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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WESTLANDS WATER DISTRICT,)
)
 Plaintiff,)
)
 NORTHERN CALIFORNIA POWER)
 AGENCY; SACRAMENTO MUNICIPAL)
 UTILITY DISTRICT,)
)
 Plaintiff-)
 Intervenor)
)
 v.)
)
 UNITED STATES DEPARTMENT OF THE)
 INTERIOR, et al.,)
)
 Defendants.)
)
 and)
)
 HOOPA VALLEY TRIBE; YUOK TRIBE,)
)
 Defendant-)
 Intervenor.)
)
 _____)
)
 IN RE TRINITY RIVER (B) (23))
 LITIGATION)
)
 _____)

CIV F 00-7124 OWW DLB
MEMORANDUM DECISION AND
ORDER RE: MOTIONS FOR
PRELIMINARY INJUNCTION

FILED
MAR 22 P 3:32
E.D.

Westlands Water District ("Westlands"); San Luis & Delta-
Mendota Water Authority; and San Benito County Water District
(collectively "water-districts"); the Northern California Power

136

1 Agency ("NCPA");¹ and the Sacramento Municipal Utility District
2 ("SMUD")² (collectively "plaintiffs") move for a preliminary
3 injunction pursuant to Rule 65 of the Federal Rules of Civil
4 Procedure. The federal defendants, the Hoopa Valley Tribe, and
5 the Yurok Tribe oppose the motions. Oral argument was heard on
6 Monday, March 19, 2001.

7
8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 The underlying action involves the United States Department
10 of Interior's ("Interior") administration of the Trinity River
11 Division ("TRD") of the Central Valley Project ("CVP"), "the
12 country's largest federal water reclamation project,"³ and
13 Interior's implementation of section 3406(b)(23)⁴ of the Central
14

15 ¹ NCPA is a joint powers agency formed under California
16 law, contains fourteen public-agency members, including eleven
17 cities, an irrigation district, a public utilities district, and
18 a municipal port. See Doc. 105 ¶ 2 (NCPA complaint-in-
19 intervention).

20 ² SMUD is a political subdivision of the State of
21 California, formed under California law. See Doc. 109 ¶ 2 (SMUD
22 complaint-in-intervention); Cal. Pub. Util. Code §§ 11501-4403.5
23 (2000). It serves over one-half million customers within a 900-
24 square-mile area, including over 450,000 residential customers.
25 See Doc. 109 ¶ 2.

26 ³ O'Neill v. United States, 50 F.3d 677, 680-83 (9th Cir.
27 1995); see also United States v. Westlands Water Dist.,
28 F.Supp.2d ___, 2001 WL 263417, * 1 (E.D. Cal. Mar. 13, 2001).

29 ⁴ CVPIA §§ 3406(b) and (b)(23) reads:

30 The Secretary, immediately upon the enactment of this title,
31 shall operate the Central Valley Project to meet all obligations
32 under State and Federal law, including but not limited to the
33 Federal Endangered Species Act, 16 U.S.C. § 1531, et seq., and
34 all decisions of the California State Water Resources Control
35 Board establishing conditions on applicable licenses and permits
36 for the project. The Secretary, in consultation with other State

1 Valley Project Improvement Act ("CVPIA")⁵ in such a way as to

2
3 and Federal agencies, Indian tribes, and affected interests, is
4 further authorized and directed to:

5 . . .
6 (23) in order to meet Federal trust responsibilities to protect
7 the fishery resources of the Hoopa Valley Tribe, and to meet the
8 fishery restoration goals of the Act of October 24, 1984, Public
9 Law 98-541, provide through the Trinity River Division, for water
10 years 1992 through 1996, an instream release of water to the
11 Trinity River of not less than three hundred and forty thousand
12 acre-feet per year for the purposes of fishery restoration,
13 propagation, and maintenance and,

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

24 (B) not later than December 31, 1996, the Secretary shall forward
25 the recommendations of the Trinity River Flow Evaluation Study,
26 referred to in subparagraph (A) of this paragraph, to the
27 Committee on Energy and Natural Resources and the Select
28 Committee on Indian Affairs of the Senate and the Committee on
Interior and Insular Affairs and the Committee on Merchant Marine
and Fisheries of the House of Representatives. If the Secretary
and the Hoopa Valley Tribe concur in these recommendations, any
increase to the minimum Trinity River instream fishery releases
established under this paragraph and the operating criteria and
procedures referred to in subparagraph (A) shall be implemented
accordingly. If the Hoopa Valley Tribe and the Secretary do not
concur, the minimum Trinity River instream fishery releases
established under this paragraph shall remain in effect unless
increased by an Act of Congress, appropriate judicial decree, or
agreement between the Secretary and the Hoopa Valley Tribe.
Costs associated with implementation of this paragraph shall be
reimbursable as operation and maintenance expenditures pursuant
to existing law.

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

⁵ Pub. L. No. 102-575, § 3401-12, 106 Stat. 4600, 4706
(Oct. 30, 1992).

1 allegedly reduce available CVP water and electricity to meet
2 Interior's contractual commitments to the water-districts,⁶
3 federal water-service contractors, and power generators, and
4 adversely impact other parties, including the public.

5 The TRD transfers water from the Klamath River Basin in
6 Trinity County, where the Trinity River is a tributary, to the
7 Sacramento River Basin. Construction of the TRD of the CVP was
8 completed in 1963, and it commenced operations in 1964. See 65
9 Fed. Reg. 69510, at 69571, 2000 WL 1711646 (Nov. 17, 2000). It
10 primarily consists of the Trinity Dam and Powerplant, Clair Engle
11 Lake, Lewiston Dam, Lake, and Powerplant; Clear Creek Tunnel,
12 Judge Francis Carr Powerhouse, Clair A. Hill Whiskeytown Dam and
13 Whiskeytown Lake, Spring Creek Power Conduit and Powerplant, and
14 Spring Creek Debris Dam and Reservoir. Its primary function was
15 to store Trinity River water for regulated diversion to
16 California's Central Valley for agricultural, municipal, and
17 industrial uses. See id. The TRD's construction and operation
18 resulted in the diversion of up to ninety percent (90%) of the
19 average annual discharge into the Trinity River at Lewiston
20 (1,234,000 acre-feet of the 1,396,000 acre-foot inflow), and
21 blocked access to 109 miles of steelhead and salmon spawning and
22

23 ⁶ There are actually three different water district
24 plaintiffs: Westlands; San Luis & Delta-Mendota Water Authority
25 ("San Luis Water"); and San Benito County Water District ("San
26 Benito Water") (collectively "water-districts"). San Luis Water
27 consists of thirty-two public agencies that contract with
28 Reclamation for CVP water for use within the California counties
of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito,
and Santa Clara. See Doc. 38 ¶ 2 (declaration of Daniel Nelson).
See id.

1 rearing habitat.⁷ In response to declining fisheries and
2 degraded habitat conditions, Interior decided in 1981 to increase
3 flows into the Trinity River ranging from 140,000 acre-feet to
4 340,000 acre-feet annually, with reductions in dry and critically
5 dry years. In addition, the USFWS was directed to undertake a
6 Flow Evaluation Study to assess fish habitat at various flows,
7 summarize the effectiveness of other instream and watershed
8 restoration activities, and recommend appropriate flows and other
9 measures necessary to better maintain favorable habitat
10 conditions. The study began in October, 1984 and was completed
11 by a June, 1999, report. In October, 1984, Congress enacted the
12 Trinity River Basin Fish and Wildlife Management Act⁸ to restore
13 fish and wildlife populations to pre-TRD levels. This Act
14 provides funding for construction, operation, and maintenance of
15 the eleven-item action plan developed by the Trinity River Task
16 Force in 1982. CVPIA § 3406(b)(23) requires, through the TRD, an
17 annual instream release of not less than 340,000 acre-feet of
18 water into the Trinity River in order to meet Federal trust
19 responsibilities to protect fishery resources of the Hoopa Valley
20 and Yurok Tribes and to meet the fishery restoration goals of the
21

22
23 ⁷ Trinity Lake has a storage capacity of 2,448,000 acre-
24 feet, and Lewiston reservoir has a storage capacity of 14,660
25 acre-feet. Reduced river flows, combined with excessive
26 watershed erosion and encroachment of the river channel by
27 riparian vegetation, caused major changes in the channel
28 morphology resulting in the simplification and degradation of the
remaining salmon and steelhead habitat of the Trinity River below
the Lewiston Dam, which resulted in rapid declines of salmon and
steelhead populations following completion of the TRD.

⁸ Public Law 98-541, 98 Stat. 2721.

1 Management Act.⁹ The CVP TRD accounts for between twenty-five
2 and thirty percent (25-30%) of the 2000 MW of CVP-generated
3 annual power. See Doc. 105 ¶ 12.¹⁰

4 The Trinity River Basin is home to protected fish species:
5 The native anadromous salmonid species of interest in the
6 mainstem Trinity River and its tributaries include chinook
7 salmon, coho salmon, and steelhead. Of the three species,
8 there are two spawning populations of chinook salmon (spring
9 and fall) and two spawning populations of steelhead (winter
10 and summer). All anadromous species begin their life in
11 fresh water, then migrate to the ocean to mature, and return
12 to spawn in fresh water.

13 Doc. 42 exhibit I at 3-151 to 3-152 (DEIS). The spring-run
14 chinook migrates in the spring to summer, spawns in the early
15 fall, rears in winter-spring-summer, and makes its habitat for
16 feeding in shallow, slow-moving waters adjacent to higher water
17 velocities. The fall-run chinook migrates in the fall, spawns in
18 the fall, rears in winter-spring-summer, and makes its habitat in
19 the same areas as the spring-run chinook. The winter steelhead
20 migrates in the fall to winter, spawns between February and
21 April, rears year-round, and makes its habitat in areas of clean
22 cobble where there is refuge from high velocities, where

24 ⁹ The 340,000 acre-feet release represents the third-
25 lowest unregulated flow on record (over 80 years) in the Trinity
26 River. See TRFEFR at 62-64 & tbl 4.4.

27 ¹⁰ For a more expansive description of the TRD, see Eric
28 Stene, Central Valley Project: Trinity River Division (Fifth
Draft), at <http://dataweb.usbr.gov/html/trinity.html> (last
visited Mar. 20, 2001) (last modified Mar. 17, 2001).

1 juveniles overwinter for one to two or more years. The summer
 2 steelhead migrates in the spring to summer, spawns between
 3 February and April, rears year-round, and makes its habitat in
 4 the same area as its related species. See Doc. 42 exhibit M at
 5 2-103 table 3-10 (FEIS).

6 In January, 1998, the draft Trinity River Flow Evaluation
 7 Report was released. In June, 1999, Interior, in consultation
 8 with the Hoopa Valley Tribe, published the Trinity River Flow
 9 Evaluation Final Report ("TRFEFR"). See Doc. 42 exhibit H.¹¹
 10 The TRFEFR recommends increasing the Trinity River fish flows
 11 from the statutorily-mandated 340,000 acre-feet/year to between
 12 369,000 and 815,000 acre-feet/year. See Doc. 35 at ¶ 38 (first
 13 amended complaint). Specifically, the recommended annual water
 14 volumes for instream release are:

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	

11 See also FWS Publications Online, at
 12 <http://www.nctc.fws.gov/library/pubs3.html> (last visited Mar. 21,
 13 2001) (last modified Mar. 15, 2001).

1 See TRFEFR xxxi; 241.¹²

2 On October 19, 1999, the United States Bureau of Reclamation
3 ("Bureau") and the United States Fish & Wildlife Service
4 ("USFWS") released the draft "Trinity River Mainstem Fishery
5 Restoration Environmental Impact Statement/Report" ("DEIS"),
6 which described alternate approaches for restoring and
7 maintaining the Trinity River fishery. See Doc. 35 at ¶ 38; see
8 also Doc. 42 exhibit F (DEIS selected pages); exhibit I (whole
9 DEIS).¹³ The six evaluated approaches were the "No Action
10 Alternative" (DEIS § 2.1.2); "Maximum Flow Alternative" (DEIS
11 § 2.1.3); "Flow Evaluation" (DEIS § 2.1.4); "Percent Inflow
12 Alternative" (DEIS § 2.1.5); "Mechanical Restoration Alternative"
13 (DEIS § 2.1.6); and "State Permit Alternative" (DEIS § 2.1.7).
14 See Doc. 42 exhibit I at 2-1 to 2-31. Eight other alternatives
15 were considered, but eliminated (i.e., not fully evaluated)
16 within the DEIS. See id. "The DEIS/EIR identifies a preferred
17 alternative that . . . increase[s] annual [water] releases to the
18 Trinity River through a new water management program that . . .
19 seek[s] to provide a minimum level of water . . . to restore the
20 Trinity River fishery. The preferred alternative is based on the
21 Flow Evaluation Study, an extended study that commenced October,

22
23 ¹² The average is weighted, because the calculation takes
24 into account the probability of the occurrence of the type of
25 water year.

26 ¹³ See also Trinity River Draft Environmental Impact
27 Statement Released for Public Comment ("TR DEIS webpage"), at
28 <http://www.mp.usbr.gov/mp140/news/1999/DOI-TRIN.html> (last
modified Oct. 26, 1999) (visited Dec. 14, 2000); FWS Publications
Online, at <http://www.nctc.fws.gov/library/pubs3.html> (last
visited Mar. 21, 2001) (last modified Mar. 15, 2001)..

