The ISO declared a Stage One
17 Electrical Emergency July 9, 2002, and a State Two Electrical
18 Emergency on July 10, 2002.

19 Plaintiffs argue that the ROD should be set aside because
20 the FEIS does not realistically assess the impacts of the
21 Preferred Alternative on power system reliability, requiring an
22 SEIS. Defendants assert the FEIS and DEIS did analyze power
23

24 ³¹ Janice Schneider, the former Counselor to the Deputy
25 Secretary of the Interior at the U.S. Department of the Interior,
26 declares that she prepared a briefing paper, dated December 17,
27 2000, for the Secretary of the Interior discussing, *inter alia*,
28 ongoing developments in the power markets in California. 27 AR
17676-89, Schneider Dec., Ex. L to filed Doc. 73. This cannot
substitute for NEPA review.

1 system reliability and that no SEIS is required.

2
3 a. Discussion of Power Impacts in FEIS

4 The FEIS contains a section in its Power Analysis Thematic
5 Response entitled "CVP Generation in Relation to Total California
6 Generation and Demand." Appendix D2, 91-101. In this section,
7 the FEIS opines that TRD-generated power produces capacity to
8 supply approximately 1 percent of current California demand and
9 will account for less than 1 percent of the projected 2010
10 demand. D2, 91-2. It also states that although demand growth
11 has outstripped supply growth, completion of additional
12 powerplants is anticipated to help avoid electrical emergency
13 alerts in the future. The power generators argue "detailed
14 assessment" of the impact of CVP power supplies on the greater
15 California region was not conducted for the DEIS/EIR, other than
16 presented in the socioeconomics section. 22 AR 13320, 13888.

17 The ROD states that "operating criteria will be developed"
18 to allow WAPA to respond to emergencies per obligations to the
19 North American Electric Reliability Council and Presidential
20 Memo, of August 3, 2000, providing federal agencies work with
21 California to develop backup power generation for power shortage
22 emergencies. The thematic response concluded that: "[i]t is
23 anticipated that as demand for power increases, additional power
24 supplies will be built to meet the increase in total California
25 demand. As this occurs, the CVP's current total contribution of
26 meeting 4 or less percent of total California electrical demand
27 will constitute a decreasing proportion of the state's overall
28 power generation supply." FEIS, D2-92.

1 Other than this discussion, the only information that
2 relates to the California energy crisis is the analysis included
3 in both the DEIS and FEIS about the extent of decrease in power
4 production under the various options to the State as a whole.
5 This discussion was not related to system reliability, but to
6 socioeconomics. The ROD results in decreased value of CVP power
7 production of \$5,564,000 annually under the Preferred
8 Alternative, a 3% decrease of \$9,024,000 annually. ROD at p. 22.
9 Appendix F to the DEIS addresses power impacts as does Table 3-49
10 to the FEIS. See also TRFEFR, Appendix A, p.A.-12, Table 4,
11 p.A.-17, which review the 1981 Secretarial Decision. The FEIS
12 discusses the California power crisis; the issue is whether
13 Interior took a "hard look."

14 EIS review is under the "rule of reason" standard; *Churchill*
15 *County*, 276 F.3d at 1071: "Under this standard, we ask 'whether
16 an EIS contains a reasonably thorough discussion of the
17 significant aspects of the probable environmental consequences."
18 *Id.* (quoting *Trout Unlimited*, 509 F.2d at 1283). To determine
19 whether an EIS is reasonably thorough, courts must make "a
20 pragmatic judgment whether the EIS's form, content and
21 preparation foster both informed decision-making and informed
22 public participation." *Id.* (quoting *Block*, 690 F.2d at 761).

23 When deciding NEPA claims, a court may not impose its own
24 notion of which procedures are best. *Id.* at 1072. Instead, a
25 court's role is to insure the agency has taken "a hard look."
26 *Id.* "[NEPA] is not meant to 'mandate particular results' but to
27 provide a process to ensure that federal agencies take a 'hard
28 look' at the environmental consequences of proposed acts. When

1 an agency makes a decision subject to NEPA's procedural
2 requirements, 'the only role for a court is to insure that the
3 agency has considered the environmental consequences; it cannot
4 interject itself within the area of discretion of the
5 executive....'" *Tillamook County*, 288 F.3d at 1143-44 (quoting
6 *Strycker's Bay Neighborhood Council*, 444 U.S. at 227). Courts
7 must strictly interpret the procedural requirements of NEPA "'to
8 the fullest extent possible' consistent with the policies
9 embodied in NEPA." *Churchill*, 276 F.3d at 1072. Pro forma
10 compliance is not enough. *Id.*

11 Interior was informed by WAPA that Interior's previous
12 analysis of the power impacts was based upon an assumption that
13 was no longer valid. Further analysis was recommended. WAPA
14 provides its own analysis in its letter that discusses the
15 impacts of the Trinity River EIS and the FEIS. Interior
16 responded to the WAPA letter, with a "memorandum to file" to
17 document its position on the California power crisis: "in 1999,
18 all of the power generated by the Trinity River Division (TRD)
19 relative to the total of recent power consumption in California
20 shows that the TRD accounted for less than 0.70% than [sic] the
21 total consumption and the change in power generated would result
22 in an average decrease of 0.041% in an average water year, before
23 accounting for new generating capacity." AR 17676. It noted
24 that although implementation of the Preferred Alternative would
25 result in only insignificant effects on power generation within
26 California, the ROD must include a direction to Interior and WAPA
27 to develop coordination measures to allow for increased
28 generation of power during periods of critical shortfalls in

1 California. AR 17677. Interior addressed WAPA's concerns,
2 determined that the impact of implementing the Preferred
3 Alternative on the California energy crisis was minimal, but
4 provided the ROD include a condition to develop measures for
5 increased power generation during critical periods of energy
6 shortfall. None of this additional "consideration" was subject
7 to public participation.

8 Interior took a look at the issue. Title 40 C.F.R. §1502.14
9 requires the look be reasonably thorough. Interior cannot be
10 required to adopt measures other stakeholders believe are
11 prudent, except if reason and science make the agency's choice
12 arbitrary, capricious, or unlawful. Interior does not provide an
13 analysis of the net effect of power impacts on Northern
14 California in implementing the Preferred Alternative. Its process
15 thwarted public participation and informed decision-making on
16 power capacity and reliability issues. *Greenpeace Action v.*
17 *Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992). Although Appendix
18 D responds to many issues raised by the power generator
19 plaintiffs, ultimately, Interior's finding that the Preferred
20 Alternative's effect on California power generation from the CVP
21 will be minimal and that its response to power emergency
22 situations will comply with the Presidential Memo of 8/3/00,
23 cannot be tested based on the AR. A "hard look" at relevant
24 power supply and reliability consequences requires an SEIS.

25 The power generator plaintiffs also argue that the DEIS
26 analysis of the Preferred Alternative did not focus on its impact
27 on power system reliability. Not surprisingly, the electricity
28 power grid in California is a function of power supply and

1 demand. The government submits a declaration from Mr. Marcus,
2 responding to Mr. Dame's declaration on behalf of the power
3 generator plaintiffs. Even if both declarations are considered
4 because they aid in understanding the complex and technical
5 issues surrounding the way in which hydroelectric power
6 generating capacity of the CVP is affected by the Preferred
7 Alternative, both as it relates to state-wide power demand and
8 Northern California power demand, such information needed to be
9 part of the NEPA review. Defendants point to Appendix F and
10 attachment F1, which analyze the impact of the Trinity River
11 alternatives on the balance between power supply and demand, as
12 evidence the capacity issue was considered. The analysis
13 includes changes to CVP supply (project capacity) and CVP demand
14 (project use) and considers the effect of dry-year monthly
15 capacity changes. The DEIS observes that peak power loads occur
16 in summer months, which are most sensitive to reduced capacity.
17 Additional months, January - March and December are also periods
18 of increased power use. The DEIS concludes the Preferred
19 Alternative would increase dry year capacity on the average 6.5
20 Mw over the No Action Alternative. The most significant month,
21 December, shows a reduction of capacity by 85 Mw, in excess of
22 the 50Mw level of significant change in capacity, which is
23 provided for in the FEIS and ROD by an emergency provision.
24 Contrary to Plaintiffs' assertion, Interior did consider evolving
25 circumstances as pertinent to power generation and reliability,
26 revised the ROD accordingly, but acknowledged regional and local
27 effects require further analysis. 27 AR 17676-89, 17691-92; May
28 23, 2002, California energy Commission letter.

1 Extra-record references are made to a briefing memo prepared
2 for the Secretary of the Interior as of December, 2000, and
3 California Energy Commission Scoping Comments, which identify
4 2592 Mw of new power generating capacity in operation (not
5 dependent upon hydro power) and another 13,867 Mw of power
6 generation capacity under construction, 3,213 Mw of which are
7 expected to be operational by the end of 2002. An additional
8 9,980 Mw of power generation capacity are in licensing. Marcus
9 Dec. ¶ 21, California Energy Commission Comments pp. 6-7. The
10 experts do not agree. Their differing opinions reflect contrary
11 scientific viewpoints that do not require a choice. Interior's
12 conclusion that negative impacts on power generation capacity
13 will be offset by resource development may be valid, however, it
14 was not subjected to public scrutiny.

15 *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th
16 Cir. 2000), involved a 10 year old, out-of-date EIS. Here the
17 lawsuit was initiated upon completion of the FEIS and before the
18 ROD was signed. Interior should have performed an SEIS to
19 address the effect on Northern California power supply and
20 reliability resulting from implementation of the Preferred
21 Alternative in view of major changes associated with the
22 California energy crisis.

23
24 b. Supplemental EIS re: Energy Impacts

25 An agency decision to forego completing an SEIS will not be
26 set aside unless it is arbitrary and capricious. *Friends of the*
27 *Clearwater*, 222 F.3d at 556. The court must consider whether the
28 decision not to complete an SEIS was "based on a consideration of

1 the relevant factors and whether there has been a clear error of
2 judgment." *Id.* "Review under this standard is to be searching
3 and careful, but remains narrow, and a court is not to substitute
4 its judgment for that of the agency." *Id.* (quoting *Mt. Graham*
5 *Red Squirrel*, 986 F.2d at 1571). "This is especially appropriate
6 where . . . the challenged decision implicates substantial agency
7 expertise." *Id.*

8 The FEIS discusses the impact of implementing the Preferred
9 Alternative on the developing California energy crisis. The
10 agency determined that "in 1999, all of the power generated by
11 the Trinity River Division (TRD) relative to the total of recent
12 power consumption in California accounted for less than 0.70% of
13 the total consumption and the change in power generated would
14 result in an average decrease of 0.041% in an average water year,
15 before accounting for new generating capacity. AR 17676.
16 Interior decided that despite the seriousness of the 2001 energy
17 crisis, it was not a significant new circumstance because any
18 reduction in energy production which would be caused by
19 implementation of the Preferred Alternative would be so small.
20 Interior's determination that the 2001 California energy crisis
21 was not a sufficiently significant factor as to require a
22 supplement to the DEIS, can only be overturned if it was a clear
23 error in judgment. A court may not substitute judicial judgment
24 for that of the agency.

25 The information in the FEIS is not sufficient to permit
26 informed analysis of the ultimate effects of the California
27 energy crisis. All the information bearing on the analysis is
28 extra-record and has been submitted in the form of conflicting

1 declarations in the lawsuit. The CVP makes an allegedly "minor"
2 contribution to the annual California energy supply and
3 implementing the Preferred Alternative is alleged to have less
4 than a .05% effect on the California power supply. Interior's
5 view that ongoing new development of California power generation
6 capacity will ameliorate reduction in CVP power generation
7 capacity caused by implementing the ROD is not challenged.
8 Defendants' extra-record arguments about evolving knowledge of
9 alleged market fraud and manipulation by power suppliers in 2000-
10 2001 were not known or available to Interior in December 2000 and
11 cannot be considered.

12 Even though supplemental analysis would likely favor
13 Interior's position that CVP power supply impacts are not
14 significant, for the additional reason that the California power
15 shortages were, in some measure, caused by fraud and market
16 manipulation, the Administrative Record has not been
17 supplemented. Even if the parties' declarations are considered
18 for technical assistance, they are not dispositive. "The
19 complete record" does not assuage the concerns about significant
20 change wrought by the energy crisis or the need for an SEIS on
21 the power effects issue.

22 Plaintiffs' motion for summary judgment on the issue of the
23 federal defendants' failure to comply with NEPA based on analysis
24 of the Preferred Alternative's effect on power system supply and
25 reliability is GRANTED. The federal defendants' motion on the
26 same issue is DENIED.

27
28 4. Timing of EIS and the Trinity River Flow Evaluation

1 Final Report

2 Plaintiffs argue that an FEIS should have been completed on
3 the TRFES before the final report on the study was published.
4 Resolution of this issues raises two questions: 1) was the
5 Trinity River Flow Evaluation Final Report ("TRFEFR") a major
6 federal action; and, 2) if so, was the FEIS prepared in a timely
7 manner.

8
9 a. Major Federal Action

10 NEPA requires that an EIS be prepared for all "major federal
11 actions." 42 U.S.C. § 4332(2)(C). "*Major Federal action*
12 includes actions with effects that may be major and which are
13 potentially subject to Federal control and responsibility." 40
14 C.F.R. § 1508.18 (emphasis in original). It includes, *inter*
15 *alia*, "[a]doption of formal plans, such as official documents
16 prepared or approved by federal agencies which guide or prescribe
17 alternative uses of federal resources, upon which future agency
18 actions will be based." *Id.* at 1508.18(b)(2).

19 The first seven chapters of the TRFEFR include the
20 introduction, background, historical perspective, study
21 approaches, results, and restoration strategies. Chapter Eight
22 is entitled "recommendations." The executive summary of the
23 TRFEFR describes the purposes of each chapter. Chapter 8
24 contains recommendations "to utilize an Adaptive Environmental
25 Assessment and Management (AEAM) approach to guide future
26 management and ensure the restoration and maintenance of the
27 fishery resources of the Trinity River" and to use "instream
28 flow, channel-rehabilitation, and fine and course sediment"

1 recommendations in order to implement Chapter Seven's "conclusion
2 that a modified flow regime, a reconfigured channel, and strategy
3 for sediment management are necessary to have a functioning
4 alluvial river . . . that will provide the diverse habitats
5 required to restore and maintain the fishery resources of the
6 Trinity River." TRFEFR at 227, 230. The summary of the
7 recommendations chapter also describes the integration of these
8 three primary actions: "Rehabilitation of the mainstem Trinity
9 River and restoration and maintenance of its fishery resources
10 requires (1) increased annual instream volumes and variable
11 reservoir release schedules, (2) fine and coarse sediment
12 management, and (3) mainstem channel rehabilitation. *Id.* at 233.
13 The first of these recommendations are the increased flows
14 adopted in the DEIS, FEIS, and ROD.

