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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE)
COUNCIL, et al.,)
)
Plaintiffs,)
)
v.)
)
DIRK KEMPTHORNE, in his official)
capacity as Secretary of the)
Interior, et al.,)
)
Defendants,)
)
CALIFORNIA DEPARTMENT OF WATER)
RESOURCES,)
)
Defendant-Intervenor,)
)
STATE WATER CONTRACTORS,)
)
Defendant-Intervenor,)
)
SAN LUIS & DELTA-MENDOTA WATER)
AUTHORITY, et al.,)
)
Defendant-Intervenors.)
)
_____)

1:05-cv-1207 OWW TAG
ORDER ON PLAINTIFFS'
MOTIONS FOR SUMMARY
JUDGMENT

The Court has read and considered the memoranda of points and authorities and other documents in support of and in opposition to Plaintiffs' Motion for Summary Judgment, and has heard and considered the arguments of counsel at the hearing on

1 this matter held on April 26, 2007.

2 NOW THEREFORE, good cause appearing, the Court GRANTS IN
3 PART AND DENIES IN PART Plaintiffs' motion for summary judgment.
4 Specifically, the Court FINDS and DECLARES that the U.S. fish and
5 Wildlife Service's ("FWS") 2005 biological opinion on the impacts
6 of the long-term operations of the Central Valley Project and
7 State Water Project on the delta smelt ("2005 BiOp") is unlawful
8 and inadequate on the following grounds:

9 (1) The Delta Smelt Risk Assessment Matrix, as currently
10 structured, does not provide a reasonable degree of certainty
11 that mitigation actions will take place, even if FWS retains the
12 discretion to draw upon numerous sources of water, not just the
13 Environmental Water Account, Central Valley Project Improvement
14 Act (b) (2) water, and Vernalis Adaptive Management Plan programs,
15 to support fish protection.

16 (2) FWS failed to utilize the best available scientific
17 information by not addressing the 2004 fall midwater trawl data
18 and the issue of climate change.

19 (3) The 2005 BiOp's historical approach to setting take
20 limits fails to consider take in the context of most recent
21 overall species abundance and jeopardy.

22 (4) The 2005 BiOp did not adequately consider impacts to
23 critical habitat by (a) failing to analyze how project operations
24 will impact the value of critical habitat for the recovery of the
25 smelt and (b) failing to consider impacts upon the entire extent
26 of known smelt critical habitat.

27 The Court GRANTS Plaintiffs' motions for summary judgment
28 with respect to these claims. Plaintiffs' remaining claims are

1 DENIED.

2 This Order is effective this 1st day of June, 2007, at 12:30
3 p.m. The parties have agreed that the effect of the order as to
4 Endangered Species' Act consequence under §§ 7 and 9 shall be
5 stayed pending further order of this court or entry of final
6 judgment, whichever first occurs.

7 The stay is without prejudice to the right of any party to
8 seek legal or equitable relief to address any injury in
9 accordance with the requirements of law.

10 A separate remedies hearing shall be scheduled in accordance
11 with the schedule agreed to by the parties and adopted this day
12 in open court.

13

14 IT IS SO ORDERED.

15 Dated: June 1, 2007

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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