1 1984, and was completed in June, 1999. Under the preferred
2 alternative, an average of 52 percent of the water in the Trinity
3 River would continue to be diverted to the Central Valley based
4 on annual hydrology. The preferred alternative also . . .
5 address[es] upstream habitat, sedimentation, and runoff issues."
6 TR DEIS webpage. "The Flow Evaluation Alternative, coupled with
7 additional watershed protection efforts (described in the
8 Mechanical Restoration Alternative), was identified as the
9 Preferred Alternative in terms of best meeting the purpose and
10 need and goals and objectives, while also minimizing adverse
11 impacts." DEIS at 2-3.

12 Interior published the availability of the draft EIS/EIR and
13 the commencement of a public comment period scheduled to end on
14 December 8, 1999. See 64 Fed. Reg. 56364, 1999 WL 827447 (Oct.
15 19, 1999). The public comment period was extended until January
16 20, 2000. See 64 Fed. Reg. 67584, 1999 WL 1078497 (Dec. 2,
17 1999); 64 Fed. Reg. 72357, 1999 WL 1247501 (Dec. 27, 1999).

18 On January 20, 2000, the water-districts submitted written
19 comments¹⁴ criticizing the draft report, noting, inter alia, that
20 the draft report failed to analyze the preferred alternative's
21 potential adverse environmental impacts on federally-listed
22 endangered or threatened fish species within the Sacramento River
23 system and the Sacramento-San Joaquin Delta ("Delta"), and also
24 failed to analyze how these adverse impacts, if any, could be
25

26
27 ¹⁴ "Comments of the San Luis & Delta-Mendota Water
28 Authority on the Trinity River Mainstem Fishery Restoration
Environmental Impact Statement/Environmental Impact Report,"
dated Jan. 19, 2000.

1 minimized or avoided. See Doc. 35 at ¶¶ 39-40 & exhibit A.

2 On March 10, 2000, Westlands and San Luis sent a sixty-day
3 notice of intent to sue to Interior, threatening suit if Interior
4 did not undertake a formal ESA consultation on the TRFEFR. See
5 Doc. 92 exhibit A (declaration of Eric N. Robinson).

6 On March 29, 2000, Interior forwarded the TRFEFR to
7 Congress, pursuant to CVPIA § 3406(b)(23) ("the Secretary shall
8 forward the recommendations of the Trinity River Flow Evaluation
9 Study . . . to the Committee on Energy and Natural Resources and
10 the Select Committee on Indian Affairs of the Senate and the
11 Committee on Interior and Insular Affairs and the Committee on
12 Merchant Marine and Fisheries of the House of Representatives.
13 If the Secretary and the Hoopa Valley Tribe concur in these
14 recommendations, any increase to the minimum Trinity River
15 instream fishery releases established under this paragraph and
16 the operating criteria and procedures referred to in subparagraph
17 (A) shall be implemented accordingly."). See Doc. 35 at ¶ 42.

18 On May 8, 2000, Interior responded to the water-districts'
19 letter, acknowledging that ESA "§ 7 consultation over potential
20 effects to species listed as either threatened or endangered
21 under the ESA . . . must be accomplished as part of the process
22 of making a decision on the Program." Doc. 92 at exhibit C. It
23 reassured that "no final decision on the Program will be made
24 until both the USFWS and NMFS have issued biological opinions
25 regarding implementation of the Program, and that these opinions
26 will be taken into consideration in making such decisions." Id.

27 On October 12, 2000, the NMFS formally issued the
28 "Biological Opinion for the Trinity River Mainstem Fishery

1 Restoration EIS and Its Effects on Southern Oregon/Northern
2 California Coast Coho Salmon, Sacramento River Winter-run Chinook
3 Salmon, Central Valley Spring-run Chinook Salmon, and Central
4 Valley Steelhead" ("NMFS BioOp."). See Doc. 35 at ¶ 43; exhibit
5 B. This opinion states that implementation of the report will
6 affect many aspects of the river, including decreased water
7 flows, and discusses reasonable and prudent measures ("R&PMs") to
8 minimize or avoid the preferred alternative's impacts on
9 federally-listed fish. See id. at 43-45.

10 Also on October 12, 2000, the USFWS issued "Re[-]initiation
11 of Formal Consultation: Biological Opinion of the Effects of
12 Long-term Operation of the Central Valley Project and State Water
13 Project as Modified by Implementing the Preferred Alternative in
14 the Draft Environmental Impact Statement/Environmental Impact
15 Report for the Trinity River Mainstem Fishery Restoration
16 Program" ("USFWS BioOp"). See id. at ¶ 48 & exhibit C.

17 On November 17, 2000, Interior published notice of the
18 availability of the final EIS/EIR. See 65 Fed. Reg. 69512, 2000
19 WL 1711646 (Nov. 17, 2000);¹⁵ see also Doc. 42 exhibit M (final
20 Trinity River Mainstem Fishery Restoration Environmental Impact
21 Statement/Report, State Clearinghouse No. 1994123009, dated
22 October, 2000); FWS Publications Online, at
23 <http://www.nctc.fws.gov/library/pubs3.html> (last visited Mar. 21,
24 2001) (last modified Mar. 15, 2001)..

25
26 ¹⁵ The notice was originally published on October 20,
27 2000, see 65 Fed. Reg. 63087, 2000 WL 1544855 (Oct. 20, 2000),
28 but was rescinded on October 25, 2000, because the final EIS/EIR
had not yet been issued, see 65 Fed. Reg. 63888, 2000 WL 1579932
(Oct. 25, 2000).

1 On December 14, 2000, the water-districts filed their
2 complaint in this court against defendants,¹⁶ with three claims
3 for relief from:

- 4 (1) "maladministration" of the Endangered Species Act
5 ("ESA")¹⁷ by the USFWS;
6 (2) maladministration of the ESA by NMFS; and
7 (3) violation of the NEPA¹⁸ by all defendants.

8 See Doc. 1 15-24. That same day, plaintiffs sought an emergency
9 court order to enjoin the defendant, Bruce Babbitt (as Secretary
10 of the Interior), from executing a Record of Decision ("ROD")¹⁹

11
12 ¹⁶ The defendants are: the United States Department of the
13 Interior ("Interior"); Bruce Babbitt (Secretary of Interior), in
14 his official capacity; the United States Bureau of Reclamation
15 ("Bureau"); Eluid Martinez (Commissioner of the Bureau) in his
16 official capacity; Lester A. Snow (Regional Director of
17 Interior), in his official capacity; the United States Fish and
18 Wildlife Service ("USFWS"); Jamie Rappaport Clark (Director of
19 USFWS), in her official capacity; Michael Spear (Operations
20 Manager of the California/Nevada Operations Officer of the
21 USFWS), in his official capacity; the United States Department of
22 Commerce ("Commerce"); Norman Y. Mineta (Secretary of Commerce),
23 in his official capacity; National Marine Fisheries Service
24 ("NMFS"); Penelope Dalton (Assistant Administrator for the NMFS),
25 in her official capacity; and Rebecca Lent (Regional
26 Administrator for NMFS), in her official capacity. See Doc. 1
27 ¶¶ 9-21.

28 ¹⁷ See 16 U.S.C. §§ 1531-44 (2000).

¹⁸ See 42 U.S.C. §§ 4321; 4331-35; 4341-47; 4361-70d
(2000).

¹⁹ The ROD is intended to document a decision by the
Secretary.

At the time of its decision (§ 1506.10) or, if appropriate,
its recommendation to Congress, each agency shall prepare a
concise public record of decision. The record, which may be
integrated into any other record prepared by the agency,
including that required by OMB Circular A-95 (Revised) . .
., shall:

- (a) State what the decision was.
(b) Identify all alternatives considered by the agency in

1 with the Hoopa Valley Tribe, scheduled to be signed on Tuesday,
2 December 19, 2000.

3 The motion for a Temporary Restraining Order ("TRO") was
4 denied in open court the following afternoon, Friday, December
5 15, 2000, and the confirming written order was entered on January
6 30, 2001. See Doc. 85. The TRO was not issued because at the
7 time of the December 15th hearing, Secretary Babbitt had not yet
8 signed the ROD. The signing was scheduled for December 19, 2000.
9 Until the ROD was signed, there was no "final agency action" that
10 Westlands could challenge. See id. at 4-5 (citing W. Radio
11 Servs. Co. v. Glickman, 123 F.3d 1189, 1197 (9th Cir. 1997);
12 Bennett v. Spear, 520 U.S. 154 (1997)).

13 On December 19, 2000, Secretary Babbitt traversed the
14 Trinity River in a Hoopa Valley Tribe canoe, and signed the ROD
15 on the banks of the Trinity River. See Doc. 35 ¶ 51 & exhibit D;
16 Arcata Fish and Wildlife Office Home Page, at
17 <http://www.ccfwo.r1.fws.gov/> (last visited Jan. 31, 2001) (last
18 modified Jan. 22, 2001). The ROD directs Interior's agencies "to
19 implement the Preferred Alternative as described in the FEIS/EIR

20
21 reaching its decision, specifying the alternative or
22 alternatives which were considered to be environmentally
23 preferable. An agency may discuss preferences among
24 alternatives based on relevant factors including economic
25 and technical considerations and agency statutory missions.
26 An agency shall identify and discuss all such factors
27 including any essential considerations of national policy
28 which were balanced by the agency in making its decision and
state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize
environmental harm from the alternative selected have been
adopted, and if not, why they were not. A monitoring and
enforcement program shall be adopted and summarized where
applicable for any mitigation.

40 C.F.R. § 1505.2 (2000).

1 and as provided below," Doc. 35 exhibit D at 2, and "to implement
2 the reasonable and prudent measures described in the NMFS and
3 [USFWS] Biological Opinions," id. at 11. The Senior Chairman of
4 the Hoopa Valley Tribal Council also signed the ROD. See id. at
5 26.

6 On January 5, 2001, the water-districts filed a first
7 amended complaint ("FAC"), alleging four causes of action:

- 8 (1) maladministration of the ESA by the USFWS, claiming that by
9 "issuing a non-jeopardy biological opinion that requires a
10 major change in CVP operations [i.e., preventing any
11 upstream movement of 0.5 km or more of the X2 water quality
12 standard], the USFWS has exceeded its authority under the
13 Endangered Species Act," see Doc. 35 ¶¶ 60-68;
- 14 (2) maladministration of the ESA by NMFS, claiming that NMFS
15 acted arbitrarily and capriciously, and in excess of its
16 authority under the ESA, by issuing a biological opinion
17 that internally conflicts, because it states on one hand
18 that "NMFS does not anticipate that implementation of the
19 proposed flow schedules will incidentally take any SONCC
20 coho salmon," and on the other hand, prescribes R&PMs to
21 deal with incidental takes, see id. at ¶¶ 69-76;
- 22 (3) violation of NEPA by all defendants, claiming that: (a) the
23 draft and final EIS/EIRs do not analyze the impacts of
24 implementing the requirements of the USFWS and NMFS
25 biological opinions; (b) the final EIS/EIR does not
26 adequately describe what CVP operational changes will occur
27 to protect, or mitigate the adverse effect upon, listed fish
28 upon which the draft EIS/EIR acknowledges implementation of

1 the preferred alternative may have a significant adverse
2 impact, simply deferring mitigation consideration until
3 later; (c) because the biological opinions modified the
4 proposed action by creating new environmental impacts (or
5 new circumstances and information), the defendants failed to
6 supplement the EIS/EIRs to analyze these impacts and publish
7 the analysis for public comment; (d) the draft and final
8 EIS/EIR do not fairly evaluate alternatives, and are in
9 essence a "post hoc rationalization to justify a course of
10 action decided upon before NEPA review even began;" (e) the
11 EIS/EIRs utilize improper definitions of proper purpose by
12 using the "healthy river," rather than an objective,
13 standard; and (f) the final EIS/EIR, or a supplement
14 thereto, does not analyze the impact of implementation of
15 the preferred alternative on California's current energy
16 crisis, see id. at ¶¶ 77-82; and

17 (4) violation of the Administrative Procedure Act ("APA"),
18 claiming that the TRFEFR's recommendations adopted by the
19 ROD are not based on the best available scientific data in
20 violation of CVPIA § 3406(b)(23)(A); and other conclusions
21 contained therein are arbitrary and capricious, see id. at
22 ¶¶ 83-88.

23 They request: (1) an order to set aside and vacate the TRFEFR,
24 the ROD, and the BioOps as unlawful agency actions; (2) a
25 preliminary injunction to prevent the defendants from
26 implementing the ROD or enforcing the BioOps; (3) a preliminary
27 injunction to prohibit the defendants from releasing in excess of
28 340,000 acre-feet from the Trinity River instream until adequate

1 flow studies, EIS/EIRs, and BioOps are issued; and (4) attorney's
2 fees and costs. See id. at 28-29.²⁰

3
4 ²⁰ In support of their motion for a preliminary
5 injunction, the water-district plaintiffs submitted declarations
6 from: Daniel Nelson (Doc. 38); John Gregg (Doc. 39); Daniel J.
7 O'Hanlon (Doc. 40); Thaddeus L. Bettner (Doc. 41); and James Snow
8 (Doc. 42). The Snow declaration has thirteen exhibits,
9 comprising thousands of pages.