15 CVPIA Section 3406(b)(23) required Interior to complete the
16 TRFES and make recommendations to Congress and the Hoopa Tribe
17 for permanent instream fishery flows by fall 1996. The
18 government cannot plausibly argue that the TRFEFR, which compiled
19 all the data regarding the Trinity River restoration and
20 recommended a modified flow regime that reallocates up to over
21 815,000 AF of CVP water to the Trinity River, does not constitute
22 a recommendation on a proposal for major federal action. Doc.
23 136 at 42:21-43:1. Section 3406(b)(23) directs that the
24 Secretary make recommendations for increased flows. After
25 forwarding the recommendations to Congress, the Secretary had two
26 options: 1) to concur; or, 2) not to concur. If the Secretary
27 and the Hoopa Valley Tribe (with whom the Secretary must consult
28 on the TRFES) concurred, the recommendations were to be

1 implemented. The recommendations of the TRFEFR were designed to
2 guide how Interior uses federal resources; and future agency
3 action was likely to be based upon these recommendations.³² The
4 TRFEFR constitutes the "[a]doption of [a] formal plan[], such as
5 [an] official document[] prepared or approved by [a] federal
6 agenc[y] which guide[s] or prescribe[s] alternative uses of
7 federal resources, upon which future agency actions will be
8 based." See 40 C.F.R. § 1508.18(b)(2). This is major federal
9 action; Interior recognized its responsibility to prepare an EIS
10 and did so.

11
12 b. Timeliness of EIS Preparation

13 CEQA regulations address the time for EIS preparation. "An
14 agency shall commence preparation of an environmental impact
15 statement as close as possible to the time the agency is
16 developing or is presented with a proposal (§ 1508.23) so that
17 preparation can be completed in time for the final statement to
18 be included in any recommendation or report on the proposal. The
19 statement shall be prepared early enough so that it can serve
20 practically as an important contribution to the decisionmaking
21 process and will not be used to rationalize or justify decisions

22 _____
23 ³² The federal defendants cite *Churchill*, 276, F.3d at 1075
24 for the proposition that a "court has no authority to . . .
25 determine a point during the germination process of a potential
26 proposal at which an impact statement should be prepared." *Id.*
27 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976)).
28 However, they omit the next sentence: "A final EIS is required
only at the time the agency 'makes a recommendation or report on
a proposal for federal action." *Id.* The TRFEFR was a
recommendation and report for federal action.

1 already made." 40 C.F.R. § 1502.5 (emphasis added).
2 "Preparation of an environmental impact statement on a proposal
3 should be timed (§ 1502.5) so that the final statement may be
4 completed in time for the statement to be included in any
5 recommendation or report on the proposal." 40 C.F.R. § 1508.23.

6 Here, the draft TRFEFR (a report on a proposal) was released
7 in January 1998 and the final TRFEFR was published in June 1999.
8 Four months later, in October 1999, the DEIS was released. The
9 public comment period on the DEIS extended to January 20, 2000.
10 On March 29, 2000, Interior forwarded the TRFEFR to Congress
11 pursuant to CVPIA § 3406(b)(23). Eight months later, on November
12 17, 2000 the FEIS was published. On December 18, 2000, the Hoopa
13 Valley Tribe concurred in the TRFEFR's recommendations and on
14 December 19, 2000, the Secretary and the Hoopa Valley Tribe
15 signed the ROD.

16 Section 3406(b)(23)'s requirements made the flow
17 recommendations in the TRFEFR a critical decisionmaking point.
18 Once the Secretary made recommendations in the TRFEFR, the Tribe
19 could concur in them (and they would be implemented), or not
20 concur, which would leave flows at the statutory minimum level
21 (340,000 AF) pending further legislative or judicial action. The
22 point in time at which the Secretary had the broadest discretion
23 to determine flow levels was the point at which the TRFEFR
24 recommendations were made. That was the point in time at which
25 the FEIS should have been completed so that the EIS could have

26
27
28

1 had an effect on the decisionmaking.³³ The government argues an
2 FEIS was not required before the TRFEFR was submitted to Congress
3 because it was a programmatic and project-specific EIS. FEIS pp.
4 1-3.

5 "NEPA procedures must insure that the environmental
6 information is available to public officials and citizens before
7 decisions are made and before actions are taken." 40 C.F.R. §
8 1500.1(b); *Northwest Res. Info. Ctr.*, 56 F.3d at 1064 ("The
9 purposes of an EIS are to provide decisionmakers with
10 sufficiently detailed information to aid in determining whether
11 to proceed with the action in light of its environmental
12 consequences and to provide the public with information and an
13 opportunity to participate in the information gathering
14 process."). The FEIS was not prepared before the Final Flow
15 Recommendations were submitted to Congress. All components of
16 the Flow Study and Restoration Plan were incorporated into the
17 ROD and the FEIS. When the TRFEFR was submitted in March 2000,
18 Congress had the DEIS, but not the FEIS. It was not required
19

20
21 ³³ The federal defendants argue that a separate EIS was not
22 required for the TRFEFR because it and the ROD were connected
23 actions. 40 C.F.R. § 1508.25(a)(2) ("Connected actions, which
24 means that they are closely related and therefore should be
25 discussed in the same impact statement . . ."). There is no
26 question they are related; the only question is when the EIS
27 should have been prepared. Section 1502.5 states, the FEIS must
28 be completed in time to "serve practically as an important
contribution to the decision-making process. . . ." The primary
decisionmaking here occurred at the time the TRFEFR made its flow
and related recommendations, not when the Secretary concurred
with the ROD. The ROD was signed one day after the tribe
concurred in the TRFEFR.

1 that a separate EIS be completed at every stage of the project.
2 At least two of Plaintiffs' major concerns, power impacts and
3 Integrated Management Alternative were not fully considered in
4 the DEIS provided to Congress. A related contention, that
5 Interior improperly narrowed the range of alternatives considered
6 to meet the initial 1996 statutory deadline is treated below. 2
7 AR 632, 659.

8
9 5. EIS Alternatives

10 Plaintiffs complain the EIS violated NEPA because it did not
11 examine a reasonable range of alternatives and that the ROD must
12 therefore be set aside. This argument has four premises: 1) the
13 various laws applicable to the management of the CVPIA and the
14 restoration of the Trinity River require that only enough water
15 be devoted to accomplish Trinity River fishery restoration as
16 necessary and no more; 2) based on this interpretation of the
17 governing law, Interior failed to consider a reasonable range of
18 alternatives; 3) an "Integrated Habitat and Fishery Management"
19 alternative is an important reasonable alternative, used on other
20 rivers, that must be considered; and, 4) the EIS unlawfully
21 constrained the range of options by concentrating on increased
22 water flows and channel restoration to ignore any integrated
23 management alternative that incorporated non-flow management
24 measures.

25
26 a. Statutory Mandate

27 Plaintiffs argue that CVPIA "general" provisions in Sections
28 3402 and 3406 limit Section 3406(b)(23) water releases to only

1 the amount necessary to achieve the restoration purposes of the
2 1984 Act and "to the extent restoration reasonably can be
3 accomplished by means other than flows, the Secretary must at
4 least *consider* utilizing such other means," but did not do so.
5 (Emphasis in original). Doc. 233 at 17:11-14 (SMUD motion).
6

7 i. Statutory History

8 The Trinity River Division was authorized in 1955 by Public
9 Law 84-386 ("1955 Act"). "For the principal purpose of
10 increasing the supply of water available for irrigation and other
11 beneficial uses in the Central Valley of California, the
12 Secretary of the Interior, acting pursuant to the Federal
13 reclamation laws . . ., is authorized to construct, operate, and
14 maintain, as an addition to and an integral part of the Central
15 Valley Project, California, the Trinity River division . . ."
16 Pub. L. No. 84-386, 69 Stat. 719 (1955). Section 2 of the 1955
17 Act provides:

18 Subject to the provisions of this Act, the operation of
19 the Trinity River division shall be integrated and
20 coordinated, from both a financial and an operational
21 standpoint, with the operation of other features of the
22 Central Valley Project, as presently authorized and as
23 may in the future be authorized by Act of Congress, in
24 such manner as will effectuate the fullest, most
25 beneficial, and most economic utilization of the water
resources hereby made available: Provided, that the
Secretary is authorized and directed to adopt
appropriate measures to insure the preservation and
propagation of fish and wildlife, including, but not
limited to, the maintenance of the flow of the Trinity
River below the diversion point at not less than one
hundred and fifty cubic feet per second . . .

26 *Id.* at § 2 (emphasis added). The Senate Report on the 1955 Act
27 notes that the "development of the Trinity River was planned with
28 a view to maintaining and improving fishery conditions. . . and

1 requires that the project be operated so as to insure the
2 preservation and propagation of fish and wildlife." S. Rep. No.
3 84-1154, at 5 (1955); H. Rep. No. 84-602, at 4 (1955).

4 In 1984, Congress passed the Trinity River Basin Fish and
5 Wildlife Management Act ("1984 Act") to restore fish and wildlife
6 populations to pre-TRD levels. The 1984 Act found "the
7 construction of the Trinity River division of the Central Valley
8 Project in California, authorized by the Act of August 12, 1955
9 (69 Stat. 719), has substantially reduced the streamflow in the
10 Trinity River Basin thereby contributing damage to pools,
11 spawning gravels, and rearing areas and to a drastic reduction in
12 the anadromous fish populations. . . ." Pub. L. No. 98-541 §
13 1(1) (1984). It recognizes the 1955 Act directed the Secretary
14 of the Interior "to take appropriate actions to ensure the
15 preservation and propagation of such fish and wildlife." *Id.* at
16 § 1(3). In order to restore the fish populations to the levels
17 approximating those that existed immediately prior to TRD
18 construction, the Secretary was directed to formulate and
19 implement a fish management program that would include the
20 following components:

21 (1) The design, construction, operation, and
22 maintenance of facilities to --

23 (A) rehabilitate fish habitats in the Trinity River
24 between Lewiston Dam and Weitchpec;

(B) rehabilitate fish habitats in tributaries of such
river below Lewiston Dam and in the south fork of such
river; and

(C) modernize and otherwise increase the effectiveness
of the Trinity River Fish Hatchery.

26 (2) The establishment of a procedure to monitor (A) the
27 fish and wildlife stock on a continuing basis, and (B)
28 the effectiveness of the rehabilitation work.

(3) Such other activities as the Secretary determines
to be necessary to achieve the long-term goal of the
program.

1 *Id.* at § 2(a).

2 In 1992, Congress enacted the CVPIA. Pub. L. No. 102-575,
3 106 Stat. 4600 (1992):

4 (a) to protect, restore, and enhance fish, wildlife,
5 and associated habitats in the Central Valley and
Trinity River basins of California;

6 (b) to address impacts of the Central Valley Project
on fish, wildlife and associated habitats;

7 (c) to improve the operational flexibility of the
Central Valley Project;

8 . . .
9 (f) to achieve a reasonable balance among competing
10 demands for use of Central Valley Project water,
including the requirements of fish and wildlife,
agricultural, municipal and industrial and power
contractors.

11 Pub. L. No. 102-575, § 3402 (1992).

12 Section 3406(a) amended the CVP Authorization Act of August
13 26, 1937 by, *inter alia*, inserting the following sentence: "The
14 mitigation for fish and wildlife losses incurred as a result of
15 construction, operation, or maintenance of the Central Valley
16 Project shall be based on the replacement of ecologically
17 equivalent habitat. . . ." It also added the mitigation,
18 protection and restoration of fish and wildlife as one of the
19 purposes of the CVP.

20 CVPIA Section 3406(b) addresses fish, wildlife, and habitat
21 restoration. It begins with a general statement that: "The
22 Secretary . . . shall operate the Central Valley Project to meet
23 all obligations under State and Federal law, including but not
24 limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et
25 seq., and all decisions of the California State Water Resources
26 Control Board establishing conditions on applicable licenses and
27 permits for the project." *Id.* at § 3406(b). It then lists
28 twenty-three specific actions the Secretary is to take.

1 Section 3406(b)(23) provides that an instream flow of not
2 less than 340,000 AF of water shall be released each year from
3 the Trinity River Division for the purposes of fishery
4 restoration, propagation, and maintenance. Section (b)(23)
5 directs the Secretary to complete the TRFES "in a manner which
6 insures the development of recommendations, based on the best
7 available scientific data, regarding permanent instream fishery
8 flow requirements and Trinity River Division operating criteria
9 and procedures for the restoration and maintenance of the Trinity
10 River fishery." Pub. L. No. 102-575 § 3406(b)(23)(A). Section
11 (b)(23)(B) directs the Secretary to forward the TRFES to Congress
12 and if the Secretary and the Hoopa Valley Tribe concur in the
13 TRFES' recommendations, to implement the instream fishery
14 releases to meet the fishery restoration goals of the 1984 Act.
15 Section (b)(23) has an express, further purpose to meet federal
16 trust responsibilities to the Hoopa Valley Tribe.

17 In 1996, Congress amended the 1984 Act. Congress directed
18 that Trinity River restoration was to be measured not only by
19 returning adult anadromous fish spawners, but also by the ability
20 of dependant tribal, commercial, and sport fisheries to
21 participate fully, through in-river and ocean harvest
22 opportunities, in the benefits of the restoration. Pub. L. No.
23 104-408 (1996). Congress added language that amended the
24 activities that were to be undertaken by the Secretary. *Id.* The
25 original language directed the Secretary to "modernize and
26 otherwise increase the effectiveness of the Trinity River Fish
27 hatchery. The 1996 Act added "so that it can best service its
28 purpose of mitigation of fish habitat loss above Lewiston Dam

1 while not impairing efforts to restore and maintain naturally
2 reproducing anadromous fish stocks within the basin." *Id.*
3 Contrary to the EIS management team's scope definition, the
4 restoration of the TR fishery goes beyond the Trinity mainstem
5 fishery to fish stocks within the Trinity River basin and to
6 habitats in tributaries and the south fork of that river below
7 Lewiston Dam. § 2(a)(1)(B).

8
9 ii. Plaintiffs' "Only Enough Necessary" Argument

10 Plaintiffs argue the various laws applicable to CVP
11 management and TR restoration require that only enough water be
12 devoted to TR restoration as necessary and no more.
13 Specifically, they contend that CVPIA sections 3402(f) and
14 3406(b) require balancing all the competing interests of CVP
15 water users and such balancing necessarily limits the amount of
16 CVP water restored to Trinity River. Section 3402 and the
17 prefatory provisions of Section 3406(b) are general provisions,
18 controlled by the more specific provisions found in the
19 subsections of Section 3406(b). *Westlands*, 43 F.3d at 461-62.
20 Section 3406(b)(23) directs that the TRFES be completed and that
21 it make recommendations, based on the best available scientific
22 data, for permanent fishery flow requirements. The volume of
23 flows is to be determined by the Secretary.

24 What water is necessary for restorative instream flows is
25 not a subject to be second-guessed by a court unless Interior's
26
27
28

1 decision is arbitrary, capricious, or unlawful.³⁴ *Morongo Band of*
2 *Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 576 (9th
3 Cir. 1998) (“[W]here an issue requires ‘a high level of technical
4 expertise, we must defer to the informed discretion of the
5 responsible federal agencies.’”) (quoting Marsh, 490 U.S. at
6 377). SMUD argues that the limited alternatives considered,
7 impermissibly constrained Interior from formulating and analyzing
8 a multi-purpose alternative: restore the fishery and secondarily
9 protect the needs of all other CVP users. Citing *Greenpeace v.*
10 *Nat’l Marine Fisheries Servs.*, 55 F.Supp.2d 1248 (W.D. Wa. 1999)
11 (EIS/R that did not evaluate as an alternative, integrated total
12 allowable fish catch with other management measures; such as
13 location and timing of fishery, year types and groupings, product
14 quality, habitat alteration, and markets, prevented decision-
15 makers from making fully informed choice).

16 SMUD’s fourth and fifth claims assert Interior abdicated its
17 obligations under the CVPIA and other federal reclamation law to
18 manage the Trinity River division for multiple purposes to
19 effectuate the most beneficial and economic utilization of
20 Trinity River water; to meet requirements of the 1984 TR
21 Management Act; and to achieve reasonable balance among multiple
22

23 ³⁴ Reference to the 1984 Act does not change this. Section
24 (b)(23) incorporates the 1984 Act’s goal to restore fish and
25 wildlife populations to pre-TRD levels. The means selected to
26 achieve this goal were rehabilitation of the Trinity River
27 mainstem and tributaries, and increased hatchery production to
28 replace lost habitat below Lewiston Dam. The CVPIA addressed
another means of achieving the 1984 Act’s goal, i.e., increased
flows. The 1996 amendment of the 1984 Act expands the scope and
standard of restoration.

1 interests that depend on CVP water. CVPIA § 3406(2)(f). The
2 first assertion that permanent annual flow volumes cannot be
3 "scientifically justified" is not supported by science or
4 history. The Trinity River has been actively studied for over 20
5 years and the proposed implementation of flow volumes to restore
6 the river is variable to the extent of the water year class.
7 Habitat restoration focuses on channel rehabilitation efforts.

8 The ROD's permanent variable annual aggregate flow volume is
9 fixed without regard to actual future experience. Interior is
10 the manager of the CVP and has discretion to determine the timing
11 and volume of water releases throughout the water year; to
12 incorporate additional objectives beyond restoring and
13 maintaining the fishery; i.e., to meet reservoir storage
14 requirements; management of peak flows for hydropower production,
15 flood control releases to serve safety; and to manage annual
16 available CVP water supply to satisfy contractual obligations.
17 The adoption of finite annual aggregate flow release volumes to
18 be retained within the Trinity Basin is rationally related to the
19 Bureau's management function to restore the fishery and
20 facilitates planning and annual publication of available water
21 from all CVP storage reservoirs.

22 Choosing a new flow regime that divides approximately 50% of
23 Trinity River flows north of Lewiston Dam between the Trinity and
24 Sacramento River Basins, instead of the historical average of 75%
25 to 90% diversion to the Sacramento Basin and south, since TRD
26 completion in 1964, is not per se irrational, arbitrary, or
27 capricious to implement the congressional mandate to restore and
28 maintain the Trinity River fishery. The adopted schedule retains

1 approximately 48% of Trinity River water for restoration in the
2 Trinity mainstem between Lewiston Dam and Weitchpec, with 52%
3 released to the Sacramento River Basin for the benefit of Central
4 Valley species and users, including SMUD. The restoration
5 standard has been set to approximate pre-TRD conditions. The
6 ultimate NEPA issue centers on whether the intentional narrowing
7 of the EIS purpose to concentrate on increased water flows and
8 channel rehabilitation prevented the decision-maker and the Court
9 from assessing the utility of a variable flow alternative that
10 uses non-flow measures to serve all the statutory objectives of
11 the 1984 Act as amended, the CVPIA, and the secondary purposes of
12 minimizing effects on all other CVP water users.

13
14 c. Legal Interpretation at EIS Purpose

15 SMUD recounts the dispute over the purpose of the EIS that
16 developed within the Management Team. In essence, the view that
17 prevailed was based on a legal interpretation of the 1984 Act and
18 the CVPIA, separating the CVPIA flow minimums and final study
19 requirements to the exclusion of P.L. 98-541's requirement to
20 modernize and otherwise increase the effectiveness of the Trinity
21 River hatchery as part of the broad objective to formulate and
22 implement a fish and wildlife management program for the Trinity
23 River basin to restore fish and wildlife populations to the
24 levels approximating those which existed immediately prior to the
25 start of construction of the Trinity River Division.

26 Contrary to the constricted EIS purpose used, the 1984 Act,
27 Pub. L. 98-541, § 1(5), 99 Stat. 2721 (October 24, 1984) directed
28 a "[Trinity River] Basin-wide fish and wildlife management

1 program," to be achieved by formulating and implementing a plan
2 to restore fish and wildlife populations to pre-Trinity River
3 Division levels. The October 30, 1992, CVPIA mandated minimum
4 annual 340,000 AF flows "to meet the fishery restoration goals"
5 of the 1948 Act and a completed Trinity River Flow Evaluation
6 Study by December 1996, through recommendations for permanent
7 instream fishery flow requirements and Trinity River Division
8 Operating Criteria and Procedures to restore and maintain the
9 Trinity River fishery. § 3406(b)(23)(A). Unambiguous statutory
10 language requires permanent Trinity River restoration flows and
11 TRD operating criteria and procedures. The 1984 Act was
12 reauthorized in 1996 by statutory amendment.

13 As a matter of statutory interpretation, the CVPIA specific
14 minimum flows and direction to formulate permanent TR restoration
15 flows and TRD operating criteria and procedures, take precedence
16 over more general language of the 1984 Act. *Edmund v. United*
17 *States*, 520 U.S. 651, 657 (1997); *In re Padilla*, 222 F.3d 1184,
18 1192 (9th Cir. 2000) (where specific and general statute
19 addresses same subject matter, specific takes precedence
20 regardless of sequence of enactment and must be applied first).
21 However, the '84 Act goal of achieving pre-TRD levels of fish and
22 wildlife in the Trinity Basin, not just the Trinity River
23 mainstem, was not repealed or modified and was re-emphasized and
24 further defined in the 1996 Act. The CVPIA includes a balancing
25 of competing demands for use of CVP water objectives, which,
26 although secondary to the more specific restoration goals of
27 (b)(23), should have been given consideration in the NEPA review
28 because (b)(23) also refers to the '84 Act as restoration

1 authority. The management team's pre-litigation legal
2 interpretation, narrowing the EIS purpose, is entitled to no
3 judicial deference, because it is not reasonable and ignores the
4 additional statutory goals of improving not only the mainstem,
5 but also tributaries and south fork, and balancing competing CVP
6 uses. The CVPIA does not narrow the legislative purpose of
7 Trinity River restoration, which remains basin-wide, and does not
8 include only the TR mainstem between Lewiston Dam and Weitchpec.

9
10 b. Range of Alternatives

11 Plaintiffs argue that Interior's EIS did not consider a
12 sufficient number of different alternatives. This issue turns in
13 part on the purpose of the EIS, which, according to Interior, is
14 "to carry out the Congressional directive in subsection (b)(23)
15 of the CVPIA to assess environmental issues, alternatives and
16 impacts associated with the restoration of natural production of
17 anadromous fish on the Trinity River mainstem downstream of
18 Lewiston Dam." Aug. 20, 2002 hearing at 6:1-6 (Mr. Shockey).

19 SMUD agrees that the EIS's purpose is to restore anadromous
20 fish in the Trinity River and that the directive is to accomplish
21 this goal by increased flows,³⁵ as (b)(23) provides for permanent
22 instream fishery flow requirements. SMUD argues that the range

23
24 ³⁵ "SMUD does not disagree with the federal defendants or
25 the Tribes that the purpose as stated, as Mr. Shockey points out,
26 stated on the first page of the EIS, was to restore the
27 anadromous fishery in the mainstem of the Trinity River. SMUD
28 does not disagree that taken together, the statutes amount to a
federal directive to accomplish this goal by way of increased
flows into the Trinity mainstem." Aug. 20, 2002 hearing at 11:9-
17 (Mr. Saxton).

1 of alternatives, to achieve this purpose was too narrow and
2 arbitrary because lower flows could have been recommended if non-
3 flow restoration measures were integrated with flow measures.
4 SMUD complains the TRFES wrongfully adopts an "ecological
5 perspective philosophy" which abandons basin-wide considerations
6 to concentrate on maximized fixed flow requirements which prevent
7 applying integrated management measures to address constantly
8 changing hydrological conditions.

9 The Water Districts argue that Interior improperly
10 substituted the statutory goal of restoring the fishery with a
11 "dynamic alluvial river objective."³⁶ Aug. 20, 2002 hearing at
12 18:5 (Mr. O'Hanlon). The water districts' argument is
13 essentially that added "river objectives" are not required in the
14 selection of alternatives.³⁷ They argue this caused Interior to
15 only consider flow-related alternatives to the exclusion of an
16 Integrated Management Alternative proposed by SMUD's expert.
17 This part of the controversy centers on the "restore and maintain
18 a 'healthy' Trinity River in part by establishing 'healthy river'
19

20 ³⁶ SMUD also made this argument in their papers, but did
21 not raise it at oral argument when asked to identify the purpose
22 of the EIS.

23 ³⁷ The stated purpose of the EIS is to "restore and
24 maintain the natural production of anadromous fish on the Trinity
25 River mainstem downstream of Lewiston Dam." DEIS at 1-4.
26 However, in addition to this purpose the EIS had the goal of
27 restoring and maintaining a "'healthy' Trinity River mainstem
28 downstream of Lewiston Dam" which was further defined by the
establishment of "qualitative 'healthy river' objectives." *Id.*
This goal "established a framework for the DEIS." *Id.* Besides
ten "healthy river" goals there are goals related to the salmonid
population restoration, Trinity County, and CEQA compliance.

1 objectives based on 'known and presumed attributes of the pre-dam
2 Trinity River.'" DEIS 1, 12-13.

3
4 C. Legal Interpretation of EIS Purposes

5 SMUD points to the early dispute over the purpose of the EIS
6 that developed within the EIS Management Team. The approach that
7 prevailed was based on the team's legal interpretation of the
8 1984 Act, CVPIA, and 1996 Act, that separated the CVPIA flow
9 minimums and final study requirements, to the exclusion of the
10 '84 and '96 Acts' broader purposes, which include an integrated
11 16-point Trinity River Fish and Management program covering water
12 flows, sediment management, tributaries rehabilitation, hatchery
13 modification, and stream and land use management. The adopted
14 EIS purpose also rejected the statutory direction to modernize
15 and otherwise increase the effectiveness of the Trinity River
16 hatchery as part of the broad statutory objective to formulate
17 and implement a fish and wildlife management program for the
18 Trinity River basin, (AR 27289) which would restore the fish and
19 wildlife populations in the basin to the levels approximating
20 those which existed immediately prior to the start of
21 construction of the Trinity River Division.

22 SMUD points to letters and memoranda evidencing that legal
23 advisors to the EIS management team intentionally narrowed and
24 limited the scope and content of the EIS to ultimately focus only
25 on increased flows and channel restoration of the mainstem
26 Trinity River below Lewiston Dam and Weitchpec, purposefully
27 ignoring the rest of the Trinity River basin, tributaries, south
28 fork, and impacts on other CVP uses and users. In intentionally

1 limiting the scope of the EIS, the EIS managers recognized time
2 was short and they improperly sought to attenuate the range of
3 alternatives considered to restrict public participation and to
4 permit completion of the ROD within the then-perceived 1996 time
5 deadline.

6 SMUD further argues that by seizing on the reference to
7 "natural" fish restoration, which appears in (b)(23) the legal
8 advisors manipulated the EIS' focus to ignore Trinity River Fish
9 Hatchery improvements, measures other than flow releases, and
10 improperly locked-in an excessive permanent flow regime adopted
11 by the ROD, ignoring non-flow alternatives as additional means to
12 achieve restoration. Defendants acknowledge that the ROD relies
13 on experimental, untested methodology, which "will be evaluated
14 in the future." (AR 623, 587-90, 92-94, 623-24, 632, 636-37,
15 639-40, 643, 652, 661, 733, 770, 778, 804-07).

16 SMUD asserts no deference is owed to the pre-litigation
17 legal position here taken by Interior, even if it interprets
18 legislation the agency implements. *Gilliland v. E.J. Bartells*
19 *Co., Inc.*, 270 F.3d 1259, 1262 (9th Cir. 2001) (litigation
20 position entitled to deference only if reasonable). Ultimately,
21 the narrowing and limitation of the alternatives considered to
22 increased permanent flows, channel restoration, minor watershed
23 protection, consisting of sediment-control measures already in
24 place and road de-commissioning, resulted in an EIS that did not
25 adequately or honestly consider whether an integrated management
26 alternative, based on stream restoration science presently
27 utilized by Interior that integrates multiple approaches to
28 fishery restoration that would take into account the overall

1 effect on other CVP users.

2 SMUD contends that the ROD is arbitrary and capricious
3 because its recommended permanent flows are hypothetical,
4 untested, and unreliable. No matter what actual experience and
5 adaptive management proves, the ROD has permanently locked-in and
6 prohibits change in flow volumes below its established minimum
7 flows for each annual hydrologic year-type. Interior neither
8 explains nor analyzes the failure to consider an integrated
9 management alternative with secondary objectives to minimize
10 impacts on other CVP users.

11
12 i. The Law

13 An EIS must discuss reasonable alternatives to a proposed
14 action. *American Rivers v. Fed. Energy Regulatory Comm'n*, 201
15 F.3d 1186, 1201 (9th Cir. 1999); 42 U.S.C. § 4332(2)(C)(iii).
16 Section 1502.14 of the CEQ regulations requires agencies to
17 "[r]igorously explore and objectively evaluate all reasonable
18 alternatives," to include a "no action" alternative, and a
19 preferred alternative. 40 C.F.R. § 1502.14. However, agencies
20 are not required to include "every alternative device and thought
21 conceivable by the mind of man." *Vermont Yankee Nuclear Power*
22 *Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519,
23 551 (1978). "The range of alternatives that must be considered
24 in the EIS need not extend beyond those reasonably related to the
25 purposes of the project." *Laguna Greenbelt, Inc. v. Dep't of*
26 *Transp.*, 42 F.3d 517, 524 (9th Cir. 1994).

27 When determining whether a reasonable range of alternatives
28 was considered, the "touchstone" is whether the EIS's "selection

1 and discussion of alternatives fosters informed decision-making
2 and informed public participation." *Headwaters, Inc. v. Bureau*
3 *of Land Management, Medford Dist.*, 914 F.2d 1174, 1180 (9th Cir.
4 1990) (quoting *Block*, 690 F.2d at 767). NEPA does not require
5 the consideration of alternatives: whose effect cannot be
6 reasonably ascertained; whose implementation is remote or
7 speculative; which are infeasible, ineffective, or inconsistent
8 with basic policy objectives; or which are not significantly
9 distinguishable from alternatives actually considered, or; which
10 have substantially similar consequences. *Id.* at 1180-81.
11 However, "an agency cannot define its objectives in unreasonably
12 narrow terms" to restrict the range of reasonable alternatives.
13 *City of Carmel-By-The-Sea v. Dep't of Transp.*, 123 F.3d 1142,
14 1155 (9th Cir. 1997). The "rule of reason" guides both the
15 choice of alternatives and the extent to which an EIS must
16 discuss each alternative. *American Rivers*, 201 F.3d at 1201.