10 In support of its sixty-seven (67) page opposition to the
11 preliminary injunction, the government submitted seven volumes,
12 also comprising thousands of pages, including declarations from:
13 Martin A. Bauer (Doc. 69); Stephen Hatchett (Doc. 70); David
14 Marcus (Doc. 71); fishery biologist Joseph C. Polos (Doc. 72);
15 Janice M. Schneider (Doc. 73); Charles R. Shockey (Doc. 74);
16 Michael G. Thabault (Doc. 75); fishery biologist Paul A. Zedonis
17 (Doc. 76); Doctor William J. Trush (Doc. 75); Chester V. Bowling
18 (Doc. 69); Thomas "Tom" Dang (Doc. 69); Jay D. Glase (Doc. 69);
19 Derek Hiltz (Doc. 70); Scott M. McBain (Doc. 70); Mary Ellen
20 Mueller (Doc. 71); Mark Oliver (Doc. 71); Lloyd Peterson (Doc.
21 71); Donald R. Reck (Doc. 72); and Gary R. Stern (Doc. 74).

22 In support of their reply for preliminary injunction, the
23 water-districts filed supplemental declarations of James Snow
24 (Doc. 90); and Thaddeus L. Bettner (Doc. 91); and the declaration
25 of Eric N. Robinson (Doc. 92). Westlands also requests judicial
26 notice of: (1) Interior's Notice of Intent to prepare an EIS/EIR
27 for the Mainstem Trinity River Fisher Restoration, 59 Fed. Reg.
28 51607, dated October 12, 1994 (exhibit A); (2) certified copy of
California Governor Gray Davis' Emergency Proclamation, dated
January 17, 2001 (exhibit B); (3) Interior's departmental manual,
part 516, national Environmental Policy Act of 1969, Chapter 4,
dated September 26, 1984 (exhibit C); (4) Interior's Notice of
proposed revised procedures, 65 Fed. Reg. 52212, dated August 28,
2000 (exhibit D); (5) the fact that on January 17, and 18, 2001,
northern California experienced rolling blackouts. See Doc. 93.

29 In support of its motion for a preliminary injunction, NCPA
30 filed declarations of fisheries biologist Paul Bratovich (Doc.
31 31); and professional engineer George "Buzz" Link (Doc. 32). In
32 support of its reply, NCPA filed the supplemental declaration of
33 Roger A. Fontes (Doc. 103).

34 In support of its motion for a preliminary injunction, SMUD
35 filed declarations of: operations engineer Heather B. Lee; Brian
36 Jobson (Doc. 112); Charles H. Hanson, Ph.D. (Doc. 113);
37 professional engineer Paul G. Scheuerman (Doc. 114); Michael D.
38 Harvey, Ph.D. (Doc. 115); Eddy Lim (Doc. 116); and professional
engineer George "Buzz" Link (Doc. 117). In support of its reply,
SMUD filed reply declarations of: Brian Jobson (Doc. 95); George
"Buzz" Link (Doc. 96); Eddy Lim (Doc. 97); Charles H. Hanson
(Doc. 98); and Paul G. Scheuerman (Doc. 99).

1 On February 8, 2001, the NCPA and the SMUD were granted
2 leave to intervene as plaintiffs of right in this action under
3 Rule 24 of the Federal Rules of Civil Procedure, over the
4 opposition of the Hoopa Valley and Yurok Tribes. See Doc. 118.²¹

5 The present controversy is whether a preliminary injunction
6 should issue to preclude the government from implementing the
7 preferred alternative (the "Flow Evaluation") of the TRFEFR under
8 the ROD, which, inter alia, increases annual water releases into
9 the Trinity River. Plaintiffs argue implementation of the ROD
10 violates the NEPA, the ESA, and the APA, alleging no sufficient
11 or timely environmental review was conducted of either the
12 adverse effects of the preferred alternative of the TRFEFR, the
13 changes imposed by the two BioOps published thereafter, or their
14 effects in light of the changed circumstances caused by
15 California's current energy crisis.

16
17 II. STANDARD

18 A. Preliminary Injunction

19 Two alternative tests exist to determine whether and when a
20 preliminary injunction should issue.²² The "traditional test"
21 requires a plaintiff to establish:

- 22 (1) the significance of the threat of irreparable harm to
23

24 ²¹ NCPA's complaint-in-intervention, previously lodged on
25 January 05, 2001, was filed on February 06, 2001. See Doc. 105.
26 SMUD's complaint-in-intervention, previously lodged on January
05, 2001, was filed on February 06, 2001. See Doc. 109.

27 ²² The standards for a temporary restraining order ("TRO")
28 and a preliminary injunction are essentially identical. See City
of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985).

1 plaintiff if the injunction is not granted;

2 (2) the state of the balance between this harm and the
3 injury that granting the injunction would inflict on
4 the defendant;

5 (3) the probability that plaintiff will succeed on the
6 merits; and

7 (4) the public interest favors granting the injunction.

8 See 11A Charles Alan Wright, Arthur R. Miller & Richard L.

9 Marcus, Federal Practice and Procedure § 2948 (1995 & 2000 Supp.)

10 ("Federal Practice & Procedure"); see also Textile Unlimited,

11 Inc. v. A..BMH & Co., Inc., 240 F.3d 781, 786 (9th Cir. 2001)

12 (citing Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football

13 League, 634 F.2d 1197, 1200 (9th Cir. 1980)); Am. Motorcyclist

14 Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983); Tex.

15 Instruments Inc. v. Teggera, Inc., 192 F.R.D. 637, 639 (C.D. Cal.

16 2000). Some courts condense the latter three factors into a

17 single element, which weighs the relative balance of hardships to

18 the plaintiff, the defendant, and the public. See Alaska v.

19 Native Village of Venetie, 856 F.2d 1384, 1389 (9th Cir. 1988).

20 "However, the Ninth Circuit primarily employs the 'alternative'

21 two-prong test applied by the Second Circuit, which provides that

22 a preliminary injunction may be granted if the movant

23 demonstrates either: (1) a probability of success on the merits

24 and irreparable injury, or (2) serious questions going to the

25 merits and that the balance of hardships tips sharply in its

26 favor." 13 James Wm. Moore et al., Moore's Federal Practice

27 §§ 65.22[5][i][i] (3d ed. 2000) ("Moore's") (citing cases); see

28 also Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001) (en

1 banc) (citing Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir.
2 1998), aff'd, Saenz v. Roe, 526 U.S. 489 (1999)); Gentala v. City
3 of Tucson, 213 F.3d 1055, 1060-61 (9th Cir. 2000) (same).²³ The
4 two alternatives in the above test should not be treated as
5 separate tests, but rather as opposite ends of a continuum in
6 which the necessity for showing "irreparable harm increases as
7 the probability of success decreases." Gentala, 213 F.3d at
8 1060-61 (quoting Roe, 134 F.3d at 1402); Associated Gen.
9 Contractors of Cal., Inc. v. Coalition for Econ. Equity, 950 F.2d
10 1401, 1410 (9th Cir. 1992) (quoting Big Country Foods, Inc. v.
11 Bd. of Educ., 868 F.2d 1085, 1088 (9th Cir. 1989)).²⁴ "A
12 preliminary injunction is not a preliminary adjudication on the
13 merits, but a device for preserving the status quo and preventing
14 the irreparable loss of rights before judgment." Textile

15 _____
16 ²³ See also Greenpeace Found. v. Daley, 122 F.Supp.2d
17 1110, 1122 (D. Haw. 2000) ("The conventional test for granting a
18 preliminary injunction requires the moving party to demonstrate:
19 '(1) a likelihood of success on the merits and the possibility of
20 irreparable injury; or (2) sufficiently serious questions going
21 to the merits to make them a fair ground for litigation, and that
22 the balance of hardships tips sharply in favor of the party
23 seeking relief.'") (quoting Marbled Murrelet v. Babbitt, 83 F.3d
24 1068, 1073 (9th Cir. 1996) (citing Sierra Club v. Marsh, 816 F.2d
25 1376, 1382 (9th Cir. 1987))) (alteration marks omitted).

26 ²⁴ The basis for injunctive relief (preliminary or
27 permanent) in the federal courts has always been irreparable
28 injury and the inadequacy of legal remedies. See Weinberger v.
Romero-Barcelo, 456 U.S. 305, 312 (1982); Stanley v. U.S.C., 13
F.3d 1313, 1320 (9th Cir. 1994). Under either the traditional or
the reformed approach, to obtain a preliminary injunction, the
plaintiff must show that it is "likely" to prevail on the merits.
See Haitian Refugee Ctr., Inc. v. Christopher, 43 F.3d 1431, 1432
(11th Cir. 1995). As part of the balancing of factors, the
competing claims of injury must be weighed and the effect on each
party of the granting or withholding of the requested relief
considered. See Amoco Prod. Co. v. Village of Gambell, 480 U.S.
531 (1987).

1 Unlimited, Inc., 240 F.3d at 786 (citing Sierra On-Line, Inc. v.
2 Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984)).

3 The district court is vested with reasonable discretion
4 when determining whether to grant a preliminary injunction. See
5 A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th
6 Cir. 2001) (citing Gorbach v. Reno, 219 F.3d 1087, 1091 (9th Cir.
7 2000) (en banc) ("A district court's decision to grant a
8 preliminary injunction is generally reviewed for an abuse of
9 discretion.") (citing Bay Area Addiction Research & Treatment,
10 Inc. v. City of Antioch, 179 F.3d 725, 732 (9th Cir. 1999))).

12 III. DISCUSSION

13 A. Preliminary Injunction ("PI")

14 The water-districts, NCPA, and SMUD seek a preliminary
15 injunction to prohibit the Secretary of the Interior from
16 implementing the Preferred Alternative identified in the ROD, on
17 the ground that they will suffer great harm if it is implemented,
18 because less CVP water and electricity will be available to them
19 under their water-service contracts with Interior, and the
20 issuance of the TRFEFR, the draft and final EIS/EIRs, and the
21 BioOps, and implementation of the ROD, are all in violation of
22 the ESA, the NEPA, and the APA.

24 1. Test

25 Plaintiffs must either show: probability of success on the
26 merits and irreparable injury; or alternatively, raise serious
27 questions going to the merits and demonstrate the balance of
28 hardships tips sharply in their favor. See Gentala, 213 F.3d at

1 1060. "A 'serious question' is one on which the movant has a
2 'fair chance of success on the merits.'" EBay v. Bidder's Edge,
3 Inc., 100 F.Supp.2d 1058, 1064 (N.D. Cal. 2000) (quoting Sierra
4 On-Line, Inc., 739 F.2d at 1421). "Generally, the 'balance of
5 harm' evaluation should precede the 'likelihood of success
6 analysis' because until the balance of harm has been evaluated
7 the court cannot know how strong and substantial the plaintiff's
8 showing of the likelihood of success must be." Id. (citing
9 Native Village of Venetie, 856 F.2d at 1389); see also 11A
10 Federal Practice & Procedure § 2948.1, at 139 ("Perhaps the
11 single most important prerequisite for the issuance of a
12 preliminary injunction is a demonstration that if it is not
13 granted the applicant is likely to suffer irreparable harm before
14 a decision on the merits can be rendered.").

15 Plaintiffs point to American Motorcyclist Ass'n, 714 F.2d at
16 962, for the proposition that the "burden of establishing
17 irreparable harm is lessened when a violation of the [NEPA] is
18 alleged." Doc. 37 at 14:4-7 (citing id. at 965-66 ("the presence
19 of strong NEPA claims gives rise to more liberal standards for
20 granting an injunction") (emphasis in original) (citing cases)).
21 This is the law in the Ninth Circuit. However, this more
22 generous standard, i.e., presumption for granting injunctions
23 when NEPA violations purportedly exist, does not apply in the
24 "unusual" circumstances where "enjoining government action
25 allegedly in violation of NEPA might actually jeopardize natural
26 resources." Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250
27 n.16 (9th Cir. 1984) (discussing Am. Motorcyclist Ass'n, where an
28 injunction did not issue although the desert conservation plan

1 probably violated NEPA, because granting the injunction would
2 likely harm, rather than protect, the environment) (citing Alpine
3 Lake Prot. Soc'y v. Schlapfer, 518 F.2d 1089, 1090 (9th Cir.
4 1975) (refusing to grant injunction because "unusual
5 circumstances" meant more harm could occur to forest from disease
6 if injunction granted)).

7 This is the situation here: plaintiffs want to enjoin
8 implementation of the ROD, which implements the preferred
9 alternative of the TRFEFR, for alleged procedural timing
10 violations of the NEPA, even though the ROD protects the
11 environment by increasing River flows to enhance the salmonid
12 habitat and satisfies the five-year overdue statutory mandate to
13 restore the Trinity River fisher. Plaintiffs' predominant harm
14 is potential loss of water or electricity for non-environmental
15 uses. As evaluated below, enjoining any implementation of the
16 ROD may possibly harm the species within the Trinity River
17 ecosystem. The lower threshold showing for issuance of
18 preliminary injunctions when a NEPA violation is alleged does not
19 apply given the facts of this case.