17 Interior observes it has concurrent discretion to determine
18 how best to restore the Tribes' reserved fishing rights in the
19 Trinity River as part of the express federal trust obligation to
20 the Indian Tribes, in part defined in the 1996 amendment of the
21 1984 Act. *Parrows v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995).

22

23 ii. Alternatives Considered

24 The DEIS identified four alternatives to meet the statutory
25 purpose, goals, and objectives: 1) Maximum Flow, dedicating all
26 Trinity River flows above Trinity Dam to fishery restoration; 2)
27 Flow Evaluation, utilizing managed flows and mechanical
28 rehabilitation; 3) Percent Inflow reducing released water into

1 the Trinity River at forty per cent of the rate it flows into the
2 Trinity Reservoir; and 4) Mechanical Restoration, using
3 mechanical means to alter the river channel and create fish
4 protection habitat. DEIS at 2-1. In addition to these four
5 alternatives, measures including "No Action," "maintaining the
6 status quo," and "State Permit," reducing annual 340,000 AF flows
7 to 120,500 AF, the level specified in Interior's 1959 water
8 permits, were also analyzed. *Id.* The State Permit Alternative
9 was analyzed as a standard against which to compare other
10 alternatives, because it is the baseline for state permitting
11 purposes. *Id.* However, it is not viable as it calls for flows
12 less than the statutory minimum.

13 The Maximum Flow Alternative "would use all of the Trinity
14 River inflows above Trinity Dam to restore the river ecosystem
15 through managed flows, which would include periodic peak flow
16 releases." DEIS at 2-11. No mechanical restoration would be
17 carried out. *Id.* at 2-12. The Flow Evaluation Alternative is
18 based on the TRFES recommendations. *Id.* at 2-16. Forty-seven
19 mechanical rehabilitation projects would be constructed under
20 this alternative. *Id.* at 2-21. The Percent Inflow Alternative
21 "would approximate natural flow patterns, at a reduced scale, by
22 releasing water into the Trinity River at a proportion of the
23 rate it flows into Trinity Reservoir." *Id.* at 2-22. The water
24 released would approximate 40 percent of the previous week's
25 inflow. This option would include the same mechanical channel
26 restoration projects as the Flow Evaluation Alternative. *Id.* at
27 2-25. The Mechanical Restoration Alternative maintains instream
28 flows at 340,000 AF/year and depends on mechanical means to

1 restore the fish population. *Id.* at 2-26. It would include
2 watershed protection measures, forty-seven channel rehabilitation
3 projects, and dredging of ten potential pools. *Id.* at 2:29-30.
4 The State Permit Alternative would reduce the flows to 120,500
5 AF/year as specified in Reclamation's state water permits. *Id.*
6 at 2-31. No mechanical restoration projects would be undertaken.
7 *Id.* The No Action Alternative "represents ongoing activities and
8 operations" and reflects conditions in the year 2020. *Id.* at 2-
9 4. It assumes ongoing watershed protection measures will
10 continue and that current habitat improvement projects and
11 programs, including the maintenance of twenty-seven existing
12 channel rehabilitation projects, will also continue. *Id.* at 2-7-
13 8.

14 In addition to the alternatives discussed in the DEIS, the
15 agency severally considered and discussed, but rejected without
16 detailed analysis, the following measures: 1) removal of Trinity
17 and Lewiston Dams; 2) harvest management; 3) fish passage
18 facilities; 4) trucking fish around the dams; 5) predator
19 control; 6) increased hatchery production; 7) pumped storage;
20 and, 8) channel augmentation using Weaver Creek. DEIS at 2-35-
21 42. Removal of the dams was not considered viable because of
22 environmental impacts and foregone benefits and costs. The
23 Harvest Management Alternative was rejected because habitat, and
24 not the number of spawning adults, was the limiting factor in
25 natural production of anadromous fish. Even with harvesting
26 restrictions and increased spawning escapement, natural fish
27 production declined. *Id.* at 2-39. The Predator Control
28 Alternative was rejected for the same reason. *Id.* at 2-40.

1 Increased hatchery production was rejected because it did not
2 increase the number of "naturally" reproducing anadromous fish.
3 *Id.* at 2-41. SMUD complains it was error to separately analyze
4 and reject each management measure as a stand-alone alternative
5 and not as an integrated plan.

6 The Preferred Alternative was the Flow Evaluation
7 Alternative with additional watershed improvements described in
8 the Mechanical Restoration Alternative. DEIS at 2-3. The
9 Preferred Alternative was selected using six screening criteria:
10 1) substantially increases natural production of anadromous fish
11 on the Trinity River; 2) substantially restores both inriver and
12 ocean fishing opportunities; 3) improves tribal access to trust
13 resources; 4) balances environmental and social impacts; 5)
14 allows for continued operation of the TRD; and, 6) limits
15 flooding. *Id.*

16
17 iv. Were Sufficient Alternatives Considered?

18 Plaintiffs contend the EIS too narrowly focused on
19 alternatives designed to increase flows, improve habitat and
20 summarily rejected alternatives that could not by themselves
21 restore fish populations.

22
23 A. Focus of EIS

24 Plaintiffs complain the lead agencies exclusively focused on
25 alternatives designed to alter the geomorphic environment of the
26 Trinity River. The purpose of the EIS is to "restore and
27 maintain the natural production of anadromous fish on the Trinity
28 River mainstem downstream of Lewiston Dam." Plaintiffs are

1 correct that the alternatives analyzed by the EIS are all
2 directed at restoring the mainstem Trinity River fish habitat
3 below Lewiston Dam. For instance, harvest management was
4 rejected because the preliminary analysis showed that limited
5 habitat, not harvest restrictions, was the reason for the
6 fishery's decline. "The results of the analysis indicated that
7 although spawner escapement increased due to increasing harvest
8 restrictions, natural production, as indicated by the production
9 index, actually decreased. . . . The lack of a positive response
10 (i.e., increase in production) with increasing harvest
11 restrictions was due to the current quantity and quality of
12 anadromous fish habitat in the Trinity River." DEIS at 2-39.
13 Predator control was rejected for the same reason. *Id.* at 2-40.
14 Increased hatchery production was rejected because "[e]vidence
15 shows that increasing hatchery production can significantly
16 impair efforts to restore and maintain naturally reproducing fish
17 stocks. *Id.* at 2-41.

18 Agencies are not required to consider options that conflict
19 with basic policy objectives. *Headwaters*, 914 F.2d at 1180-81.
20 Here, the purpose of the EIS was to restore "naturally"
21 reproducing anadromous fish in the Trinity River mainstem
22 downstream of Lewiston Dam, not just increase fish population.
23 In addition, the 1996 Act limited the use of hatchery production
24 by requiring that it not impair efforts to restore and maintain
25 "naturally" reproducing anadromous fish stocks in the basin.
26 Pub. L. No. 104-143, at § 3(c). SMUD complains that science
27 recognizes that integrated management applied in combination in
28 limited degrees, including hatchery production, harvest

1 management and predator control, will enhance fishery
2 restoration efforts while affording protection to other CVP uses.
3 Interior has the discretion not to use such measures as stand-
4 alone alternatives; however, Plaintiffs are correct that Interior
5 did not take a hard look at, or consider in depth, a fully
6 integrated management alternative that reduced variable flow
7 increases in conjunction with other management prescriptions.
8 Because NEPA requires fair consideration of reasonable (feasible)
9 alternatives, including discussion of the alternatives and
10 opposing viewpoints, to avoid undue narrowing of the means of
11 achieving the purpose of an EIS, an SEIS should have been
12 prepared. *City of Carmel-by-the-Sea v. U.S. Dept. Transp.*, 123
13 F.3d 1142, 1155 (9th Cir. 1999); cited in *American Rivers v.*
14 *F.E.R.C.*, 201 F.3d 1186, 1200 (9th Cir. 1999).

15
16 b. Rejection of Stand-Alone Alternatives
17 that Could Not Restore Fish Populations

18 Plaintiffs complain the EIS considered each potential
19 restorative alternative standing alone without combining them
20 into an Integrated Management Plan. Specifically they object
21 that the Harvest Management and the Hatchery Management
22 alternatives were not combined with lower flows in a separate
23 alternative. To the extent this argument is related to these two
24 specific alternatives, they have been discussed.

25
26 c. Integrated Management Alternative

27 Plaintiffs argue, based on the post-ROD expert opinion of
28 Dr. Hanson, that an Integrated Management Alternative was

1 essential to reasonableness of the range of alternatives; should
2 have been analyzed as a reasonable alternative; and failure to do
3 so was arbitrary, capricious, or unlawful. Plaintiffs point to
4 the 1984 Act which directs the Secretary to take an integrated
5 approach to restoring the Trinity River. However, the disputed
6 EIS is not the first EIS on the Trinity River restoration. An
7 EIS was completed in 1983 on the Trinity River Basin Fish and
8 Wildlife Management Program. DEIS at 1-12. The 1984 Act was
9 passed to give the Secretary the authority to implement that
10 plan. Pub. L. No. 98-541, at § 1(6). This followed Interior's
11 Solicitor's opinion, citing legislative history, that the 1955
12 Act authorized the Permit, and required instream flow needs in
13 the Trinity River Basin to be met before water was exported.

14 The current EIS evaluates and analyzes the mechanical river
15 restoration projects and the TRFES' recommendation and
16 alternatives.³⁸ Interior objects to SMUD's Integrated Management
17 Alternative claiming it was not presented in the NEPA public
18 comment period; *Vermont Yankee Nuclear Power Corp. v. Natural*
19 *Resources Defense Council*, 435 U.S. 519, 551-53 (1978), yet
20 nonetheless responds on the merits. The declaration of Dr.
21 Hanson is considered to aid the Court in understanding applicable
22 river restoration science and to assist the evaluation whether
23 Integrated Management alternative was reasonable and should have

24

25 ³⁸ In 1993, the USFWS and Trinity County began an
26 Environmental Assessment ("EA") to evaluate the channel
27 rehabilitation projects. In July 1994, the Secretary mandated
28 that an EIS be prepared to evaluate any new channel
rehabilitation projects as well as the TRFES' recommendations and
any reasonable alternatives. The current EIS was the result.

1 been considered and discussed.

2 When determining whether a reasonable range of alternatives
3 was considered, the "touchstone" is whether the EIS's "selection
4 and discussion of alternatives fosters informed decision-making
5 and informed public participation." *Headwaters*, 914 F.2d at
6 1180. NEPA does not require the consideration of alternatives
7 whose effect cannot be reasonably ascertained; whose
8 implementation is remote or speculative; which are infeasible,
9 ineffective, or inconsistent with basic policy objectives, or;
10 which are not significantly distinguishable from alternatives
11 actually considered or which have substantially similar
12 consequences. *Id.* at 1180-81. However, "an agency cannot define
13 its objectives in unreasonably narrow terms" to avoid a range of
14 reasonable alternatives. *City of Carmel-By-The-Sea*, 123 F.3d at
15 1155. The EIS should analyze and consider the "full spectrum."
16 The "rule of reason" guides the choice of alternatives. *American*
17 *Rivers*, 201 F.3d at 1201.

18 The plaintiffs argue that the EIS had to consider an
19 alternative that restored TR anadromous fish while minimizing the
20 effect on competing CVP uses. Plaintiffs' proposed Integrated
21 Management Alternative involves: "(1) instream and watershed
22 habitat protection; (2) instream and watershed habitat
23 restoration and improvement; (3) hatchery management and stock
24 supplementation; (4) predator control; (5) inland and ocean
25 harvest; (6) water quality control; and, (7) land management
26 within the watershed and along the stream channel corridor, as
27 well as other elements." Doc. 236 at ¶ 4 (Hanson Decl.). SMUD's
28 comments on the DEIS raised 67 points. App. D3-2579 to 2646.

1 Interior responded to each, either directly or by reference in
2 thematic responses included in the FEIS, but as stand-alone
3 measures, not as an integrated plan.

4 SMUD's proposed alternative combines increased flows with a
5 variety of mechanical restoration measures. The Preferred
6 Alternative does combine increased variable annual flow releases
7 from Lewiston Dam, coarse sediment introduction, mechanical
8 channel rehabilitation and adaptive management, which includes
9 watershed protection. All alternatives were analyzed assuming
10 that the current fish population management programs would
11 continue. The relevant statutes and Interior's preliminary
12 findings limit the applicability of harvest management and
13 hatchery management. Ultimately, plaintiffs seek the absolute
14 minimum increase of flow and a greater proportion of mechanical
15 restoration and watershed management through hatchery and harvest
16 management, predator control and other non-flow means, in
17 contrast with the Preferred Alternative. Interior disagrees and
18 supports its opposing view with the Trush, ¶ 4, and Polos
19 declarations. The latest input purports to respond to
20 plaintiffs' proposed alternatives, but not in the context of NEPA
21 public comment to permit informed decision-making. The absence
22 of public participation, full consideration, or discussion in the
23 NEPA process of an Integrated Management Alternative, that sought
24 to minimize impacts on other CVP users, requires an SEIS.

25
26 D. Method of Selection

27 Plaintiffs assert the method used to select the Preferred
28 Alternative preordained the alternative chosen. Specifically,

1 Interior used the Trinity River System Attribute Analysis
2 Methodology ("TRSAAM") to create the Preferred Alternative and
3 then applied it to choose among options which included only one
4 viable choice, the Preferred Alternative.

5 The fishery restoration analysis in the EIS used the same
6 "healthy river" attributes employed by the TRFES. However, the
7 EIS analyzed the alternatives not only against those attributes,
8 but other criteria as well. The Preferred Alternative was
9 selected using six screening criteria: 1) substantially increases
10 natural production of anadromous fish on the Trinity River; 2)
11 substantially restores both inriver and ocean fishing
12 opportunities; 3) improves tribal access to trust resources; 4)
13 balances environmental and social impacts; 5) allows for
14 continued operation of the TRD; and, 6) limits flooding. DEIS at
15 2-3. Although Plaintiffs do not contend that the screening
16 criteria used are arbitrary or irrational, nor that each criteria
17 does not serve the statutory fishery restoration purpose; they
18 maintain no realistic alternative was provided.

20 E. Reasonableness of Alternatives

21 Plaintiffs argue the only viable alternative analyzed was
22 the Flow Evaluation Alternative, because the other "reasonable"
23 alternatives were "strawmen." The EIS identified four
24 "reasonable alternatives:" Maximum Flow; Flow Evaluation;
25 Percent Flow, and; Mechanical Restoration, along with a no action
26 alternative. Eventually a combination of the Flow Evaluation and
27 the Mechanical Restoration alternatives was selected as the
28 Preferred Alternative. Plaintiffs contend the alternatives

1 wrongfully focused solely on increased flows and flow-related
2 measures to the exclusion of non- or reduced-flow alternatives.

3 The Maximum Flow Alternative would release all water that
4 flows into the Trinity River above Lewiston Dam. Plaintiffs
5 argue that this is a "straw" alternative because it is the
6 functional equivalent of removing the Dam, which was rejected
7 prior to analysis by the agency. All water that enters the
8 reservoir would be released under this alternative, so the only
9 difference between it and Trinity Dam removal is that the dam
10 would remain in place. Interior determined removal of the dams
11 was impractical because of environmental impacts, foregone
12 benefits, and removal costs. Some of these concerns are the same
13 as those raised by the Maximum Flow Alternative, but the costs
14 related to the two alternatives are not co-extensive. While the
15 Maximum Flow Alternative is at the end of the spectrum of
16 reasonableness, it evaluates conditions under maximum potential
17 flow condition.

18 Plaintiffs maintain the Percent Flow and Mechanical
19 Restoration alternatives were not viable because they could not
20 meet the ten attributes of a healthy river. The ten attributes
21 of a healthy river were not the only criteria which drove
22 selection of the Preferred Alternative. While the Flow
23 Evaluation Alternative may have had an advantage under the
24 healthy river criteria, other issues were considered. The
25 Mechanical Restoration Alternative incorporates physical
26 improvements to the river to maximize beneficial effects on fish
27 habitat.

28 Plaintiffs suggest the Percent Flow Alternative was a

1 "strawman" because it could not be implemented based on the
2 statutory requirement that a minimum of 340,000 AF of water be
3 released into the Trinity River each year. Section (b)(23)
4 provides that "[i]f the secretary and the Hoopa Valley Tribe
5 concur in these recommendations, any increase to the minimum
6 Trinity River instream fishery releases established under this
7 paragraph and the operating criteria and procedures referred to
8 in subparagraph (A) shall be implemented accordingly." The
9 Percent Flow Alternative does not meet the 340,000 AF minimum in
10 dry and critically dry years.³⁹ At oral argument, the federal
11 defendants argued that this did not make the option unreasonable
12 because the Secretary could change the alternative by requiring
13 that mandatory minimum flows be released during dry and
14 critically dry years. The point of the EIS is to inform the
15 public and the Secretary of the reasonable alternatives available
16 and the impacts of those alternatives. A Percent Inflow
17 Alternative that included 340,000 AF in dry and critically dry
18 years is different from one that does not have this requirement.
19 An EIS alternative that is inconsistent with and violates a
20 statutory minimum flow mandate is not reasonable, because it
21 assumes a flow condition that could not be implemented absent
22 Congressional action to amend the CVPIA. This alternative was
23 not reasonable because it could not be implemented.

24
25 f. Lower Flow Evaluation Alternative

26 _____
27 ³⁹ Under the Percent Inflow Alternative 165,000 AF would be
28 released in critically dry years, and 325,000 AF would be
released in dry years. DEIS, at 2-25.

1 Plaintiffs argue that the EIS itself suggests a lower flow
2 alternative exists. The TRFEFR lists ranges of water flows that
3 could possibly achieve the healthy river objectives. The report
4 selected a number from within this range. Plaintiffs argue that
5 there should have been more than one flow evaluation alternative
6 analyzed in the EIS based on these numbers, i.e., one that was at
7 the lower end of the range.

8 "[A]n agency's consideration of alternatives is sufficient
9 if it analyzes an appropriate range of alternatives, even if it
10 does not consider every available alternative." *Headwaters*, 914
11 F.2d at 1181. Alternatives that are not significantly
12 distinguishable from an alternative already considered need not
13 be analyzed. *Id.* The ranges contained in the TRFEFR are for
14 peak flows in the various water year types. The difference
15 between the lowest number in the range and the number selected by
16 the TRFES is: 3,000 cfs in extremely wet years; 2,500 cfs in wet
17 years; 1,000 cfs in normal years; 800 cfs in dry years, and; 200
18 cfs in critically dry years. These peak flows are to run for
19 five-days under all water year types except in critically dry
20 years in which the peak flow would run for 36 days. The total
21 difference between the amount analyzed under the Flow Evaluation
22 Alternative and the lowest possible flow alternative suggested by
23 plaintiffs is 15,000 cfs in extremely wet years; 12,500 cfs in
24 wet years; 5,000 cfs in normal years; 4,000 cfs in dry years,
25 and; 7,200 cfs in critically dry years. In aggregate terms, the
26 increased flow volumes serve purposes in addition to fishery
27 restoration and maintenance, including flood control, reservoir
28 storage limits, and dam safety.

1 g. Conclusion - Range of Alternatives

2 Upon close analysis, Interior in actuality considered three
3 options for Trinity River fishery restoration: The Maximum Flow
4 Alternative (the maximum increase in CVP water to the Trinity
5 River); the Flow Evaluation Alternative (mid-range alternative),
6 and; the Mechanical Restoration Alternative (the minimum amount
7 of water). This range of alternatives consisted of two extreme
8 endpoints and one mid-range alternative, which pre-ordained the
9 selection. Plaintiffs argue that there should have been more
10 mid-range alternatives considered, i.e., at the least an
11 alternative that utilized Integrated Management methods,
12 including non-flow measures, based on available science and
13 existing fishery restoration methods used in the Lower Mokelumne
14 River Management Plan, the joint CALFED/SJRMP San Joaquin River
15 Fishery Technical Team Workshop Report and other restoration
16 planning on the Sacramento-San Joaquin Rivers and Delta. Such an
17 analysis would have permitted a hard look at Plaintiffs'
18 contention that an Integrated Management approach would best
19 serve the interests of the Trinity River fishery, the CVP, and
20 all other CVP stakeholders.

21 Considering only one reasonable alternative prevented
22 "selection and discussion of alternatives [to] enable informed
23 decision-making and informed public participation." *Headwaters*,
24 914 F.2d at 1180; *California v. Block*, 690 F.2d 753, 766-67 (9th
25 Cir. 1982). The selection criteria used to chose the Preferred
26 Alternative, a flow-driven regime in the TR mainstem, which
27 purposefully avoided restoration by non-flow methods, even if
28 reasonably calculated to achieve the statutorily defined

1 objective was premised on an unduly, narrowly-defined EIS
2 purpose. Other reasonable options exist, as SMUD suggests lower
3 flows combined with increased mechanical restoration, fishery
4 management, predator control, harvest management, and related
5 measures should have been the subject of a hard look. At oral
6 argument the federal defendants raised another option, the
7 Percent Inflow Alternative with the dry and critically dry year
8 flows at the 340,000 AF floor.

9 The range of alternatives considered was not adequate.
10 Developing fish passage facilities, trucking fish around dams,
11 predator control, a pumped storage project and channel
12 augmentation at Weaver Creek were considered, individually, and
13 rejected as stand-alone measures under the soporific, such
14 consideration achieved "clarity," DEIS 2:2-3; Interior also
15 avoided analysis of "measures that would be addressed by other
16 natural resource agencies." FEIS D3:2587. DEIS 2, 35-42, FEIS
17 App. 2, 49. The inclusion of one mid-range option with two
18 relatively unrealistic alternatives dictated the option selected.
19 Plaintiffs' contention that the EIS should have been prepared
20 with multiple purposes which included gauging permanent increases
21 of CVP water allocated to the Trinity River to minimize impacts
22 on all other CVP users has merit. Interior was required to take
23 a hard look at such a reasonable alternative and it did not.

24 Ultimately, the amount of water permanently rededicated to
25 the Trinity River to achieve fishery restoration is committed to
26 the joint discretion of Congress, Interior, and the Tribes to be
27 implemented under Interior's CVP management operational
28 discretion. Interior's Preferred Alternative and ROD adopt a

1 permanent and immutable dedication of CVP water to the Trinity
2 River Mainstem, without the searching and objective analysis NEPA
3 requires. If Interior is wrong, the permanent flows cannot be
4 changed without Congressional action, if such flows are excessive
5 or unnecessary. Harm is visited upon other CVP interests when
6 water is reallocated. Although Interior did consider mechanical
7 channel restoration, watershed restoration, and "adaptive
8 management," the public and all other CVP stakeholders were
9 entitled to have their input timely considered and to have
10 Interior take a hard look, at the least, at a multiple purpose
11 alternative that integrated restoration management methods with
12 secondary objectives set forth in the restoration statutes. The
13 failure to do so violates NEPA.

14 Plaintiffs' motion for summary adjudication on the issue of
15 the federal defendants' failure to reasonably scope the purpose
16 of the EIS and to comply with NEPA based on the unreasonably
17 narrow range of alternatives considered is GRANTED. Defendants'
18 cross-motion on the issue is DENIED.

19
20 C. ENDANGERED SPECIES ACT

21 Section 7 of the ESA, 16 U.S.C. § 1536, requires that
22 federal agencies "in consultation with and with the assistance of
23 the Secretary, insure that any action authorized, funded, or
24 carried out by such agency . . . is not likely to jeopardize the
25 continued existence of any endangered species or threatened
26 species or result in the destruction or adverse modification of
27 habitat of such species which is determined . . . to be critical,
28 unless such agency has been granted an exemption. . . ." 16

1 U.S.C. § 1536(a)(2). When an agency requests formal consultation
2 under Section 7(a)(2), a formal report, called a biological
3 opinion, is prepared giving the USFWS's or the NMFS's⁴⁰ opinion
4 about whether the agency action is "likely to jeopardize the
5 continued existence of a listed species or result in the
6 destruction or adverse modification of critical habitat." 16
7 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h). "Jeopardize the
8 continued existence of" means engaging in "an action that
9 reasonably would be expected, directly or indirectly, to reduce
10 appreciably the likelihood of both the survival and recovery of a
11 listed species in the wild by reducing the reproduction, numbers,
12 or distribution of that species." 50 C.F.R. § 402.02. If
13 jeopardy is likely, the report is called a "jeopardy biological
14 opinion." 50 C.F.R. § 402.14(h)(3). If the action is not likely
15 to jeopardize the continued existence of a listed species or
16 result in the destruction or adverse modification of critical
17 habitat, the report is called a "no jeopardy biological opinion."
18 *Id.*

19 A jeopardy opinion must consider, and if lawful include,
20 reasonable and prudent alternatives ("RPAs"). 16 U.S.C.
21 § 1536(b)(3)(A) ("If jeopardy or adverse modification is found,
22 the Secretary shall suggest those reasonable and prudent
23 alternatives which he believes would not violate subsection (a)
24

25
26 ⁴⁰ The CFR regulations apply to both the USFWS and the
27 NMFS. The regulations use the term "Service" to describe both
28 agencies. 50 C.F.R. § 402.02 ("Service means the U.S. Fish and
Wildlife Service or the National Marine Fisheries Service, as
appropriate.").

1 (2) of this section and can be taken by the Federal agency or
2 applicant in implementing the agency action."); 50 C.F.R. §
3 402.14(h)(3). RPAs are "alternative actions identified during
4 formal consultation that can be implemented in a manner
5 consistent with the intended purpose of the action; that can be
6 implemented consistent within the scope of the Federal agency's
7 legal authority and jurisdiction; that [are] economically and
8 technologically feasible; and, that the Director believes would
9 avoid the likelihood of jeopardizing the continued existence of
10 listed species or result[] in the destruction or adverse
11 modification of critical habitat." 50 C.F.R. § 402.02.

12 Where the USFWS or NMFS concludes the agency action and any
13 resultant incidental take⁴¹ will not violate Section 7(a)(2) of
14 the ESA, the Service must include within the opinion an
15 incidental take statement that, *inter alia*, specifies reasonable
16 and prudent measures ("RPMs") that are necessary or appropriate
17 to minimize such impact. 16 U.S.C. § 1536(b)(4)(C)(ii); 50
18 C.F.R. § 402.14(i). The incidental take statement (ITS) must
19 also specify "the terms and conditions (including, but not
20 limited to, reporting requirements) that must be complied with by
21 the Federal agency or any applicant to implement the [RPMs]." 50
22 C.F.R. § 402.14(i)(1)(iv). RPMs are "actions . . . necessary or
23 appropriate to minimize the impacts, i.e., amount or extent, of
24

25 ⁴¹ "Incidental take" is defined as "takings that result
26 from, but are not the purpose of, carrying out an otherwise
27 lawful activity conducted by the Federal agency or applicant."
28 50 C.F.R. § 402.2. "Take" means "to harass, harm, pursue, hunt,
shoot, wound, kill, trap, capture, or collect, or to attempt to
engage in any such conduct." 16 U.S.C. § 1532(19).

1 incidental take." 50 C.F.R. § 402.02. "Reasonable and prudent
2 measures, along with the terms and conditions that implement
3 them, cannot alter the basic design, location, scope, duration,
4 or timing of the action and may involve only minor changes." 50
5 C.F.R. § 402.14(i)(2).

6 The issuance of biological opinions, RPMs and ITSSs by
7 Interior through the FWS, is final agency action under 16 U.S.C.
8 § 1536, subject to judicial review. Challenges to agency action
9 under the ESA are governed by the APA. *Arizona Cattle Growers'*
10 *Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir.
11 2001). An agency's decision may not be overturned by the court
12 unless it is arbitrary and capricious. *Id.* "As long as the
13 agency decision was based on a consideration of relevant factors
14 and there is no clear error of judgment, the reviewing court may
15 not overturn the agency's action." *Id.*

16 Plaintiffs argue that the federal defendants committed two
17 ESA violations: 1) the USFWS BioOp unlawfully mandates major
18 changes in CVP operations, even if the Trinity River restoration
19 actions will not jeopardize any listed species; and, 2) the NMFS
20 BioOp arbitrarily mandates the implementation of the ROD's
21 instream flow releases in the absence of lethal take of Trinity
22 River fish. Westlands contends NEPA compliance was required
23 before biological opinions issued which authorized incidental
24 take of Sacramento winter-run chinook salmon, Sacramento
25 splittail, and delta smelt, citing *Ramsey v. Kantor*, 96 F.3d 434,
26 437, 444. Defendants correctly cite *Southwest Center for*
27 *Biological Diversity v. Keasse*, CV-S-97-1969 GEB JFM (E.D. Ca
28 1998), which holds that FWS is not required to file NEPA

1 documents every time it issues a biological opinion or an
2 incidental take statement. *Id.* (*Ramsey* characterized the § 7
3 ITS as the "functional equivalent" of a § 10 permit).

4
5 1. USFWS Biological Opinion

6 The USFWS BioOp is a "no jeopardy opinion." AR 17536.⁴²
7 After determining that the Preferred Alternative will not
8 jeopardize listed species, the BioOp included, as required, an
9 incidental take statement. The following RPM was a part of the
10 incidental take statement:

11 Reclamation shall minimize the effects of reoperating
12 the CVP resulting from the implementation of the
13 Preferred Alternative within the Trinity river basin on
14 listed fish in the Delta. . . . These terms and
15 conditions are non-discretionary. To implement
16 Reasonable and Prudent Measure number one Reclamation
17 must implement the following:

- 18 • If Reclamation in its annual operations
19 planning process detects that implementation
20 of the Preferred Alternative will result in
21 an upstream (eastward) movement of X2 in any
22 month between February 1 through June 30 of
23 0.5 km, Reclamation shall incorporate within
24 its operating plan measures that can and will
25 be implemented to minimize or eliminate such
26 upstream movements.