20
21 2. PI Factor-1: Irreparable Injury

22 Plaintiffs assert they will suffer primarily two types of
23 imminent, irreparable harm if the preferred alternative is
24 implemented. First, the water-districts argue that under the
25 ROD's flow regime (which implements the TRFEFR's preferred
26 alternative), they will receive less, possibly considerably less,
27
28

1 water than now, which cannot be recovered once lost.²⁵ See Doc.
2 37 23-24. Second, all plaintiffs claim that they may not receive
3 their present allotment of subsidized CVP electricity, which will
4 also be diminished under the preferred alternative, thereby
5 mandating that they purchase that lost amount of electricity in
6 the open market, at a substantially higher price than they
7 currently pay for CVP-generated electricity. See id. at 24.

8 The government rejoins that "virtually all forms of the
9 injuries alleged involve financial and monetary costs, which by
10 their nature are not irreparable for purposes of injunctive
11 relief." Doc. 68 56.²⁶ Regarding the threatened loss of water,
12 the government argues that: (1) implementation of the ROD will
13 not alter Trinity Water flows until late April; (2) based on the
14 current forecasts that water year 2001-2002 will be critically
15 dry, the total lost water to all south-of-delta CVP water
16 contractors will be minimal, only 29,000 acre-feet;²⁷ and (3) the
17 water-districts will not suffer the entire yearly threatened
18

19 ²⁵ In its opposition to the TRO, the Government argued
20 that the harm, dissipation of water, was not sufficiently
21 immediate, because it would not occur until February or April,
22 2001. See 12/15/2000 Declarations of Chester V. Bowling and
23 Michael J. Ryan. The is specious, as the Bureau well knows,
24 because the pre-Irrigation season has commenced, and water use
25 continues to intensify in spring and summer months.

26 ²⁶ The government also contends that the energy costs used
27 by the plaintiffs to calculate the potential injury (higher
28 electric bills) are "significantly overstated." See id. at
58:17.

²⁷ Presumably, the government derives this figure by
subtracting the current, statutorily-mandated flow diversion
(340,000 acre-feet) from the TRFEFR's proposed figure during a
critically-dry year (368,600), which actually equals an
additional 28,600 acre-feet.

1 reduction, because not issuing the injunction will only impact
2 the water that may be lost during the pendency of this case
3 (between the date of this hearing or initial flow alteration
4 (late April) and the date when the final ruling on the merits
5 issues), which according to the federal defendants should be as
6 early as August 1, 2001. See id. & n.31.

7 According to Mr. Snow, implementation of the ROD will reduce
8 Westlands' long-term average CVP water supply by approximately
9 57,000 acre-feet/year, which represents an average five percent²⁸
10 reduction to all south-of-Delta water contractors. See Doc. 42
11 at ¶ 8. The impact is further exaggerated when a dry or
12 critically-dry year follows a wet year, because the amount of CVP
13 water storage for the following year is also reduced. See id. at
14 ¶ 11; exhibit B (containing graph that models water reductions
15 under the ROD). For example, Mr. Snow declares that when a dry
16 year follows a wetter year, the average annual delivery of CVP
17 water to south-of-Delta water contractors will be reduced by
18 286,000 acre-feet, of which Westlands will lose the majority,
19 172,000 acre-feet. See id. After comparing the two possible
20 alternatives (either reduced deliveries or additional releases of
21

22 ²⁸ Implementation of the ROD will reduce CVP water
23 deliveries by approximately 65,000 acre-feet, which is
24 approximately 3.5% of the total 1,900,000 acre-feet for south-of-
25 Delta agricultural service contractual entitlements
26 (65,000/1,900,000 = 0.0342). Because the Bureau only allocates
27 CVP water in five-percent increments, and Westlands has
28 entitlement to sixty percent of the 1,900,000 acre-feet delivered
south of the Delta, Mr. Snow alleges Westlands will suffer a five
percent or approximately 57,000 acre-feet/year reduction (0.05 x
0.60 x 1,900,000 = 57,000).

1 stored water) available to comply with the USFWS BioOp's X2
2 R&PMs, Mr. Snow argues such compliance will cause additional
3 "significant" water supply reductions to Westlands. See id. at
4 ¶ 19.²⁹ Mr. Bettner writes that such water reductions will
5 result in fallowed land, because pumping for additional
6 groundwater cannot fully compensate the lost CVP water, and other
7 sources mentioned by the government are unreliable and/or
8 impossible to tap. See Doc. 41 ¶¶ 10-15.

9 Westlands also has contracts for CVP-generated power. See
10 Doc. 41 exhibit B (Contract Nos. 14-06-200-3131A and 7-07-20-
11 P0003, "Contract for Electric Service to Westlands Water
12 District," dated Dec. 1, 1966, and Sept. 30, 1977). According to
13 Mr. Bettner, implementation of the ROD results in a range of CVP
14 power reduction from one percent (01%) in wet years to ten
15 percent (10%) in critically-dry periods, averaging a four percent
16 (04%) loss of CVP-generated electricity to Westlands, 10,091
17 MegaWatt hours ("Mwh"), in a normal water year, which he posits
18 will cost \$1,105,548/year to replace (a twenty-percent cost
19 increase). See id. at ¶ 22; exhibit E. The government
20 challenges this projected cost of the replacement electricity,
21 claiming that the prices Mr. Bettner used are not representative
22 of market prices, especially because year-2000 electricity prices
23 are not typical: "they are the result, according to FERC and
24

25 ²⁹ After examining the draft EIS's modeling results for a
26 sixty-nine-year-period comparison of X2 movement with the Trinity
27 flow, Mr. Snow notes the X2 standard will be violated in seven
28 percent (07%) of all February months; one percent (01%) of all
March and April months; and twenty percent (20%) of all June
months. See id.

1 others, of market design rather than underlying economic costs,"
2 and "they represent the effect of demand unconstrained by having
3 to actually pay the market prices." See Doc. 71 ¶¶ 7-18
4 (declaration of David Marcus).

5 SMUD also alleges injury from a diminished supply of
6 electricity, contending that less CVP-generated electricity will
7 be available, which will exacerbate California's energy crisis.
8 See Doc. 116 ¶¶ 9-25 (declaration of Eddy Lim). Specifically, it
9 will suffer "an increase in frequency, magnitude and duration of
10 load curtailments" to its customers, see id. at ¶ 26, and
11 overall, the lost available CVP-generated electricity represents
12 an additional cost of \$24,000,000, with SMUD bearing \$7,000,000,
13 see id. at ¶ 28. The government debates the validity of these
14 estimates. See Doc. 69 (declaration of Thomas "Tom" Dang); Doc.
15 71 (Marcus declaration).

16 NCPA furnishes electricity to approximately 700,000
17 customers in northern and central California. See Doc. 107 2:7-
18 8. It alleges that "alarming increases in mortality of all four
19 chinook salmon runs in the Sacramento River occur with
20 implementation of the Preferred Alternative." See Doc. 31 at
21 ¶ 4(a) (declaration of fisheries biologist Paul Bratovich). For
22 example, Mr. Bratovich opines that a ten-percent (10%) mortality
23 increase for fall-run chinook salmon occurs in fifty-five percent
24 (55%) of the sixty-nine years modeled under the preferred
25 alternative, up to a high of 100.3 percent in 1947. See id. at
26 3:22-4:5. Similar mortality increases are experienced for the
27 other chinook salmon runs (greater than 10% mortality increase
28 occurs 51% of time for late-fall-run chinook salmon, with a high

1 of 507.8% in 1939; greater than 10% mortality increase occurs 57%
2 of time for winter-run chinook salmon, with a high of 348.8% in
3 1932; greater than 10% mortality increase occurs 57% of time for
4 spring-run chinook salmon, with a high of 107.9% in 1947). See
5 id. at 4:5-28. Additionally, NCPA notes that the government has
6 not adequately considered the "interdependence" of the Trinity
7 and Sacramento Rivers, such that an additional increase in
8 Trinity down-flow must be compensated by an increased Sacramento
9 River supplemental release, because the X2 salinity standards
10 must be maintained. See Doc. 105 ¶ 10 (NCPA complaint-in-
11 intervention). For example, Mr. Link declares that
12 implementation of the preferred alternative will conflict with
13 other regulatory constraints placed on the operational CVP, such
14 as water temperature restrictions at Red Bluff Diversion Dam that
15 will be violated by cold-water exports to the Sacramento River
16 through Spring Creek Power Plant. See Doc. 32 at ¶ 4
17 (declaration of George "Buzz" Link). Aside from the risk to the
18 listed threatened or endangered species, NCPA also alleges injury
19 from reduced available CVP-generated electricity, contending that
20 the EIS/EIRs did not conduct a detailed assessment regarding the
21 loss of CVP power on California as a whole. See id. at ¶¶ 11-
22 21.³⁰

23 Last, implementation of the ROD (implementing the preferred
24 alternative of the TRFEFR) may also harm listed fish in the TRD:
25 There would be significant adverse impacts to Sacramento
26 River fall (1 percent) and winter (2 percent) chinook salmon

27
28 ³⁰ NCPA asserts that diversion of one acre-foot of Trinity
River water reduces CVP power by 1100kWh. See id. at ¶ 5.

1 runs. . . . Similar to the case for the Maximum Flow
2 Alternative, increased losses of eggs and sac-fry fall
3 chinook salmon would occur as a result of increased water
4 temperatures during drought conditions (1924, 1931 through
5 1934, and 1977). These temperature increases would result
6 in higher mortality, compared to No Action, of incubating
7 and developing salmon eggs and pre-emergent fry life stages.
8 Doc. 42 exhibit I at 3-176 & table 3-15 (DEIS).³¹

9 Plaintiffs adequately establish the probability of
10 irreparable injury: lost water for current deliveries and
11 shortage, which cannot be replaced; and additionally, a potential
12 for electrical energy loss, which will adversely impact the human
13 environment as well as salmonid species in the Sacramento River.

14 On the other side of the calculus, the government argues the
15 environment will suffer if the ROD is not implemented, i.e.,
16 degradation of the Trinity River will continue.³² According to
17 fisheries biologist Mr. Glase, Mr. Hanson's statement that
18 salmonid species returns to the Trinity River have been abundant
19 in recent years is misleading, because in most of those years,
20 the abundant returns are dominated by fish produced by the

22 ³¹ The final EIS/EIR did not alter this passage from the
23 draft EIS/EIR.

24 ³² The government's argument regarding the "limited" time
25 the plaintiffs would suffer if the injunction is erroneously not
26 issued, see Doc. 68 at 56 & n.31 ("Federal defendants submit that
27 the case can be litigated and perhaps decided on the merits as
28 early as August 1, 2001."), actually operates against them
regarding balance of hardship, because it is the party seeking to
alter the status quo, i.e., to increase annual Trinity River flow
releases to over 340,000 acre-feet, which has existed for quite
some time.

1 Trinity River Hatchery, and not naturally-produced fish from
2 within the Trinity River. See Doc. 69 ¶ 8 (declaration of Jay D.
3 Glase); see also Doc. 42 exhibit H at E-3 to E-5 (TRFEFR tables
4 showing number of fall-run and spring chinook spawning escapement
5 and origin of spawners). The government cites the declarations
6 of fisheries biologists Joseph C. Polos and Donald R. Reck in
7 support of its argument that the listed species continue to be
8 depressed. See Doc. 68 at 64. For example, the Trinity River
9 naturally-produced coho salmon, which have a three-year life
10 cycle, "are at extremely[-]low population levels," averaging only
11 202 adults returning past Willow Creek annually from 1991-1995.
12 See Doc. 72 ¶ 3 (declaration of Donald R. Reck). "The current
13 average annual run of naturally[-]produced Trinity River coho
14 salmon represent only 14 percent of the Trinity Restoration
15 Project goal established in 1983," id., with the "more alarming .
16 . . . extremely high proportion (>90%) of hatchery fish making up
17 the coho run," id. at ¶ 21 (declaration of Joseph C. Polos).
18 Although Mr. Polos writes that "[c]ontinuation of the 340,000
19 acre-feet release into the Trinity River will contribute to the
20 continued degradation of the fishery habitats of the river and
21 the suppression of its anadromous salmonid populations due to
22 poor freshwater production," because the "340,000 acre-feet
23 allocation has not been sufficient to sustain the riverine
24 habitats that supported healthy naturally[-]producing salmonid
25 populations," id. at ¶ 22 (Polos), none of the government's
26 declarants alleges irreparable injury, even if they argue that
27 implementation of the ROD's recommendations is essential. See,
28 e.g., id. at ¶ 11 (Reck) ("Failure to implement the [ROD] flows

1 beginning in mid-April 2001 will delay indefinitely the critical
2 survival benefits to coho salmon smolts associated with improved
3 water temperatures and decreased migration travel time, as
4 previous [sic] described. In turn, the decreased survival of
5 outmigrating smolts in 2001 is likely to further decrease the
6 number of returning adult spawners and continue the steep trend
7 of adversely affecting the production of future brood years and
8 the resiliency of the population.").

9 The balance of hardships favors plaintiffs, the party
10 demonstrating irreparable harm, especially because they seek to
11 maintain the status quo, see, e.g., Textile Unlimited, Inc., 240
12 F.3d at 786 ("A preliminary injunction is . . . a device for
13 preserving the status quo and preventing the irreparable loss of
14 rights before judgment.") (citing case).

15
16 3. PI Factor-2: Success on the Merits

17 Although plaintiffs demonstrate a colorable showing of
18 irreparable harm (irretrievably lost CVP water and electrical
19 energy)³³ that outweighs any showing of harm by the government,
20 before a preliminary injunction will issue, plaintiffs must also

21
22 ³³ It is not clear that the lost CVP-generated electricity
23 alone suffices for irreparable injury, because this threatened
24 loss appears solely monetary (higher-cost electricity), i.e., it
25 is not asserted that there is no alternate energy available at
26 any price. See, e.g., Am. Tunaboat Ass'n v. Brown, 67 F.3d 1404,
27 1411 (9th Cir. 1995) ("Injury of a strictly monetary nature
28 generally is not cognizable as a basis for issuing an injunction
when balanced against the possibility of irreparable injury to
marine mammals.") (citing Earth Island Inst. v. Mosbacher, 746
F.Supp. 964, 975 (N.D. Cal. 1990), aff'd, 929 F.2d 1449 (9th Cir.
1991)). If energy cannot be obtained and power consumers are
directly deprived, the injury is more serious. The lost water
cannot effectively be replaced.

1 show that they have a "fair chance" of prevailing at trial. See
2 EBay, 100 F.Supp.2d at 1064. Put another way, "[a]t the very
3 least, 'it must be shown as an irreducible minimum that there is
4 a fair chance of success on the merits.'" San Antonio Cmty.
5 Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1234
6 (9th Cir. 1997) (quoting Stanley v. U.S.C., 13 F.3d 1313, 1319
7 (9th Cir. 1994) (quoting Martin v. Int'l Olympic Comm., 740 F.2d
8 670, 675 (9th Cir. 1984) (citing Sports Form, Inc. v. United
9 Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982) (citing
10 Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace
11 Workers, 584 F.2d 308, 315 (9th Cir. 1978) (citing McCormick v.
12 Claytor, 441 F.Supp. 622 (D. Or. 1977))))). Plaintiffs are not
13 required to make as strong a showing of likely success on the
14 merits, however, because their possible harm exceeds that of the
15 defendants, see Gentala, 213 F.3d at 1060-61, and they seek to
16 maintain, rather than alter, the status quo, see, e.g., Textile
17 Unlimited, Inc., 240 F.3d at 786.

18 The gravamen of plaintiffs' argument is that the government
19 performed environmental review of its proposed action too late,
20 or incompletely: (1) the government did not timely perform an
21 EIS/EIR of the draft TRFER, so when it filed and submitted the
22 TRFEFR to Congress, it did so in violation of NEPA, because no
23 prior NEPA review of the adverse effects of it had been conducted
24 (such review plaintiffs argue was not completed until later in
25 the FEIS, in October, 2000); (2) because the government performed
26 evaluations of the impacts of implementation of the preferred
27 alternative of the TRFEFR in the NMFS and USFWS BioOps, issued
28 October 12, 2000, which plaintiffs claim impose independent

1 changes to the ROD and TRFEFR that are likely to cause additional
2 adverse environmental impacts,³⁴ the government violated NEPA by
3 not conducting further review of the adverse effects of those
4 BioOps, which plaintiffs claim are so closely "connected to" the
5 TRFEFR's preferred alternative adopted by the ROD (and mandated
6 by the ROD to be implemented),³⁵ that a single EIS/EIR should
7 have evaluated all of these actions as one, citing 40 C.F.R.
8 § 1502.4(a);³⁶ and (3) the government violated NEPA by not
9 completing a supplemental EIS to evaluate the effects of
10 implementation of the ROD's increased water releases in light of
11 the changed circumstances caused by California's current energy
12 crisis. See Doc. 37.³⁷

13
14 ³⁴ See Doc. 42 ¶¶ 17-19 (Snow declaration) (describing the
effects of the BioOps that have not been evaluated under NEPA).

15 ³⁵ See Doc. 35 exhibit D at 11 ("the Department's agencies
16 are directed, through the Trinity Management Council, to
17 implement the Preferred Alternative as described in the FEIS/EIS
18 and to implement the reasonable and prudent measures described in
the NMFS and Service Biological Opinions.") (emphasis added).

19 ³⁶ 40 C.F.R. § 1502.4(a) (2000) states:

20 (a) Agencies shall make sure the proposal which is the subject of
21 an environmental impact statement is properly defined. Agencies
22 shall use the criteria for scope (§ 1508.25) to determine which
23 proposal(s) shall be the subject of a particular statement.
Proposals or parts of proposals which are related to each other
closely enough to be, in effect, a single course of action shall
be evaluated in a single impact statement.

24 Id. (emphasis added).

25 ³⁷ Plaintiffs also challenge the substance of the
26 government's decision, arguing that any environmental review
27 conducted was a "post hoc rationalization to justify a course of
28 action decided upon before NEPA review even began," because such
review was done after the government had already decided which
course it was taking, as shown by the submission of the TRFEFR to
Congress in early 2000, and did not fairly evaluate alternative

1 In response to the first argument, the government contends
2 that "Interior commenced the formal NEPA process . . . six years
3 ago" when it published a Notice of Intent to prepare an EIS
4 before the TRFES was completed. See Doc. 68 25 (incorrectly
5 citing 59 Fed. Reg. 25141);³⁸ Doc. 35 exhibit D 8 (ROD).³⁹ In
6 response to the second alleged violation of NEPA (not evaluating
7 the BioOps' changes), the government begins by attempting to
8 distinguish Westlands Water Dist. v. United States Dep't of
9 Interior, 850 F.Supp. 1388 (E.D. Cal. 1994), on which plaintiffs
10 rely, as a case where the BioOps at issue were "part of a
11 systematic and connected set of agency decisions" that resulted
12 in the reallocation of over 225,000 acre feet of CVP water for
13 salmon protection with alleged adverse environmental impacts, as

14
15
16 proposals or the objections plaintiffs submitted. They argue,
17 therefore, that the adoption of the preferred alternative was
18 arbitrary and capricious, and in violation of both the NEPA and
19 ESA

18 ³⁸ The correct citation is 59 Fed. Reg. 51607, 1994 WL
19 551677 (Oct. 12, 1994).

20 ³⁹ "Pursuant to section 102(2)(C) of the National
21 Environmental Policy Act of 1969, as amended, and the California
22 Environmental Quality Act of 1970, as amended, the Fish and
23 Wildlife Service (Service) and the Hoopa Valley Tribe propose to
24 prepare a draft environmental impact statement/environmental
25 impact report (EIS/EIR) to evaluate mainstem Trinity River
26 fishery restoration projects and to assist the Secretary of the
27 Interior in developing recommendations for permanent instream
28 fishery flow requirements and Trinity River Division operating
criteria and procedures for the restoration and maintenance of
the Trinity River Fishery, Trinity River Division, Central Valley
Project (CVP), California. Such recommendations are required by
the Flow Evaluation Program, authorized by a January 14, 1981,
Secretarial Directive, and for Section 3406(b)23(A) of the
Central Valley Project Improvement Act (CVPIA) dated October 30,
1992."
59 Fed. Reg. 51607 (Oct. 13, 1994).

1 compared to this case, which the government claims is different
2 because: (1) that case ruled on a motion to dismiss, where the
3 more lenient standard applied (accepting Westlands' allegations
4 as true); and (2) in that case, the Bureau had not performed any
5 NEPA compliance, e.g., an EA or EIS/EIR, before proposing an
6 adjustment in the water allocations, whereas here, extensive NEPA
7 review was conducted before the recommendation was presented to
8 Congress, the BioOps issued, and the ROD was signed. See Doc. 68
9 at 26-27. Last, the government argues that the energy concerns
10 are not as serious as the plaintiffs paint them, and do not
11 require an SEIS.

12
13 4. Application

14 A party seeking to challenge governmental action as
15 violating NEPA must use the APA, because the NEPA does not afford
16 a private right of action. See Cantrell v. City of Long Beach,
17 241 F.3d 674, 2000 WL 33152061, *4 n.2 (9th Cir. Feb. 5, 2001)
18 ("Although NEPA does not provide a private right of action for
19 violations of its provisions, private parties may enforce the
20 requirements of NEPA by bringing an action against the federal
21 agency under § 10(a) of the Administrative Procedure Act.")
22 (citing 5 U.S.C. § 702; Lujan v. Nat'l Wildlife Fed'n, 497 U.S.
23 871, 882-83 (1990)). "To demonstrate statutory standing under
24 the APA, a plaintiff must (1) identify a final agency action; and
25 (2) show that the injury complained of 'falls within the "zone of
26 interests" sought to be protected by the statutory provision
27 whose violation forms the basis of the complaint.'" ONRC Action
28 v. Bureau of Land Mgmt., 150 F.3d 1132, 1135 (9th Cir. 1998)

1 (quoting Salmon River Concerned Citizens v. Robertson, 32 F.3d
2 1346, 1353-54 (9th Cir. 1994) (quoting Lujan, 497 U.S. at 882)).

3
4 a. Final Action

5 "The Supreme Court in Bennett set forth a two-part test for
6 determining whether an agency action was final for the purposes
7 of the Administrative Procedure Act: (1) the action had to mark
8 the consummation of the agency's decision-making process; and
9 (2) the action had to be one from where rights or obligations
10 have been determined or from where legal consequences will flow."
11 Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1125
12 (9th Cir. 1997) (citing Bennett, 520 U.S. at 177).

13 Here, final action occurred when Interior (through its
14 Secretary, Babbitt) and the Hoopa Valley Tribe signed the Trinity
15 River ROD at the shore of the Trinity River on December 19, 2000.
16 That signing represents the consummation of Interior's decision-
17 making process (it agreed to implement the TRFEFR's preferred
18 alternative adopted in the ROD and EIR/EISs, with no other action
19 required by Interior), especially under CVPIA § 3406(b)(23)
20 (requiring the agreed-upon alternative of the TRFEFR to be
21 implemented after the government and Hoopa Valley Tribe so
22 concur). It is major federal action that significantly affects,
23 inter alia, CVP water, electricity, and environmental
24 interests.⁴⁰

25
26 ⁴⁰ Under certain specific circumstances, not present here,
27 issuance of a biological opinion may itself qualify as final
28 agency action subject to judicial review under the Administrative
Procedure Act ("APA"), 5 U.S.C. § 706 (1996). See Bennett, 520
U.S. at 177-79; see also, e.g., Pac. Coast Fed'n of Fishermen's

1 b. National Environmental Policy Act ("NEPA")⁴¹

2 The "NEPA requires federal agencies to prepare an EIS for
3 'major Federal actions significantly affecting the quality of the

4
5 Ass'n, 71 F.Supp.2d 1063, 1066-67 (W.D. Wash. 1999) ("A
6 [Fisheries] biological opinion is a final agency action that may
7 be set aside under the Administrative Procedure Act") (citing id.
8 at 174); Greenpeace v. Nat'l Marine Fisheries Serv., 55 F.Supp.2d
9 1248, 1260 (W.D. Wash. 1999) (holding that Fisheries' biological
10 opinion regarding interaction between fisheries and Steller sea
11 lion population was final agency action for purposes of judicial
12 review pursuant to the APA) (citing Bennett, 520 U.S. at 178);
13 In Bennett, ranchers and irrigation districts challenged a
14 biological opinion issued by the U.S. Fish and Wildlife Service
15 pursuant to the ESA. See Bennett, 520 U.S. at 157. Petitioners
16 were water users of a water reclamation project administered by
17 Reclamation. See id. The Fish and Wildlife Service's biological
18 opinion recommended to Reclamation that, in order to avoid
19 jeopardy to certain endangered fish, a "reasonable and prudent
20 alternative" was to maintain minimum water levels in certain
21 reservoirs, causing, in the aggregate, a reduction in the water
22 available for use by the petitioners and others. See id. at
23 159-60. The government argued that no causation existed, because
24 any reduction in water allocated to petitioners resulted, not
25 from the biological opinion, but from Reclamation's independent
26 decision, an entity that was not a party to the lawsuit and that
27 was not legally bound to follow the biological opinion. See id.
28 at 168-69. The Supreme Court disagreed.

[The government's argument] wrongly equates injury "fairly
traceable" to the defendant with injury as to which the
defendant's actions are the very last step in the chain of
causation. While, as we have said, it does not suffice if
the injury complained of is the result of the independent
action of some third party not before the court, that does
not exclude injury produced by determinative or coercive
effect upon the actions of someone else.

Id. (internal quotations and citations omitted) (further noting
the near certainty that agency officials will follow Fish and
Wildlife Service's biological opinions).

Westlands challenges the biological opinions in this case as
not complying with NEPA. The APA does not permit such action.

⁴¹ The purposes of the NEPA are to: "declare a national
policy which will encourage productive and enjoyable harmony
between man and his environment; to promote efforts which will
prevent or eliminate damage to the environment and biosphere and
stimulate the health and welfare of man; to enrich the
understanding of the ecological systems and natural resources
important to the Nation." 42 U.S.C. § 4321 (1995).