27 AR 17537-38 (emphasis added). Contrary to the government's
28 contention that no requirement exists that Interior prevent
upstream movement of X2, the need to control movement of X2 has

42 "After reviewing the current status of the delta smelt,
splittail, the environmental baseline, and the cumulative
effects, it is the Service's biological opinion that the proposed
action is not likely to jeopardize the continued existence of
these species, or result in the destruction or adverse
modification of critical habitat for delta smelt." AR 17536.

1 the potential to require major changes in CVP operations with
2 corresponding significant impacts.⁴³ The parties do not dispute
3 that an RPM may not mandate major changes. 50 C.F.R. §
4 402.14(i)(2) ("Reasonable and prudent measures, along with the
5 terms and conditions that implement them, cannot alter the basic
6 design, location, scope, duration, or timing of the action and
7 may involve only minor changes.") (emphasis added). An agency's
8 action may be set aside if it is not in accordance with the law.
9 *In re Transcon Lines*, 89 F.3d 559, 563 (9th Cir. 1996). The
10 USFWS exceeded its authority in mandating the X2 RPM because it
11 was not legally authorized to require implementation of an RPM
12 that would result in the major changes Mr. Bowling recognizes re-
13 operation of the CVP will necessitate in twenty percent of all
14 water years. Interior provides no analysis of what the X2 RPMs
15 will be or their consequences in those years. The X2 RPM is a
16 major change that cannot lawfully be adopted by a BioOp without
17 NEPA compliance.

18 Defendants also note that the RPM calls for FWS and the
19 Bureau to work cooperatively in dry and critically dry years "to
20 develop temperature objectives in the Trinity and Sacramento
21 Rivers, which will "not mandate any operational changes." This
22 is directly contradictory to Mr. Bowling's opinion that major
23 changes in CVP operations will be needed in short water years,
24 which are 20% of water years. Plaintiffs' summary adjudication
25 motion as to the X2 RPM in the USFWS BioOp is GRANTED, this RPM
26 must be set aside. The federal defendants' motion on this issue

27
28 ⁴³ See Chester Bowling statement, *infra*.

1 is DENIED.

2
3 2. NMFS Biological Opinion

4 Plaintiffs argue that there are three problems with NMFS'
5 BioOp: 1) under the ESA, RPMS can only be mandated if there was
6 a finding of "incidental take" and that NMFS did not make such
7 finding; 2) even if there was a finding of incidental take the
8 RPMS are not reasonably calculated to reduce the take related to
9 gravel placement; and, 3) the RPMS cannot mandate the
10 implementation of the action upon which the consultation is
11 based.

12
13 a. Finding of Incidental Take

14 The NMFS may only impose RPMS when there is evidence that
15 the agency action will result in a "take." *Arizona Cattle*
16 *Growers' Ass'n*, 273 F.3d at 1246 ("[A]n Incidental Take Statement
17 must be predicated on a finding of an incidental take.").
18 "Without evidence that a take would occur as a result of [the
19 agency's action], issuing an Incidental Take Statement imposing
20 conditions on the otherwise lawful use of land was arbitrary and
21 capricious." *Id.* at 1246. "Incidental take" is defined as
22 "takings that result from, but are not the purpose of, carrying
23 out an otherwise lawful activity conducted by the Federal agency
24 or applicant." 50 C.F.R. § 402.2. "Take" means "to harass,
25 harm, pursue, hunt, shoot, wound, kill, trap, capture, or
26 collect, or to attempt to engage in any such conduct." 16 U.S.C.
27 § 1532(19).

28 The NMFS BioOp found:

1 The NMFS does not anticipate that implementation of the
2 proposed flow schedules will incidentally take any
3 SONCC coho salmon. The NMFS does anticipate that SONCC
4 coho salmon habitat adjacent to and downstream of the
5 47 channel rehabilitation projects may be temporarily
6 degraded due to localized turbidity and potential fine
7 sedimentation of channel substrate during construction
8 activities. However, the amount of habitat temporarily
9 degraded due to these localized effects is negligible
10 compared to the long-term creation of additional
11 suitable habitat along approximately 40 miles of the
12 Trinity River. Although placement of spawning gravel
13 in the Trinity River may temporarily displace (harass)
14 an unknown number of juvenile coho salmon to
15 alternative habitats, this is not expected to result in
16 lethal take of these fish.

10 AR 17491. Plaintiffs argue that the NMFS findings do not show
11 that the coho salmon would be "harmed" by implementation of the
12 ROD. Defendants argue that the NMFS BioOp made a finding that
13 ROD construction activities would result in either "harm" or
14 "harassment."⁴⁴

16 i. Harm

17 Harm is defined as "an act which actually kills or injures
18 fish or wildlife. Such an act may include significant habitat
19 modification or degradation which actually kills or injures fish
20 or wildlife by significantly impairing essential behavioral
21 patterns, including, breeding, spawning, rearing, migrating,
22 feeding or sheltering." 50 C.F.R. § 222.102.

23 Plaintiffs opine NMFS did not find that any coho salmon

25 ⁴⁴ Defendants also argue in a footnote that plaintiffs do
26 not have standing to raise the ESA issue. In *Bennett v. Spear*,
27 520 U.S. 154, 157-77 (1997), the Supreme Court found that
28 irrigation districts, which received water from a federal water
project and would be effected if the proposed RPAs were
implemented, had standing to sue under Section 7 of the ESA.

1 would be killed or injured by the proposed action; citing NMFS'
2 conclusion that "[a]lthough there may be minor, short lived
3 adverse effects to juvenile coho salmon as a result of the gravel
4 supplementation projects, long-term results such as improved
5 spawning habitat, improved salmonid over-wintering habitat, and a
6 net increase in aquatic insect production in the immediate and
7 downstream areas are expected to provide survival benefits to
8 Trinity River coho salmon populations." AR 17478. Plaintiffs
9 are correct that NMFS found that implementation of the Preferred
10 Alternative would benefit coho salmon as a whole. However, they
11 confuse the benefit/harm to the coho salmon population as a whole
12 with the benefit/harm to individual members of the species.

13 The NMFS found that the Preferred Alternative would not
14 result in jeopardy, i.e., that the species as a whole would not
15 be harmed. However, it also found that the mechanical
16 restoration measures of the Preferred Alternative might "kill"
17 individual members of the species. "Reduced egg to fry survival
18 may occur as a result of fine sediment deposition downstream of a
19 project site."⁴⁵ AR 17477.⁴⁶ An incidental take statement and
20

21 ⁴⁵ Plaintiffs argue, relying on *Arizona Cattle Growers'*
22 *Ass'n*, that there is no evidence that the fish are in the areas
23 of the mechanical restoration projects and therefore there can be
24 no finding of incidental take. This argument is specious.
25 *Arizona Cattle Growers' Ass'n* found that where there was no
26 evidence that an ESA-listed species was found on allotments,
27 which were approximately 30,000 acres in size, the USFWS could
28 not mandate RPMs to prevent incidental take. *Arizona Cattle*
Growers' Ass'n, 273 F.3d 1229. *Arizona Cattle Growers' Ass'n*
also found that where surveys found an ESA-listed fish
"throughout" a river that ran for approximately 3.5 miles in or
adjacent to the allotment, the inclusion of an incidental take

1 RPMs are concerned with reducing the number of individuals
2 effected by the action, not the survival of the species as a
3 whole.

4
5 ii. Harassment

6 "Harass" as included in the definition of "take" is not
7 defined by statute, but legislative history describes Congress'
8 intent: "[Take] includes harassment, whether intentional or not.
9 This would allow, for example, the Secretary to regulate or
10 prohibit the activities of birdwatchers where the effect of those
11 activities might disturb the birds and make it difficult for them
12 to hatch or raise their young." H.R. Rep. 93-412, at 11 (1973).
13 NMFS has not defined the meaning of "harass," however the USFWS
14 has. The USFWS defines "harass" as "an intentional or negligent
15 act or omission which creates the likelihood of injury to

16 _____
17 statement was not arbitrary and capricious. The Ninth Circuit
18 did not require actual proof that fish were present exactly where
19 they would be impacted by cattle on the allotment. It is not
20 disputed here that coho salmon are found throughout the Trinity
21 River below Lewiston Dam, nor that they are migratory fish.

22 ⁴⁶ The NMFS also found: "Alternative rearing habitats may
23 not be as productive in terms of food or cover availability, and
24 increased competition may occur for these resources resulting in
25 decreased coho salmon fitness and survival rates." AR 17478.
26 However, this statement was contradicted later in the BioOp:
27 "Although placement of spawning gravel in the Trinity River may
28 temporarily displace (harass) an unknown number of juvenile coho
salmon to alternative habitats, this is not expected to result in
lethal take of these fish." AR 17491. Despite the contradiction
about the lethality of the gravel supplementation process, the
NMFS still found that the fitness of displaced fish would be
reduced and that there could be a reduced egg to fry survival
rate due to the sedimentation.

1 wildlife by annoying it to such an extent as to significantly
2 disrupt normal behavioral patterns which include, but are not
3 limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3.

4 The NMFS found: "[c]oho salmon fry and possibly late
5 outmigrating smelts may be displaced from the gravel deposition
6 site due to the placement of gravel into the river and/or the
7 noise from heavy machinery. Displaced juveniles are expected to
8 seek alternative downstream or upstream habitats for rearing."

9 AR 17477-78. The NMFS also found "[a]lthough placement of
10 spawning gravel in the Trinity River may temporarily displace
11 (harass) an unknown number of juvenile coho salmon to alternative
12 habitats, this is not expected to result in lethal take of these
13 fish." AR 17491. The disruption of coho salmon to the extent
14 that they migrate to another area of the river is sufficient to
15 rise to the level of "harassment." This is so even if the
16 disruption is temporally limited. "Take" is concerned with the
17 effect on individual species members, not necessarily on the
18 survival of the species as a whole.

19 Plaintiffs argue that defining "harass" to include habitat
20 modification would make the use of the term "harm" in the
21 statutory definition of "take" a nullity. Congress "intended
22 'take' to apply broadly." *Babbitt v. Sweet Home Chapter of*
23 *Communities for a Great Oregon*, 515 U.S. 687, 704 (1995).
24 "'Take' is defined . . . in the broadest possible manner to
25 include every conceivable way in which a person can 'take'
26 (harass) or attempt to 'take' any fish or wildlife." S. Rep. No.
27 93-307, 1973 U.S.C.C.A.N. 2989, 2995 (1973); H.R. Rep. No. 93-
28 412, 11 (1973) ("'Take' is defined broadly.").

1 Congress meant each term in the definition of "take" "to
2 serve a particular function in the ESA, consistent with, but
3 distinct from, the functions of the other verbs used to define
4 'take.'" *Sweet Home*, 515 U.S. at 702. In defining "harm," the
5 Supreme Court noted:

6 In contrast, if the statutory term "harm" encompasses
7 such indirect means of killing and injuring wildlife as
8 habitat modification, the other terms listed in §
9 3--"harass," "pursue," "hunt," "shoot," "wound,"
10 "kill," "trap," "capture," and "collect"--generally
11 retain independent meanings. Most of those terms refer
12 to deliberate actions more frequently than does "harm,"
13 and they therefore do not duplicate the sense of
14 indirect causation that "harm" adds to the statute. In
15 addition, most of the other words in the definition
16 describe either actions from which habitat modification
17 does not usually result (e.g., "pursue," "harass") or
18 effects to which activities that modify habitat do not
19 usually lead (e.g., "trap," "collect"). To the extent
20 the Secretary's definition of "harm" may have
21 applications that overlap with other words in the
22 definition, that overlap reflects the broad purpose of
23 the Act.

24 *Id.* at 698 n.11.

25 The use of the term "harass" in this situation does not make
26 the term "harm" a nullity. "Harm" is "an act which actually
27 kills or injures fish or wildlife. Such an act may include
28 significant habitat modification or degradation which actually
kills or injures fish or wildlife by significantly impairing
essential behavioral patterns, including, breeding, spawning,
rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102.
Harassment on the other hand occurs when an act annoys fish to
the point where they significantly modify their behavior.
These definitions, while similar, are different. Although in
certain circumstances the two definitions will overlap, mutual
exclusivity of the terms defining "take" is not required. "To

1 the extent the Secretary's definition of 'harm' may have
2 applications that overlap with other words in the definition,
3 that overlap reflects the broad purpose of the Act." *Id.* at 698
4 n.11. A finding of "harassment" in this situation does not
5 nullify "harm." Interior did not err.

6
7 b. Relation of RPM to "Take"

8 Plaintiffs argue that the only incidental take found by NMFS
9 was that related to gravel displacement and that Terms and
10 Conditions 1.a. and 1.b. are not rationally related to reducing
11 the take that would occur as a result. The first RPM in the NMFS
12 incidental take statement requires Interior to "[i]mplement the
13 flow regimes included in the proposed action (as described in
14 TRMFR DEIS, page 2-19, Table 2-5) as soon as possible." AR
15 17492. To implement that RPM, Interior is directed to comply
16 with three terms and conditions, the first two of which are in
17 dispute here:

18 1.a. Following completion of the Record of Decision
19 addressing the proposed action, Reclamation shall
20 immediately implement the components of the proposed
21 flow schedule (as described in the TRMFR DEIS, page 2-
22 19, Table 2-5) equal to or less than 6,000 CFS, and
23 implement the entire flow schedule as soon as possible
24 (i.e., after infrastructure modifications are
25 completed);

26 1.b. As necessary infrastructure modifications are
27 made, Reclamation shall incrementally implement higher
28 Trinity River flows (consistent with the proposed flow
regime), e.g., potentially release up to 8,500 CFS
after some bridge modifications, but prior to
completion of the "Bucktail" and "Poker Bar" bridge
replacements.

AR 17493.

An incidental take statement may specify RPMs that the
agency "considers necessary or appropriate to minimize" the

1 incidental taking of the species. 50 C.F.R. § 402.14(i)(1)(ii).
2 Term and conditions that must be complied with in order to
3 implement the RPMs must also be set out. 50 C.F.R. §
4 402.14(i)(1)(iv). RPMs are only required if they are necessary
5 or appropriate to minimize incidental take.

6 Here the incidental take will result from "temporarily
7 degraded [conditions] due to localized turbidity and potential
8 fine sedimentation of channel substrate during construction
9 activities." AR 17491. Plaintiffs argue that the first two
10 terms and conditions do not address this harm.⁴⁷ In doing so they
11 note that the biological assessment performed by Reclamation and
12 USFWS found that increased flows would actually increase
13 "turbidity." The biological assessment found "higher dam
14 releases will produce a marked increase in sediment transport
15 downstream resulting in increased turbidity levels due to scour."
16 AR 18354. However, it also found that the "bench flows" in the
17 Preferred Alternative would "promote[] transport of fine
18 sediment." AR 18352. Although the prescribed terms and
19 conditions may make one of the problems associated with channel
20 rehabilitation worse, i.e., turbidity, they may improve
21 sedimentation, the other problem identified in the incidental
22 take statement. On matters of scientific expertise courts should
23

24 ⁴⁷ Plaintiffs also argue that even if the increased flows
25 would help mitigate the incidental take, the RPM is "wildly
26 disproportionate to the minimal expected adverse impact of gravel
27 placement." Doc. 239 at 33:2-3. This argument is not expanded
28 upon nor do plaintiffs cite law explaining what they mean, i.e.,
whether the increased flows only address the incidental take or
the overall Trinity River restoration objective.