1 human environment,' " Ramsey v. Kantor, 96 F.3d 434, 442 (9th Cir.
2 1996) (quoting 42 U.S.C. § 4332(2)(C)),⁴² which "ensures that
3 federal agencies are informed of environmental consequences
4 before making decisions and that the information is available to
5 the public," Okanogan Highlands Alliance v. Williams, 236 F.3d
6 468, 473 (9th Cir. 2000) (citing Inland Empire Pub. Lands Council
7 v. United States Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996)).
8 The "NEPA does not mandate particular substantive results, but
9 instead imposes only procedural requirements." Id. (quoting
10 Laguna Greenbelt, Inc. v. United States Dep't of Transp., 42 F.3d
11 517, 523 (9th Cir. 1994) (quoting Vt. Yankee Nuclear Power Corp.
12 v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978))).⁴³
13 "NEPA is a procedural statute. Its purpose is to ensure informed
14 agency action. Accordingly, it requires only that the agency
15 take a 'hard look' at its decision, and not that environmental
16 concerns trump all others." Swanson v. United States Forest

18 ⁴² In Ramsey, Fisheries issued a biological opinion and
19 incidental take statement governing permissible incidental take
20 of federally-listed chinook salmon. See id. at 438-39. The
21 court held that although not a permit, "the incidental take
22 statement . . . is functionally equivalent to a permit," so
23 "issuance of that statement constitutes major federal action for
24 purposes of NEPA." Id. at 444. The Ninth Circuit "conclude[d]
25 that the National Marine Fisheries Service, the federal agency
26 that issued the incidental take statement, was required by law to
27 comply with the requirements of NEPA before issuing the
28 statement." Id.

25 ⁴³ The Council on Environmental Quality ("CEQ")
26 promulgates regulations that ensure that federal agencies meet
27 their obligations under the NEPA. See, e.g., About CEQ, at
28 http://www.whitehouse.gov/ceq/about.html (last visited Mar. 8,
2001) (last modified Feb. 22, 2001). 40 C.F.R. §§ 1500-08 are
applicable to and binding on all Federal agencies for
implementing the procedural provisions of the NEPA. See 40
C.F.R. § 1500.3 (2000).

1 Serv., 87 F.3d 339, 343 (9th Cir. 1996) (internal citation
2 omitted). Courts "review an EIS under a 'rule of reason' to
3 determine whether it contains a reasonably thorough discussion of
4 the significant aspects of the probable environmental
5 consequences." Okanogan Highlands Alliance, 236 F.3d at 473
6 (quoting City of Carmel-by-the-Sea v. United States Dep't of
7 Transp., 123 F.3d 1142, 1150 (9th Cir. 1997))

8 The NEPA also requires the federal agency in certain
9 situations to consider changed circumstances or additional
10 information by filing a supplemental EIS ("SEIS"):

11 In view of this purpose, an agency that has prepared an EIS
12 cannot simply rest on the original document. The agency
13 must be alert to new information that may alter the results
14 of its original environmental analysis, and continue to take
15 a "hard look at the environmental effects of its planned
16 action, even after a proposal has received initial
17 approval." It must "make a reasoned decision based on ...
18 the significance--or lack of significance--of the new
19 information," and prepare a supplemental EIS when there are
20 "significant new circumstances or information relevant to
21 environmental concerns and bearing on the proposed action or
22 its impacts." "If there remains major Federal action to
23 occur, and the new information is sufficient to show that
24 the remaining action will affect the quality of the human
25 environment in a significant manner or to a significant
26 extent not already considered, a supplemental EIS must be
27 prepared."

28 Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557-58 (9th

1 Cir. 2000) (internal citations, alteration marks, and footnote
2 omitted). The decision to forego preparing an SEIS will not be
3 set aside unless it was arbitrary or capricious. See id. at 556
4 (citing Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377
5 (1989)).

6 First, plaintiffs argue the government violated the NEPA by
7 failing to complete NEPA review prior to issuing the TRFEFR,
8 i.e., the timing of the draft and final EIS/EIRs. See Doc. 37
9 14. The government rejoins that the final action was not the
10 submission of the TRFEFR to Congress, which it argues was "far
11 removed from the culmination of the final decision process," and
12 solely a "scientific report to Congress," not requiring
13 independent NEPA review because it was not a recommendation or
14 report on proposals for legislation, but rather, the only final
15 action was the signing of the ROD on December 19, 2000. See Doc.
16 68 at 23-24. It argues that "Westlands overlooks the fact that
17 Interior commenced the formal NEPA process to develop and assess
18 alternatives aimed at restoring the Trinity River mainstem
19 fishery six years ago . . . , well before the TRFES was
20 completed." Id. at 25:20-23.

21 NEPA § 102(2)(C) requires that federal agencies "include in
22 every recommendation or report on proposals for legislation and
23 other major Federal actions significantly affecting the quality
24 of the human environment, a detailed [EIS]." 42 U.S.C.
25 § 4332(2)(C) (2000). "Major Federal action' includes actions
26 with effects that may be major and which are potentially subject
27 to Federal control and responsibility," 40 C.F.R. § 1508.18
28 (2000), including "[a]doption of formal plans, such as official

1 documents prepared or approved by federal agencies which guide or
2 prescribe alternative uses of federal resources, upon which
3 future agency actions will be based," id. at § 1508.18(b)(2)
4 (2000). "'Proposal' exists at that stage in the development of
5 an action when an agency subject to the Act has a goal and is
6 actively preparing to make a decision on one or more alternative
7 means of accomplishing that goal and the effects can be
8 meaningfully evaluated." 40 C.F.R. § 1508.23 (2000).

9 Here, the Notice of Intent to prepare an EIS was published
10 October 12, 1994. See ROD at 8. Interior claims it continued to
11 integrate NEPA analysis. The FEIS was completed in October,
12 2000, and published in November, 2000.

13 The first question is whether the TRFEFR was a
14 recommendation on a proposal for major federal action, thereby
15 requiring NEPA consideration.⁴⁴ Turning to the TRFEFR's text,
16

17 ⁴⁴ Plaintiffs are correct when they emphasize that the
18 government errs when it contends that the APA's requirement for
19 final agency action defines when NEPA requires preparation of an
20 EIS. The four cases cited by the government are inapposite here,
21 because they only hold that the APA requires "final agency
22 action" before a plaintiff may challenge alleged NEPA violations.
23 See ORNC Action, 150 F.3d at 1137 (affirming district court's
24 dismissal of NEPA challenge, because the plaintiffs "cannot point
25 to a deliberate decision by BLM to act or not to take action," so
26 did not meet the APA's requirement for final agency action); N.W.
27 Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv., 56 F.3d
28 1060, 1066-67 (9th Cir. 1995) (rejecting federal defendants'
argument that the plaintiffs did not challenge a final agency
action, because they challenged the flow improvement measures (a
SEIS and ROD) as inadequate, not the claim the government mis-
characterized as not preparing an SEIS for transportation); Rapid
Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist., 752 F.2d
373, 378-79 (9th Cir. 1985) (holding that the APA's final-agency-
action requirement was not met, because the government-defendant
had "explicitly disavowed any advance commitment to approve
construction," the challenged action); Haw. County Green Party v.
Clinton, 124 F.Supp.2d 1173, 1195-98 (D. Haw. 2000) (dismissing

1 the first seven chapters include the introduction, background,
2 historical perspective, study approaches, results, and
3 restoration strategies. Chapter Eight is entitled
4 "Recommendations." The executive summary of the TRFEFR describes
5 the individual purposes of each of its chapters, including
6 Chapter Eight's recommendations "to utilize an Adaptive
7 Environmental Assessment and Management (AEAM) approach to guide
8 future management and ensure the restoration and maintenance of
9 the fishery resources of the Trinity River" by "instream flow,
10 channel-rehabilitation, and fine and coarse sediment"
11 implementations, in order to support Chapter Seven's "conclusion
12 that a modified flow regime, a reconfigured channel, and strategy
13 for sediment management are necessary to have a functioning
14 alluvial river . . . that will provide the diverse habitats
15 required to restore and maintain the fishery resources of the
16 Trinity River." Doc. 42 exhibit H at xxv (TRFEFR). The summary
17 of the recommendations chapter also describes the integration of
18 these three primary actions to be taken in order to allow the
19 Trinity River to "resume its alluvial nature" and restore its
20 anadromous salmonid fishery resources:

- 21 (1) increased instream releases

22
23 plaintiffs' NEPA claim, finding the navy's commitment of
24 resources to system development, binding itself to pay its ship
25 builders, did not equate to binding itself to deploy the
26 challenged sonar system before a final EIS, so there was no
27 "final agency action" subject to review under APA).

28 By contrast, here, there was final agency action when the
ROD was signed, which gives standing under APA to challenge the
adequacy of NEPA review leading to that decision, i.e., the
TRFEFR, the BioOps, and the draft and final EIS/EIRs. When
arguing against the TRO application, the government asserted that
the ROD signing was the final agency action.

1 (2) fine and coarse sediment management, and

2 (3) mechanical channel alteration.

3 Id. at 289. The TRFEFR's recommended release schedules for each
4 water-year class under the flow evaluation alternative (later the
5 preferred alternative) are exactly the same as those adopted by
6 the draft and final EIS/EIRs, and ultimately the ROD. Compare
7 id. at 241 (TRFEFR table ES2) with Doc. 42 exhibit D at 12 (ROD);
8 Doc. 42 exhibit I at 2-17 (DEIS table 2-5);⁴⁵ Doc. 42 exhibit M
9 at 2-96 (FEIS table 2-5). In simple terms, there was in
10 chronological order:

11 (1) the TRFEFR, published in June, 1999, which in March,
12 2000, recommends to Congress a modified flow regime for
13 the Trinity River restoration;

14 (2) the draft EIS/EIR, October, 1999, which examines the
15 different flow regimes, choosing the "preferred
16 alternative" (the flow evaluation alternative);

17 (3) the final EIS/EIR, October, 2000, which makes minor
18 modifications to the draft EIS; and

19 (4) the ROD, December 19, 2000, which finally adopts the
20 preferred alternative of the TRFEFR.

21 The government cannot plausibly argue that the TRFEFR, which
22 compiled all the data regarding the Trinity River restoration and
23 recommended a modified flow regime, subsequently submitted to
24 Congress, does not constitute a recommendation on a proposal for
25

26 ⁴⁵ Apparently the DEIS had a typographical error, because
27 it listed the release during a normal water year at 636,000 acre-
28 feet, instead of 647,000, which the TRFEFR had listed, and was
corrected by the FEIS, and finally included within the ROD.

1 major federal action. Although it was not for legislation, it
2 was a published study and recommendation, jointly with the Hoopa
3 Valley Tribe, to Congress at the stage in the development of the
4 TRD restoration where Interior and the Hoopa Valley Tribe were
5 actively preparing to make a decision on different alternative
6 means (the different flow regimes) of accomplishing the Trinity
7 River's restoration, where those effects could be meaningfully
8 evaluated by Congress, implemented, and NEPA compliance ensured
9 by the draft and final EIS/EIRs.

10 Because the TRFEFR constitutes a recommendation on a
11 proposal for major federal action, an EIS was required. Was one
12 timely performed?

13 An agency shall commence preparation of an environmental
14 impact statement as close as possible to the time the agency
15 is developing or is presented with a proposal (§ 1508.23) so
16 that preparation can be completed in time for the final
17 statement to be included in any recommendation or report on
18 the proposal. The statement shall be prepared early enough
19 so that it can serve practically as an important
20 contribution to the decisionmaking process and will not be
21 used to rationalize or justify decisions already made
22 (§§ 1500.2(c), 1501.2, and 1502.2).

23 40 C.F.R. § 1502.5 (2000).

24 Preparation of an environmental impact statement on a
25 proposal should be timed (§ 1502.5) so that the final
26 statement may be completed in time for the statement to be
27 included in any recommendation or report on the proposal. A
28 proposal may exist in fact as well as by agency declaration

1 that one exists.

2 40 C.F.R. § 1508.23 (2000). Under Interior's Departmental
3 Manual, "[t]he feasibility analysis (go/no-go) stage, at which
4 time an EIS is to be completed, is to be interpreted as the stage
5 prior to the first point of major commitment to the proposal."
6 Doc. 93 exhibit C at § 4.3A.

7 Interior published the TRFEFR in June, 1999. It submitted
8 it to Congress in March, 2000. However, between those dates, it
9 completed the draft EIS in October, 1999, defining the preferred
10 alternative. Environmental review was conducted of the
11 recommendation for final action, because until the TRFEFR was
12 submitted to Congress, it did not become a recommendation on a
13 proposal for major federal action. The preferred alternative, as
14 of March, 2000, was the "first major commitment to the proposal."
15 The government did not violate NEPA by not first conducting an
16 EIS of the TRFEFR before it released it publically.

17 Second, plaintiffs argue the government violated the NEPA by
18 failing to analyze the potential adverse impacts of the NMFS and
19 USFWS BioOps, because they are so closely related to the TRFEFR
20 and the ROD, required to be implemented within the ROD, see Doc.
21 35 exhibit D at 11 ("the Department's agencies are directed,
22 through the Trinity Management Council, to implement the
23 Preferred Alternative as described in the FEIS/EIS and to
24 implement the reasonable and prudent measures described in the
25 NMFS and Service Biological Opinions."), and will effect
26 independent changes to the CVP operations, that they also merit
27 separate NEPA review. According to Mr. Snow, the USFWS BioOp
28 includes a R&PM that requires the Bureau to minimize upstream X2

1 movement of more than 0.5 kilometer between February to June,
2 which will change CVP operations to respond to such movement as
3 if the ROD had not been implemented. See Doc. 35 exhibit C at 34
4 (USFWS BioOp, attached to FAC).⁴⁶ As a result, Westlands will
5 potentially lose water because the only way to accommodate this
6 X2 movement will be to either increase the Delta inflow by
7 increasing releases of stored water, or reduce diversions of CVP
8 water from the Delta, both actions that reduce available CVP
9 water to Westlands, and can adversely affect the environment.
10 See Doc. 42 at ¶ 18. The NMFS BioOp also has a measure that can
11 harm the plaintiffs by causing additional reductions of CVP-
12 generated electricity, see Doc. 35 exhibit B at 37-38 (NMFS
13 BioOp),⁴⁷ which has not been considered. Plaintiffs also argue
14

15 ⁴⁶ For example, the USFWS BioOp gives as a R&PM that
16 "Reclamation shall minimize the effects of reoperating the CVP
17 resulting from the implementation of the Preferred Alternative
18 within the Trinity River Basin on listed fish in the delta."
19 Doc. 35 exhibit C at 33 (USFWS BioOp). It requires Reclamation
20 to implement the below action:

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

28 Id. at 34.

⁴⁷ The NFMS discusses the potential impacts to winter-run
chinook by violations of CVP-OCAP B0 temperature criteria caused
by implementation of the preferred alternative. See id. at 37.
For example, under the preferred alternative, there is a five
percent (5.0%) increase in such violations (14.3% compared to
9.3%). See id. According to the BioOp, this increase is caused
by the revised timing of exports from the Trinity River to the
Sacramento River, i.e., shifting from spring/summer (presently)
to summer/autumn (under the preferred alternative). See id.

1 that a supplemental EIS should have been prepared that analyzes
2 the effect of implementation of the ROD's flow regime on the
3 changed conditions of California's energy crisis, because less
4 CVP-generated electricity will be available. The government
5 disagrees, arguing that sufficient NEPA review of the adoption of
6 the ROD had been conducted, and the ROD is the operative federal
7 action affecting Westlands and the energy intervenors.

8 The salient question for this second alleged violation of
9 NEPA is whether the two BioOps, with their associated R&PMs (the
10 X2 movement requirement and the auxiliary bypass outlets), are
11 connected actions under the NEPA such that the government is
12 required to prepare an EIS under,⁴⁸ or alternatively, whether
13 they constitute changed conditions or new information that
14 require an SEIS.

15 "Although federal agencies are assigned the primary task of
16 defining the scope of NEPA review and their determination is
17 given 'considerable discretion,' connected or cumulative actions
18

19 To deal with the temperature problem, the BioOp recommends
20 utilizing auxiliary bypass outlets on the Trinity Dam from July
21 through October, a process that although not greatly beneficial
22 to the Sacramento River temperature problems, does assist the
23 Trinity River. See *id.* at 38. But because this additionally-
24 released water will not also pass through the Trinity River Dam
25 power plant, "[a] drawback to the auxiliary outlet releases is a
26 loss in power generation at Trinity Dam." *Id.* Thus, plaintiffs
27 argue that implementation of this NMFS BioOp, which is required
28 by the ROD, "will have an adverse power supply impact, which has
not been considered under NEPA." *Doc. 89* at 19:15-16.

⁴⁸ See also 42 U.S.C. § 4332(2)(C) (1995). Congress
recently proposed amendments to this section. See 2001 CONG US S
301 (107th Congress, 1st Session) (Feb 08, 2001) (introducing an
amendment to the National Environmental Policy Act of 1969 into
Senate that requires federal agencies to consult with state
agencies and county and local governments on EISs).

1 must be considered together to prevent an agency from 'dividing a
2 project into multiple "actions," each of which individually has
3 an insignificant environmental impact, but which collectively
4 have a substantial impact.'" Wetlands Action Network v. United
5 States Army Corps of Eng'rs, 222 F.3d 1105, 1117 (9th Cir. 2000)
6 (quoting Thomas v. Petersen, 753 F.2d 754, 758 (9th Cir. 1985)
7 (citing Alpine Lakes Prot. Soc'y v. Schlapfer, 518 F.2d 1089,
8 1090 (9th Cir. 1975))). Actions are "connected," which means
9 that they are closely related and should be discussed in the same
10 EIS, if they:

- 11 a. Automatically trigger other actions which may require
12 environmental impact statements.
- 13 b. Cannot or will not proceed unless other actions are
14 taken previously or simultaneously.
- 15 c. Are interdependent parts of a larger action and depend
16 on the larger action for their justification.

17 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2000). The two BioOps may be
18 so connected to the ROD, that they should have been discussed in
19 one FEIS together.⁴⁹

20
21 ⁴⁹ Anticipating the government's rebuttal that BioOps are a
22 separate phase of the implementation of the ROD, plaintiffs
23 argue, citing 40 C.F.R. § 1502.4(a) (2000) ("Proposals or parts
24 of proposals which are related to each other closely enough to
25 be, in effect, a single course of action shall be evaluated in a
26 single impact statement."), that because the ROD and the BioOps
27 are so closely-related that they constitute a single action, they
28 must be evaluated together. See also 40 C.F.R.
§ 1508.25(a)(1)(iii) (2000). There is no question that the two
BioOps are "interdependent parts of a larger action," 40 C.F.R.
§ 1508.25(a)(1)(iii) (2000), depending on implementation of the
preferred alternative for their justification, because the only
reason for the X2 measure is that the ROD's implementation of the
FEIS's preferred alternative (Flow Evaluation) reduces the water
now flowing, which keeps X2 movement within an acceptable range.

1 On the other hand, even if the BioOps are not connected
2 action, they may nevertheless constitute changed circumstances or
3 new information that must be addressed in a Supplemental
4 Environmental Impact Statement/Report ("SEIS"). "The
5 supplementation process is triggered when new information
6 presents a 'seriously different picture of the environmental
7 landscape' such that another in-depth look at the environment is
8 necessary." (quoting Wisconsin v. Weinberger, 745 F.2d 412, 418
9 (7th Cir. 1984)); see also Friends of the Clearwater, 222 F.3d at
10 557-58. "Agencies . . . [s]hall prepare supplements to either
11 draft or final environmental impact statements if: (i) The agency
12 makes substantial changes in the proposed action that are
13 relevant to environmental concerns; or (ii) There are significant
14 new circumstances or information relevant to environmental
15 concerns and bearing on the proposed action or its impacts." 40
16 C.F.R. 1502.9(c) (2000).

17 Plaintiffs point to National Wildlife Federation v. Marsh,
18 721 F.2d 767 (11th Cir. 1983), to support their allegation that
19 the government violated NEPA by not conducting further review of
20 the environmental impacts caused by the terms and conditions
21 imposed by the NMFS and USFWS BioOps. In that case, the Eleventh
22 Circuit reversed the district court's decision finding that the
23 United States Army Corps of Engineers' decision not to prepare an
24 SEIS/EIR was reasonable, because the project (based on a
25 completed EIS/EIR) was conditioned on obtaining a permit, which
26 itself had significant independent environmental impacts that
27 should have been evaluated in an SEIS/EIR. See id. at 771-84
28 ("appellants have shown that the Mitigation Plan involves a

1 number of proposed project changes that are likely to have a
2 significant, though beneficial, impact on the environment in and
3 around the proposed lake. . . . Given the plan's detailed
4 proposals for mitigating any adverse environmental effects
5 resulting from the creation of Lake Alma, as well as the role of
6 the plan in allaying the environmental concerns of all relevant
7 federal agencies, we conclude that the Mitigation Plan will have
8 a significant qualitative environmental impact. The conclusion
9 of Alma officials to the contrary is not reasonable and the
10 district court's approval of that conclusion is clearly
11 erroneous." (footnote omitted).

12 So too here. The ROD adopts the preferred alternative and
13 requires implementation of the two BioOps analyzing the preferred
14 alternative. See Doc. 35 exhibit D at 2; 11 (ROD). The two
15 BioOps impose significant environmental impacts,⁵⁰ even if they
16 may be beneficial. See, e.g., 40 C.F.R. § 1508.27(b)(1) (2000)
17 ("Impacts . . . may be both beneficial and adverse. A
18 significant effect may exist even if the Federal agency believes
19 that on balance the effect will be beneficial."). These effects
20 have not yet been analyzed in a supplemental EIS/EIR, but should
21 be.

22 Last, the plaintiffs argue that California's current energy
23
24
25

26 ⁵⁰ Two possible impacts are: (1) the USFWS BioOp imposes
27 the X2 mitigation standard that will have environmental impacts
28 that have not been evaluated under NEPA; and (2) the NMFS BioOp's
measure to deal with the water temperature has environmental
impacts that have not yet been evaluated.

1 crisis⁵¹ presents "a significant new circumstance requiring
2 preparation and circulation of a [SEIS]." Doc. 37 at 23.
3 Professional Engineer Scheuerman writes that the "portion of the
4 EIS addressing potential economic impacts to power customers
5 associated with the preferred alternative was developed and
6 finalized prior to the current exponential price increases being
7 experienced by the California wholesale power market." Doc. 114
8 at ¶ 6(b) (declaration of Paul G. Scheuerman). The government
9 disagrees: the ROD itself writes that "implementation of the
10 Preferred Alternative will not have any immediate impacts to
11 power supplies in California and that . . . substantial new
12 supplies are expected to be developed in California over the next
13 few years." Doc. 35 exhibit D at A-3.

14 It is indisputable that the California energy crisis
15 constitutes changed circumstances, because it began subsequent to
16 completion of the FEIS in October, 2000, when the FEIS
17 characterized any problem as solely "several statewide alerts
18 regarding insufficient reserves of available capacity." Doc. 42
19 exhibit I at D2-92 (FEIS).⁵² Interior was aware of the severe

20
21 ⁵¹ See Doc. 93 exhibit B at 2 (January 17, 2001,
22 proclamation of State of Emergency by California Governor Gray
23 Davis) ("the imminent threat of widespread and prolonged
24 disruption of electrical power to California's emergency
25 services, law enforcement, schools, hospitals, homes, businesses
26 and agriculture constitutes a condition of extreme peril to the
27 safety of persons and property within the state which, by reason
28 of its magnitude, is likely to be beyond the control of the
services, personnel, equipment, and facilities of any single
county or city").

27 ⁵² The FEIS diminishes the import of the electrical
28 crisis: Completion of additional powerplants is anticipated to
help avoid such alerts in the future. Construction of

1 electrical crisis in California before it signed the ROD on
2 December 19, 2000, and should have continued "to take a 'hard
3 look at the environmental effects of'" the ROD before signing it,
4 Friends of the Clearwater v. Dombeck, 222 F.3d at 557-58,
5 especially because implementation of the preferred alternative
6 reduces available CVP-generated electricity, which affects "the
7 quality of the human environment in a significant manner or to a
8 significant extent not already considered," id. at 558. A
9 supplemental EIS should be prepared. The reduced electricity not
10 only harms the interests of the plaintiffs (entities with
11 contracts for CVP electricity), but also the general populace of
12 the State, because that electricity must be replaced one way or
13 another, and stage three electrical emergencies⁵³ can be more
14 common if the available electricity for consumption in California
15 is further diminished, depending on the level of reserves.⁵⁴

16
17 additional generating capacity is taking place, and will
18 continue to take place, independent of any decision
19 regarding the Trinity River Mainstem Fishery Restoration.

20 A detailed assessment regarding the impact of CVP power
21 supplies on the greater California region was not conducted
22 for the DEIS/EIR, other than what is presented in the
23 Socioeconomics section. It is anticipated that as demand
24 for power increases, additional power supplies will be built
25 to meet the increase in total California demand.

26 Id. at D2-92, reflecting an analytical perspective that may have
27 been justified before the energy crisis, but is inadequate to
28 address current conditions.

29 ⁵³ See, e.g., Doc. 71 at ¶ 23 ("a Stage 3 alert occurs
30 when reserves are, or are forecasted to be, less than 3 percent
31 of demand; actual involuntary curtailments of customers would
32 have begun if reserves fell below 1.5%.) (declaration of David
33 Marcus).

34 ⁵⁴ Coincidentally, on the same day of the preliminary
35 injunction hearing, Fresno and the rest of California again
36 experienced Stage 3 rolling blackouts. See, e.g., Matt Leedy &

1 Even the Western Area Power Administration ("WAPA") of the United
2 States Department of Energy ("DOE") recognized that the CVP-TRD
3 plays a crucial role in providing energy capacity, as well as
4 electrical energy supply, for California. See Doc. 102 at ¶¶ 12-
5 13 & exhibit H. In a letter dated August 23, 2000, WAPA re-
6 examined the impacts of the preferred alternative on potential
7 reliability, because WAPA's previous work for the draft and final
8 EIS/EIRs had focused only on the potential economic impacts to
9 CVP power. See id. For example, the government's declarant,

10
11 Kerri Ginis, Dark Day for State: Visalia, Fresno and Other Areas
12 Across California Hit by Blackouts, Fresno Bee, Mar. 20, 2001, at
13 A1, A10:

14 Power outages that dimmed most of the state Monday rolled
15 through the Central Valley without warning, frustrating
16 business owners and creating confusion at intersections with
17 darkened traffic lights for up to two hours at a time. The
18 lights could go out again today if power plants stay down
19 for maintenance and temperatures remain unseasonably high. .
20 . . Several forces contributed to Monday's blackouts:
21 cutbacks in electricity from hydroelectric facilities in the
22 Pacific Northwest; a fire at a Southern California plant;
23 plants that were offline for repairs; and high demand
24 created by warm spring weather, said officials for
25 California's electricity grid. . . . The California
26 Independent System Operator called a Stage 3 power alert,
27 the most serious, shortly before noon and ordered utilities
28 to cut a total of 1,000 megawatts, causing more than 1.2
million customers to temporarily go dark. It was the first
series of rotating blackouts since parts of the state went
dim for two days in January. More than 55,000 customers from
Fresno, Tulare and Kings counties lost power Monday. Areas
hit included parts of Fresno, Clovis, Hanford and Visalia.