1 defer to the agency's expertise. *Marsh*, 490 U.S. at 377
2 ("Because analysis of the relevant documents 'requires a high
3 level of technical expertise,' we must defer to 'the informed
4 discretion of the responsible federal agencies.'") (quoting
5 *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). NMFS's opinion
6 is entitled to deference as to take resulting from gravel
7 displacement.

8
9 c. Requiring Flow Increases as an RPM

10 Plaintiffs object that the NMFS exceeded its authority by
11 requiring, as an RPM, that the Preferred Alternatives' flows be
12 implemented.⁴⁸ The purpose of consulting with the NMFS was to
13 comply with Section 7 of the ESA which requires agencies to, "in
14 consultation with and with the assistance of the Secretary,
15 insure that any action authorized, funded, or carried out by such
16 agency . . . is not likely to jeopardize the continued existence
17 of any endangered species or threatened species or result in the
18 destruction or adverse modification of habitat of such species
19 which is determined . . . to be critical, unless such agency has
20 been granted an exemption. . . ." 16 U.S.C. § 1536(a)(2).

21 The disputed action is the implementation of the Preferred
22 Alternative. Essentially what NMFS did was require that the
23 Preferred Alternative be implemented to minimize the effects of
24 implementing the Preferred Alternative. This is not a permitted
25

26 ⁴⁸ The first RPM in the NMFS incidental take statement
27 requires Interior to "[i]mplement the flow regimes included in
28 the proposed action (as described in TRMFR DEIS, page 2-19, Table
2-5) as soon as possible." AR 17492.

1 function of a RPM. Incidental take statements are intended to
2 determine if an agency's actions will jeopardize a listed
3 species. The purpose of an RPM is not to require that an agency
4 take the very action upon which consultation has been initiated.
5 Moreover, the evidence in the record shows the Preferred
6 Alternative was not necessary to mitigate the incidental take,
7 which did not require all the flow volumes or rehabilitation
8 measures it recommends.

9 By requiring the Preferred Alternative be implemented to
10 minimize the effects of implementing the Preferred Alternative,
11 the NMFS exceeded its statutory authority. That increased flows
12 and channel rehabilitation may mitigate the effects of the
13 preferred alternative is circular. Even if the evidence does not
14 support a finding that recommended habitat improvement will be
15 lethal to juvenile coho salmon, the AR does find evidence of
16 harassment which qualifies as take. Although this is not a
17 ground on which to invalidate the disputed RPM, no deference is
18 owed to NMFS's RPM that the Preferred Alternative be implemented.
19 Plaintiffs' motion for summary adjudication to set aside the RPM
20 in the NMFS BioOp requiring implementation of the Preferred
21 Alternative's flows is GRANTED. The federal defendants' motion
22 on the same issue is DENIED.

23
24 D. ADMINISTRATIVE PROCEDURES ACT

25 Section 706 of the Administrative Procedures Act ("APA")
26 directs courts to "hold unlawful and set aside agency action,
27 findings, and conclusions found to be . . . arbitrary,
28 capricious, an abuse of discretion, or otherwise not in

1 accordance with law." 5 U.S.C. § 706(2); *Ninilchik Traditional*
2 *Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000).
3 This standard is deferential and is intended to "ensure that the
4 agency considered all of the relevant factors and that its
5 decision contained no 'clear error of judgment.'" *Pacific Coast*
6 *Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*,
7 265 F.3d 1028, 1034 (9th Cir 2001) (quoting *Arizona v. Thomas*,
8 824 F.2d 745, 748 (9th Cir. 1987)). "Agency action should be
9 overturned only when the agency has 'relied on factors which
10 Congress has not intended it to consider, entirely failed to
11 consider an important aspect of the problem, offered an
12 explanation for its decision that runs counter to the evidence
13 before the agency, or is so implausible that it could not be
14 ascribed to a difference in view or the product of agency
15 expertise.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State*
16 *Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Judicial
17 review must be "'searching and careful' but remains narrow as we
18 are not to substitute our judgment for that of the agency's.'" *Ninilchik*,
19 227 F.3d at 1194 (quoting *Citizens to Preserve Overton*
20 *Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). "Deference to an
21 agency's technical expertise and experience is particularly
22 warranted with respect to questions involving engineering and
23 scientific matters." *United States v. Alpine Land & Reservoir*
24 *Co.*, 887 F.2d 207, 213 (9th Cir. 1989); *Ninilchik*, 227 F.3d at
25 1194.

26 Plaintiffs argue that Interior's decision to adopt the ROD
27 was arbitrary and capricious because it locked in permanent
28 instream flows for the Trinity River although the science upon

1 which those flows were based is uncertain. They advance two
2 primary contentions: 1) that the flows were impermissibly
3 selected from an unnecessarily high range; and, 2) that the
4 science underlying the decision was inherently uncertain because
5 the ROD's analysis acknowledges that future effects cannot be
6 determined and will require further study and response.

7
8 1. Selection of Flow Amounts Within a Range

9 The flow study ranges, which are variable by five water year
10 types, ranging from critically dry to extremely wet, derived from
11 a scientifically conducted study designed to ascertain what
12 annual instream flow levels were likely to achieve Trinity River
13 fishery restoration. That science could not pinpoint the exact
14 minimum amount necessary, year by year, under constantly changing
15 hydrologic conditions, does not make Interior's decision per se
16 arbitrary and capricious. Courts are particularly deferential in
17 scientific matters where the agency has expertise. *Ninilchik*,
18 227 F.3d at 1194. Interior's approach locks in permanent flows
19 at a minimum annual flow level, without analysis of variable
20 flows that utilize all available restorative means and without
21 considering secondary CVP interests. The statute requires a
22 permanent Trinity river restoration to approximate pre-TRD
23 conditions. This is not a subject suited for second-guessing.
24 However, Interior's choice of flow levels did not include a level
25 of analysis that considered non-flow measures or secondary
26 statutory objectives.

27
28 2. Uncertainty of the Underlying Science

1 Plaintiffs argue that the Secretary's decision was arbitrary
2 and capricious because it locked in permanent fixed amounts of
3 water that are to be released in each water year type, even
4 though the science that purports to measure the necessity of
5 those amounts was not certain.⁴⁹ Plaintiffs contend Appendices N
6 and O to the TRFEFR show that the ROD is a "major experiment in
7 fluvial geomorphology." Doc. 233 at 39:2 (SMUD Motion).

8 Appendix N describes the Adaptive Environmental Assessment
9 and Management ("AEAM") program. It recognizes that "alluvial
10 river systems are complex and dynamic. There are not many
11 unambiguous clear-cut answers to complex hydraulic, channel-
12 structure, and water quality changes . . ." and that "the
13 information we base our decisions on is almost always
14 incomplete." TRFEFR at N-2. Appendix O discusses the hypotheses
15 used, potential competing hypotheses, management objectives, what
16 is known specifically about the Trinity River, and the major
17 unknown or unquantified issues that needed to be addressed. *Id.*
18 at O-2. An agency decision is not arbitrary or capricious
19 because the agency recognizes the limitations of the information
20 upon which it bases a decision. The fact that Interior has
21 acknowledged it will learn new facts in the future, that river
22 flow management is dynamic, and climatic conditions, upon which

23
24 ⁴⁹ The federal defendants argue that the amounts are not
25 "fixed" because they vary based on the type of water year. This
26 is a red herring. The instream minimum flow increases required
27 by the ROD are permanent. The fact that the amount varies based
28 on water year type does not change this; i.e., in a normal water
year the permanent increase is approximately 300,000 AF over the
statutory 340,000 AF minimum and 475,000 AF more in an extremely
wet year.

1 CVP water supply depend, uncertain, are indicative of a
2 reflective decisionmaking process, not arbitrariness.

3 The requirements of the 1984 Act and the CVPIA do not change
4 this. They mandate restoration of the Trinity River to
5 approximate pre-Trinity River Division fish and wildlife levels.
6 The TRFES addresses a portion of the 1984 Act's broader
7 objectives along with the specific objectives of the CVPIA.
8 CVPIA section 3406(b)(23) directs Interior to complete the TRFES
9 by 1996 "in a manner which insures the development of
10 recommendations, based on the best available scientific data,
11 regarding permanent instream fishery flow requirements and the
12 Trinity River Division operating criteria and procedures for the
13 restoration and maintenance of the Trinity River fishery."
14 (emphasis added). The CVPIA requires that the "best available
15 scientific data" be used, not that Interior establish with
16 scientific certainty the exact minimum amount of water
17 permanently needed each year for enhanced instream fishery flows
18 that will restore Trinity River Basin to pre-TRD conditions. The
19 TRFEFR acknowledges that the best available scientific data is
20 not exact. This does not make Interior's decision arbitrary and
21 capricious.⁵⁰ To the contrary, the certainty Plaintiffs' seek
22

23 ⁵⁰ SMUD argues that the failure to set concrete goals
24 results in the ROD being arbitrary and capricious. The ROD's
25 goals are stated. It is not clear how the alleged failure to
26 more precisely define such goals makes the decision arbitrary and
27 capricious. The ROD here determines the flow levels reasonably
28 required for river and fishery restoration, based on the best
scientific data now available. The possibility that new data in
the future may prove the Secretary's decision wrong, does not
make arbitrary and capricious the current decision which utilizes

1 could prevent the mandated statutory goal of flow restoration
2 from ever being implemented.

3 Plaintiffs next argue that although it may be possible that
4 a flow recommendation can be implemented "without precisely
5 knowing what flows will, in fact, achieve what degree of
6 morphological change the decision to cast such numbers in
7 stone despite the high degree of uncertainty surrounding them and
8 the explicit need for an extensive and detailed adaptive
9 management plan to cover a huge array of contingent unknowns is
10 arbitrary and capricious." Doc. 233 at 39:12-16. Instead,
11 plaintiffs propose that the flows proceed "on a yearly basis to
12 posit necessary flows, test these in accordance with the adaptive
13 management plan and make necessary yearly adjustments." Doc. 286
14 at 13:8-10. They argue that Section (b)(23) does not require the
15 Secretary to actually implement the permanent instream flows.

16 Section (b)(23) has two subsections. The first mandates
17 that the TRFES be completed and that it make recommendations
18 regarding permanent instream flows.⁵¹ The second mandates that

19 _____
20 current known scientific data. Nor does the law prevent Interior
21 from making a decision that is unwise or even mistaken.

22 ⁵¹ In setting out Section (b)(23) in its reply brief, SMUD
23 seizes upon the term "regarding:" "[B]y September 30, 1996, the
24 Secretary . . . shall complete the Trinity River Flow Evaluation
25 Study . . . in a manner which ensures the development of
26 recommendations, based on the best available scientific data,
27 regarding permanent instream fishery flow requirements. . . ." Doc. 286 at 3-6. SMUD's emphasis is unclear. Presumably it
28 means that Interior could have recommended no permanent instream
flows, and instead continue to study restoration indefinitely
with variable flows adjusted each year based upon new
information. This is inconsistent with the statute's use of the

1 the recommendations be forwarded to Congress no later than
2 December 31, 1996 and that if the Secretary and the Hoopa Valley
3 Tribe concur, that those recommendations be implemented. The
4 term "permanent" in the first section combined with the mandate
5 that the recommendations actually be implemented upon the
6 occurrence of finite events, forecloses plaintiffs'
7 interpretation. Plaintiffs proposal that the instream flows for
8 the Trinity River continue to be studied on a yearly basis and be
9 changed, annually, based upon new information in perpetuity
10 derogates the statute's use of the term "permanent." "Permanent"
11 is defined as "existing perpetually; everlasting, especially
12 without significant change" and "intended to exist or function
13 for a long, indefinite period without regard to unforeseeable
14 conditions." Random House Webster's, Unabridged Dictionary 1442
15 (1998). That the term "permanent" encompasses a variable flow
16 regime, based on annual hydrological conditions, as pertains to
17 Interior's actual management of annual CVP water allocations, is
18 not necessarily inconsistent with the definition of "permanent."

19 The law mandates that the Trinity River and fishery must now
20 be restored with CVP water flows. Congress has required that
21 Trinity River water be the source of the restoration. It has not
22 provided a replacement source of that water for the CVP. That
23 such restoration will likely create CVP water shortages that will
24 deprive other CVP users has not been addressed by Congress,
25 except for general reference in the CVPIA to balance needs of
26 other CVP water users. §3402(f). Ultimately, Interior annually

27 _____
28 term "permanent."

1 uses complex quantitative water management methods to accommodate
2 the large number of variables it faces in annually allocating CVP
3 water among environmental, municipal, industrial, agricultural,
4 and power generating uses. The flow levels selected are not
5 arbitrary or capricious as a matter of law; however, they were
6 not selected from a reasonable range of alternatives.

7 Plaintiff's motion for summary judgment based on the
8 arbitrariness, capriciousness, or unlawfulness of the recommended
9 flows in the ROD is DENIED. The federal defendants' and the
10 Hoopa Valley Tribe's motions on the same issue are provisionally
11 GRANTED, subject to an SEIS which takes a hard look at a flow
12 restoration plan which considers non-flow and secondary statutory
13 objectives.

14
15 E. REMEDY

16 Defendants argue that if NEPA violations are found, the
17 court should exercise its judicial and equitable discretion and
18 allow the ROD to be implemented or at least allow the non-flow
19 measures of the ROD to continue as they have under the
20 preliminary injunctions. Plaintiffs argue that the ROD should be
21 set aside in accordance with Section 706 of the APA.

22 APA Section 706 provides: "[t]he reviewing court shall . . .
23 hold unlawful and set aside agency action, findings, and
24 conclusions found to be . . . arbitrary, capricious, an abuse of
25 discretion, or otherwise not in accordance with law." 5 U.S.C. §
26 706. Despite the mandatory language, "shall," courts retain
27 equitable discretion to fashion appropriate remedies when there
28 has been a violation of NEPA. See *Amoco Production Co. v.*

1 *Village of Gambell, Alaska*, 480 U.S. 531, 541-45 (1987); *Nat'l*
2 *Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th
3 Cir. 2001).

4 To determine whether injunctive relief is appropriate, the
5 traditional balance of harms analysis is applied. *Nat'l Parks &*
6 *Conservation*, 241 F.3d at 737. The court should consider whether
7 there will be irreparable injury and whether there are other
8 adequate legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S.
9 305, 312 (1982). However, [e]nvironmental injury, by its nature,
10 can seldom be adequately remedied by money damages and is often
11 permanent or at least of long duration, *i.e.*, irreparable."
12 *Amoco*, 480 U.S. at 545. "When the 'proposed project may
13 significantly degrade some human environmental factor,'
14 injunctive relief is appropriate." *Nat'l Parks & Conservation*,
15 241 F.3d at 737 (quoting *Alaska Wilderness Recreation & Tourism*
16 *Assoc. v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995).

17 A violation of NEPA is an environmental harm. *Sierra Club*
18 *v. Marsh*, 872 F.2d 497, 500-04 (1st Cir. 1989) ("Congress, in
19 enacting NEPA, explicitly took note of one way in which
20 governments can harm the environment (through inadequately
21 informed decisionmaking); . . . courts should take account of
22 this harm and its potentially 'irreparable' nature."). "[T]he
23 harm at stake in a NEPA violation *is* a harm to the *environment*,
24 not merely to a legalistic 'procedure,' nor, for that matter,
25 merely to psychological well-being. . . . [T]he risk implied by a
26 violation of NEPA is that real environmental harm will occur
27 through inadequate foresight and deliberation." *Id.* at 504
28 (emphasis in original).

1 The current dispute is unusual in that environmental
2 concerns are on both sides of the balance of hardships. On one
3 side, the federal defendants, in seeking to restore the Trinity
4 River fishery, failed: 1) to adequately analyze the impact of
5 likely major CVP reoperation associated with the X2 standard on
6 the Sacramento River and Delta ESA-listed species; 2) to consider
7 the impacts of Trinity Dam outlet bypass on Northern California
8 hydroelectric power supply and reliability; 3) to adequately
9 analyze the Preferred Alternative's ability to impact on Northern
10 California hydroelectric power supply; and, 4) to fully consider
11 an Integrated Management Alternative. NEPA's purpose is to
12 ensure decisions made by federal agencies include such analysis
13 to reduce the likelihood a bad decision is made. On the other
14 hand, restoration of the Trinity River fishery, and the ESA-
15 listed species that inhabit it, are to remedy real and continuing
16 environmental harm, and are unlawfully long overdue. The chronic
17 delays by Interior in discharging its express statutory duties in
18 managing the CVP, and its riverine components, have unjustifiably
19 thwarted these Congressional objectives. *See generally,*
20 *Firebaugh Canal Co. v. United States*, 201 F.3d 568, 577-78 (9th
21 Cir. 2000).

22 Contrary to Plaintiffs' assertion of irrelevancy, the
23 government is also in breach of its general and specific
24 (§ 3406(b)(23)) independent federal trust obligation to the Hoopa
25 and Yurok Tribes. Congress mandated that restoration of the
26 Trinity River begin no later than 1996, in part to discharge the
27 federal government's trust responsibility to the Tribes, a
28 deadline six years past. In addition to harm caused by delay,

1 "[T]he harm at stake is a harm to the *environment*, but the harm
2 consists of the added *risk* to the environment that takes place
3 when governmental decisionmakers make up their minds without
4 having before them an analysis (with proper public comment) of
5 the likely effects of their decision upon the environment."
6 *Sierra Club*, 872 F.2d at 500 (emphasis in original). The balance
7 of equities favors continuing to restore the Trinity River
8 fishery.

9 Congress here provided a failsafe mechanism of a minimum
10 flow regime. The undisputed evidence establishes that the
11 340,000 AF annual flows are not sufficient in all types of water
12 years to restore the Trinity River fishery. To further delay
13 implementation of (b)(23) for another indefinite period of time
14 while Interior "tries to get it right" is an inadequate remedy
15 which will result in irreparable injury.

16 Considering the totality of all factors, the balance of
17 hardships weighs heavily against enjoining the non-flow measures
18 in the ROD and the implementation of the ROD's critically dry and
19 dry year flows,⁵² in view of expert testimony that less than
20 368,000 AF of annual flows actually jeopardizes the Trinity River
21 fishery. Despite all the Plaintiffs' legitimate concerns,
22 Congress has mandated the Trinity River and its fishery must be
23 restored without further delay. This overriding mandate comes
24 from Congress and it is to Congress Plaintiffs must address their
25 concerns about any unfairness in the reallocation of the Trinity

26
27 ⁵² At oral argument the federal defendants stated that the
28 NMFS' incidental take statement is only valid if the flows are
implemented.

1 River flows to the Trinity River Basin and away from other CVP
2 uses. It is unacceptable that Interior's failures be the
3 catalyst to impose harm on all the competing interests. Such
4 prioritization of federal water use for the Trinity River is the
5 province of the executive and legislature, not the judiciary.

6 After full analysis, it is likely that the infirmities in
7 the environmental scoping and review processes can be cured by an
8 SEIS. The Sacramento River and Delta ESA-listed species are not
9 harmed by immediately implementing the ROD's non-flow measures
10 and permitting use of critically dry and dry year flows provided
11 by the ROD. Any harm to the NEPA decisionmaking process by
12 allowing these measures to go forward is overwhelmingly offset by
13 the benefit to the Trinity River fishery and need to discharge
14 the federal trust obligation owed to the Indian Tribes.

15 However, the balance of the hardships does favor enjoining
16 the implementation of the ROD's permanent recommended flows above
17 the 452,600 AF level, pending full compliance with NEPA and the
18 ESA. There are ESA-listed species on both sides of the balance
19 and other impacts on CVP water users which have not been properly
20 subjected to a "hard look." NEPA's purpose is to prevent the
21 agency from making a decision that it will later regret. The
22 bureaucratic tendency to chose an option simply because it has
23 already been implemented is a harm to the environment that is
24 real. Congress has set the minimum release of 340,000 AF/year of
25 water as a fail-safe to prevent further degradation of the
26 Trinity River pending Interior's lawful completion of scientific

1 study of the issues. Congress' finding deserves deference.⁵³ The
2 court has no inclination to, nor should it, substitute its
3 judgment to decide the permanent increase in the amount of CVP
4

5
6 ⁵³ Plaintiffs argue that Section (b)(23) "forecloses" the
7 exercise of equitable discretion without lawful concurrence based
8 on the section's provision that "[i]f the Hoopa Valley Tribe and
9 the Secretary do not concur, the minimum Trinity River instream
10 fishery releases . . . shall remain in effect unless increased by
11 an Act of Congress, appropriate judicial decree, or agreement
12 between the Secretary and the Hoopa Valley Tribe." While
13 Congress may control the exercise of a court's discretion, the
14 congressional mandate must be fairly explicit. *Weinberger v.*
Romero-Barcelo, 456 U.S. 305, 313 (1982); *Amoco*, 480 U.S. at 542.
"Congress may intervene and guide or control the exercise of the
courts' discretion, but we do not lightly assume that Congress
has intended to depart from established principles." *Romero-*
Barcelo, 456 U.S. at 313.

[T]he comprehensiveness of this equitable discretion is
not to be denied or limited in the absence of a clear
and valid legislative command. Unless a statute in so
many words, or by a necessary and inescapable
inference, restricts the court's jurisdiction in
equity, the full scope of that jurisdiction is to be
recognized and applied. The great principles of
equity, securing complete justice, should not be
yielded to light inferences, or doubtful construction.

Id. (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398
(1946)).

Given the purpose of Section (b)(23) is to restore the
Trinity River fishery and to meet the federal government's trust
obligations to the Hoopa Valley Tribe, and the fact that Section
(b)(23) states that 340,000 AF is the "minimum" instream fishery
flows required under the statute, the fair inference is that
Congress meant to limit the court's discretion in lowering the
amount of water dedicated to instream fishery flows below 340,000
AF. There is no "necessary and inescapable inference" that
Section (b)(23) limits the court's discretion to craft equitable
relief in excess of that amount. However, Congress' findings do
provide guidance.

1 water that should flow into the Trinity River.⁵⁴ This would
2 result in judicial micro-management of the Trinity River
3 restoration. The restoration decision was made by Congress, to
4 be implemented by Interior, not the Court.⁵⁵

5 Congress has expressed its unequivocal concern in the 1984
6 and 1996 Acts, as implemented by CVPIA § 3406(b)(23), is about
7 fulfilling the federal government's trust obligation to the
8 Indian Tribes. The federal defendants' failure to meet the
9 deadlines set out by Congress in the CVPIA defeats this purpose.
10 Continued delay only exacerbates the harm. In completing an SEIS
11 the federal defendants must expedite their review and conclude
12 the process within one hundred twenty (120) days following this
13 decision. The federal defendants have studied the Trinity River
14 restoration issue for over twenty years. The process must now be
15 immediately completed in compliance with federal law.

16 17 IV. CONCLUSION

18
19 ⁵⁴ The Hoopa Valley Tribe argues, relying on various
20 declarations, that the minimum amount of water necessary is
21 368,600 AF. This opinion draws upon hydrology, geomorphology,
22 and ecology. A court cannot usurp the province of the executive.
23 Congress determined that the minimum amount necessary is 340,000
24 AF/year. That minimum flow must be provided to the Trinity
25 River.

26 ⁵⁵ The Hoopa Valley Tribe also argues the preliminary
27 injunction decisions found that certain flow releases under the
28 ROD have been demonstrated to impose no harm on plaintiffs. That
is not the finding of those decisions. The preliminary
injunction decisions balanced current hardships and determined
certain annual water releases were justified under the totality
of circumstances premised on then-existing hydrological
conditions.

1 When the EIS scoping to define the purpose for the TRFES
2 began, the Tribes participated and their lawyer stood by while
3 the County of Trinity persuaded the EIS management team to
4 unfairly and unlawfully narrow the purpose and scope of the EIS.
5 Such action seeking to limit informed decision-making for the
6 sale of expediency, has no place in the NEPA process which
7 invests government lawyers and representatives with the legal
8 responsibility to carry out NEPA's public objectives to ensure
9 that a hard look is taken at all reasonable alternatives to
10 proposed major federal action, which will have undeniable
11 consequences, to enable the Agency to make an informed decision
12 with informed public participation. Here, an intentional
13 subversion of NEPA's requirements prevented full and fair
14 consideration of significant impacts which will be caused by CVP
15 reoperations. A reasonable Integrated Management alternative,
16 which would utilize non-flow measures and seek to minimize
17 impacts on all other CVP interests, while achieving the statutory
18 goal of Trinity River fishery and basin restoration, was not
19 fairly considered. Inadequate consideration was given to power
20 supply and reliability impacts in a changing hydropower
21 environment. The public had no participation in any NEPA process
22 leading to the ROD, after the DEIS public comment period closed.
23 BioOp RPMs for salinity control and temperature regulation that
24 constitute major action were improperly adopted.

25 Abrogation of the full and free investigation and
26 consideration of all reasonable alternatives has resulted in an
27 administrative record that severely limits the Court's ability to
28 conduct a fully informed analysis of all the merits of

1 Plaintiffs' NEPA claims. Specifically, that significant CVP re-
2 operation adverse impacts were not considered; an Integrated
3 Management Alternative was not properly considered or fairly
4 analyzed; and that the Preferred Alternative ignores the best
5 available science. Some of the NEPA procedures followed
6 impaired, rather than advanced, public participation and informed
7 decision-making. They also caused substantial post-ROD and
8 extra-record information to be submitted as a direct result of
9 the inappropriately narrow scope of the EIS. The defenders of
10 the EIS and ROD contend plaintiffs did not timely present
11 information, although the narrow definition of the EIS's purpose
12 was the ultimate excuse for Interior not performing the analysis.
13 They now criticize the Hanson opinions as bad science, yet there
14 was no public discussion or NEPA review of such management
15 measures, because the flow recommendations were made without
16 benefit of Dr. Hanson's scientific calculations and measures to
17 achieve secondary objectives. The agencies and EIS management
18 team intentionally narrowed the EIS purposes to "ecological" and
19 "flow-driven" objectives which avoided addressing, and foreclosed
20 public participation, on any alternative that sought to utilize
21 non-flow measures to minimize species and other CVP-wide adverse
22 impacts without compromising the Trinity River fishery and basin
23 restoration.

24 Although Interior cannot be forced to adopt an Integrated
25 Management alternative, such a reasonable alternative was
26 entitled to a hard look on its merits. There is no explanation
27 for the failures of the NEPA process that occurred in this case,
28 except that public participation had been concluded when the hard

1 questions were raised and dismissed by Interior as insignificant.
2 The NEPA process must be lawfully completed by a supplemental
3 EIS.

4 ORDERS

5 The Hoopa Valley Tribe's motion for summary judgment on the
6 issue of NEPA's applicability to this case as irreconcilably
7 inconsistent with § 3406(b)(13) and related statutes is DENIED.

8 Plaintiffs' motion for summary adjudication on the issue of
9 the federal defendants' failure to comply with NEPA based on
10 inadequate assessment of impacts of the Preferred Alternative on
11 Sacramento River and Delta ESA-listed species which will be
12 caused by CVP reoperation is GRANTED.

13 Plaintiffs' motion for summary judgment on the issue of the
14 federal defendants' failure to comply with NEPA based on a lack
15 of analysis of the Lewiston Dam alternate bypass RPM is GRANTED.
16 Opposing motions on the same issue are DENIED.

17 Plaintiffs' motion for summary adjudication on the issue of
18 the federal defendants' failure to comply with NEPA in their
19 analysis of the X2 RPM is GRANTED. The federal defendants'
20 motion on the same issue is DENIED.

21 Plaintiffs' motion for summary judgment on the issue of
22 federal defendants' failure to comply with NEPA based on analysis
23 of the Preferred Alternative's effect on power system reliability
24 is GRANTED. The federal defendants' motion on the same issue is
25 DENIED.

26 Plaintiffs' motion for summary judgment on the issue of
27 federal defendants' failure to comply with NEPA based on the
28 timing of the EIS is GRANTED IN PART.

1 Plaintiffs' motion for summary judgment on the issue of the
2 federal defendants' failure to comply with NEPA based on the
3 range of alternatives considered is GRANTED.

4 Plaintiffs' motion to set aside the X2 RPM in the USFWS
5 BioOp as major action is GRANTED. The federal defendants' motion
6 on the same issue is DENIED. Plaintiffs' motion to set aside the
7 the NMFS BioOp RPM requiring immediate implementation of the
8 Preferred Alternative is GRANTED. Federal defendants' motion on
9 the same issue is DENIED. Plaintiffs' motion to set aside the
10 NMFS BioOp because it failed to identify lethal harm to species
11 is DENIED. Federal defendants' motion on the same issue is
12 GRANTED.

13 Plaintiffs' motion to set aside the ROD because it is
14 arbitrary and capricious is DENIED.

15 Having balanced the hardships, and to avoid irreparable
16 injury, implementation of ROD flows in years except dry or
17 critically dry years, not to exceed 452,600 AF, is ENJOINED until
18 the federal defendants complete an SEIS in compliance with NEPA
19 and this decision.

20 All non-flow measures prescribed by the ROD shall proceed
21 and plaintiffs' request for an injunction against such ROD
22 measures is DENIED.

23 The federal government has a trust obligation to the Hoopa
24 and Yurok Indian Tribes and Congress expressed its intent this
25 obligation be finally fulfilled more than four years ago. The
26 federal defendants must proceed immediately to complete the NEPA
27 process. The court retains jurisdiction over this controversy to
28 enforce the orders prescribed. The federal defendants shall

1 complete the SEIS on the issued designated within one hundred
2 twenty (120) days following date of service of this decision.
3 SO ORDERED.

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5 DATED: December 9, 2002.

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 Oliver W. Wanger
8 UNITED STATES DISTRICT JUDGE
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