23 See also Paul Chavez, Second day of Rolling Blackouts Ordered in
24 California, Fresno Bee, Mar. 20, 2001, at A1 ("California's
25 utilities managers ordered rolling blackouts across the state for
26 a second straight day Tuesday, cutting off more than 125,000
27 customers as demand for electricity again outstripped supply.
28 The same factors that collided to strap California's power supply
on Monday hit again, officials with the Independent System
Operator said. Those include reduced electricity imports from
the Pacific Northwest, numerous power plants offline for repairs
and less power provided by cash-strapped alternative-energy
plants.").

1 Martin A. Bauer, highlights that following the announcement of a
2 Stage Three electrical emergency in California on January 17,
3 2001, "generation schedules were adjusted in order to utilize TRD
4 hydroelectric facilities to produce additional power. This
5 resulted in an increase in combined power production of 150 MW
6 capacity and 1,200,000 kilowatt-hours energy by the Trinity and
7 Judge Francis Carr Powerplants." Doc. 69(1) at ¶ 6. In other
8 words, CVP-generated electricity from the TRD is not only
9 important in terms of economic impact to the parties, but also
10 with respect to the total available energy capacity for the
11 State. The effects of implementation of the ROD on TRD-generated
12 energy (especially with respect to state-wide energy capacity) in
13 light of California's evolving energy crisis are new
14 circumstances that do not appear to have been evaluated.

15 An SEIS, analyzing the effects of the two BioOps and the
16 effect of implementation of the preferred alternative in light of
17 the changed circumstances of California's current energy crisis,
18 was necessary.

19
20 4. Conclusion

21 Plaintiffs have shown a threat of irreparable harm from
22 implementation of the ROD (lost water and electrical energy), and
23 a fair chance of success on the merits (incomplete NEPA review of
24 the effects of the two BioOps, and the effect of implementation
25 of the ROD with the changed circumstances of California's energy
26 crisis).⁵⁵ Because an injunction is an equitable form of relief,

27
28 ⁵⁵ Plaintiffs also argue that the government
maladministered the Endangered Species Act ("ESA") in two ways:

1 the plaintiffs' possible harm must nevertheless be balanced
2 within the totality of the circumstances of the TRD of the CVP.
3 The ROD must move forward, because the law (CVPIA) mandates, and
4 all parties admit, that the Trinity River must be restored. The
5 court lacks the legal authority and the inclination to substitute
6 its judgment for that of the Secretary. The balance is to
7 minimize, if possible, any alleged harm to plaintiffs and all
8 others affected during the pendency of this case.

9 Plaintiffs' request for a preliminary injunction to prevent
10

11 (1) the USFWS issued a non-jeopardy biological opinion that
12 requires a major change in CVP operations because of its X2
13 movement requirement; and (2) the NMFS maladministered the ESA by
14 issuing an internally-conflicting biological opinion that on one
15 hand does not anticipate any incidental take, and on the other
16 hand gives R&PMs to deal with those incidental takes.

The Administrative Procedure Act ("APA") governs judicial
17 review of administrative decisions involving the Endangered
18 Species Act. Under the APA, a court has the authority to
19 "hold unlawful and set aside agency action found to be
20 arbitrary, capricious, an abuse of discretion, or otherwise
21 not in accordance with law, or without observance of
22 procedure required by law. Review under this standard is
23 narrow and a court cannot substitute its judgment for that
24 of the agency, particularly when the challenged decision
25 implicates substantial agency expertise.

San Luis & Delta-Mendota Water Auth. v. Badgley, ___ F.Supp.2d ___,
20 2000 WL 33174417, *8 (E.D. Cal. 2000) (internal quotations,
21 quotation marks, alteration marks, and ellipsis omitted).

22 Plaintiffs attack Interior's decision to adopt the Preferred
23 Alternative of the TRFEFR as violative of the APA because it
24 failed to: (1) confirm that the evidence in the record supports
25 the "healthy river" objective; (2) confirm the existence of a
26 reasonable scientific justification for the assumption that
27 increased flows will achieve the goal of fishery restoration
28 within the Trinity River; and (3) objectively evaluate
29 plaintiffs' objections or other alternatives, instead acting with
30 agency "bias."

These additional alleged violations need not be addressed at
31 this preliminary stage, because the two prerequisites for
32 preliminary injunctive relief have already been met. They do
33 not, standing alone, raise a sufficient likelihood of success on
34 the merits to justify injunctive relief.

1 Interior from implementing the increased water releases of the
2 ROD is GRANTED, in part, as follows:

- 3 (1) the defendants, their agents, or those acting for them,
4 shall be ENJOINED, pending further order or entry of
5 judgment in this case, from changing CVP operations to
6 release more than an additional 28,600 acre-feet of water
7 over the 340,000 AF statutorily-required releases into the
8 Trinity River to implement the ROD;⁵⁶ but
9 (2) all other aspects of the ROD regarding river restoration may
10 proceed.

11
12 5. Bond Requirement

13 Rule 65(c) of the Federal Rules of Civil Procedure facially
14 requires posting of a bond by the party seeking an injunction
15 every time an injunction issues: "no restraining order or
16 preliminary injunction shall issue except upon the giving of
17 security by the applicant" Fed. R. Civ. P. 65(c) (2000)
18 (emphasis added). "The amount of security is properly left to
19 the discretion of the trial court. Failure to consider the
20 question of security is error." 13 Moore's § 65.50[1], at 65-92
21 to 65-93 (citing cases); see also Walczak v. EPL Prolong, Inc.,
22 198 F.3d 725, 733 (9th Cir. 1999) ("Federal Rule of Civil
23 Procedure 65(c) grants district courts wide discretion in setting
24 the amount of a security bond. Thus, we review the district

25
26 ⁵⁶ This amount is used because the government predicts
27 that the 2001-2002 water year will be critically dry, which under
28 the preferred alternative only requires releasing an additional
28,600 acre-feet of water. Releases under the ROD are limited to
this volume until the decision on the merits can be done.

1 court's decision as to the amount of a security bond for an abuse
2 of discretion." (citations omitted).

3 Some courts, however, permit indigent or poor parties either
4 to not post or post nominal bond amounts. See, e.g., Barahona-
5 Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999) (upholding
6 nominal \$1000 bond per plaintiff, where district court found that
7 any cost to defendant, even if wrongfully enjoined, would be
8 minimal, though plaintiffs had not made a formal showing of
9 indigency); Bd. of Educ. of Oak Park & River Forest High Sch.
10 Dist. No. 200 v. Ill. State Bd. of Educ., 10 F.Supp.2d 971, 981
11 (N.D. Ill. 1998) (ordering \$10 bond, after considering the
12 parent-plaintiffs' financial situation); Wilson v. Office of the
13 Civilian Health & Med. Program of the Uniformed Servs. (CHAMPUS),
14 866 F.Supp. 903, 909-10 (E.D. Va. 1994) (requiring military
15 dependant/insured to post \$0 bond for issuance of preliminary
16 injunction preventing CHAMPUS from denying coverage for high-dose
17 chemotherapy, where insured had limited financial resources,
18 substantial likelihood of success on merits, and requiring any
19 more substantial bond possibly could cost insured her life)
20 (citing Warner v. Ryobi Motor Prods. Corp., 818 F.Supp. 907, 909
21 (D. S.C. 1992) (requiring only \$250 bond because plaintiff had
22 limited financial resources); Kulakowski v. Rochester Hosp. Serv.
23 Corp., 779 F.Supp. 710, 717 (W.D.N.Y. 1991) (not requiring bond
24 where plaintiff demonstrated inability to pay)); California v.
25 Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1324 (9th Cir. 1985)
26 ("The court has the discretion to dispense with the security
27 requirement, or to request mere nominal security, where requiring
28 security would effectively deny access to judicial review."); but

1 see Mead Johnson & Co. v. Abbott Labs., 201 F.3d 883, 888 (7th
2 Cir. 2000) ("When setting the amount of security, district courts
3 should err on the high side.").⁵⁷

4 The district court may also set a low bond if the risk of
5 harm to the defendant from erroneous issuance of the injunction
6 is low. See Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174
7 F.3d 411, 421 n.3 (4th Cir. 1999).⁵⁸

8 The latter consideration militates toward a reduced bond for
9 plaintiffs: the government will not be materially harmed by this

10
11 ⁵⁷ For an extensive examination of the bond requirement
12 and its exceptions, see Erin Connors Morton, Note, Security for
13 Interlocutory Injunctions Under Rule 65(c): Exceptions to the
14 Rule Gone Awry, 46 Hastings L.J. 1863, 1864 (1995) ("Rather than
15 treating the security requirement as mandatory and carving out
16 narrow exceptions for these public interest litigants, at least
17 two circuits have interpreted the language of Rule 65(c) as
vesting the trial court with unfettered discretion to waive the
bond. Other circuits, while recognizing that the bond is
mandatory and that the court's discretion is limited to setting
the amount of the bond, have formulate narrow exceptions for
which waiver is appropriate.").

18 ⁵⁸ "In fixing the amount of an injunction bond, the
19 district court should be guided by the purpose underlying Rule
20 65(c), which is to provide a mechanism for reimbursing an
21 enjoined party for harm it suffers as a result of an
22 improvidently issued injunction or restraining order. The amount
23 of the bond, then, ordinarily depends on the gravity of the
24 potential harm to the enjoined party: The judge usually will fix
25 security in an amount that covers the potential incidental and
26 consequential costs as well as either the losses the unjustly
27 enjoined or restrained party will suffer during the period he is
28 prohibited from engaging in certain activities or the
complainant's unjust enrichment caused by his adversary being
improperly enjoined or restrained. Where the district court
determines that the risk of harm is remote, or that the
circumstances otherwise warrant it, the court may fix the amount
of the bond accordingly. In some circumstances, a nominal bond
may suffice." Id. (quoting 11A Federal Practice & Procedure
§ 2954, at 292, and citing Int'l Controls Corp. v. Vesco, 490
F.2d 1334 (2d Cir. 1974)) (alteration marks and internal citation
omitted).

1 preliminary injunction, because the status quo is maintained,
2 i.e., the statutorily-mandated 340,000 acre-foot annual minimum
3 Trinity River Flow remains, an amount that has been in place for
4 at least a decade through severe droughts, and only for the
5 "limited" time until the case is adjudicated on the merits.
6 Plaintiffs demonstrate a reasonable possibility of success on the
7 merits, because the government should have prepared an SEIS that
8 analyzes the effects of the two BioOps and the changed
9 circumstances of California's energy crisis.

10 To guard against the possible, but compensable, harm the
11 government may suffer from erroneous issuance of a preliminary
12 injunction, plaintiffs are ORDERED to post a bond of \$15,000,
13 one-half by the water-districts, and one-half by the power
14 intervenors, before the preliminary injunction issues.

15
16 CONCLUSION


17 Plaintiffs (the water-districts, NCPA, and SMUD), meet the
18 Ninth Circuit's requirements for issuance of a limited
19 preliminary injunction: irreparable injury (lost CVP water and
20 electrical energy) and likelihood of success on the merits
21 (incomplete NEPA review of the effect of the two BioOps and the
22 changed circumstances of California's energy crisis), which will
23 issue immediately following their posting a \$15,000 bond, one-
24 half by the water-districts (\$7,500 by the water-districts; and
25 \$3,750 each by NCPA and SMUD). The injunction limits additional
26 (i.e., above the statutorily-mandated 340,000 acre-feet) water
27 releases to 28,600 acre-feet, but otherwise allows every other
28 physical aspect of the ROD's Trinity River restoration to move

1 forward. To expedite resolution of the issues raised by this
2 case, prudence counsels preparation of an SEIS that evaluates the
3 matters described above to comply with NEPA. The parties' input
4 is invited on whether this proceeding on preliminary injunction
5 should be converted to one to make final determination of the
6 issues presented, in order to further expedite entry of final
7 judgment.

8 The parties are ORDERED to meet, confer, and within ten (10)
9 days following March 19, 2001, submit a proposed form of order in
10 conformance with this decision.

11
12 SO ORDERED.

13
14 DATED: 2001 March 22.

15
16 
17 _____
18 Oliver W. Wanger
19 UNITED STATES DISTRICT JUDGE
20
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United States District Court
for the
Eastern District of California
March 23, 2001

* * CERTIFICATE OF SERVICE * *

1:00-cv-07124

Westlands Water Dist

v.

US Dept of Interior

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on March 23, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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