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2007-11-15
U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 WESTLANDS WATER DISTRICT, SAN)
10 LUIS & DELTA-MENDOTA WATER)
11 AUTHORITY, and SAN BENITO COUNTY)
12 WATER DISTRICT,)

11 Plaintiffs,)

12 SACRAMENTO MUNICIPAL UTILITY)
13 DISTRICT,)

14 Plaintiff-Intervenor,)

15 NORTHERN CALIFORNIA POWER)
16 ASSOCIATION,)

17 Plaintiff-Intervenor)

18 v.)

19 UNITED STATES DEPARTMENT OF THE)
20 INTERIOR, ET AL,)

21 Defendants,)

22 HOOPA VALLEY TRIBE,)

23 Defendant-Intervenor,)

24 YUROK TRIBE,)

25 Defendant-Intervenor.)
26
27
28

CIV-F-00-7124 OWW DLB

MEMORANDUM DECISION AND
ORDER RE: DEFENDANT-
INTERVENORS' MOTION TO
MODIFY ORDER GRANTING
PRELIMINARY INJUNCTION FOR
WATER YEAR 2002

1 Before the court is defendant-intervenors' motion to modify
2 the March 22, 2001 order granting a preliminary injunction.
3 Hearings on the matter were held April 15, 17, and 19, 2002.
4

5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 This suit involves the United States Department of
7 Interior's ("Interior") administration of the Trinity River
8 Division ("TRD") of the Central Valley Project ("CVP") and
9 Interior's implementation of Section 3406(b)(23)¹ of the Central
10

11 ¹ CVPIA §§ 3406(b) and (b)(23) read:

12
13 The Secretary, immediately upon the enactment of this
14 title, shall operate the Central Valley Project to meet
15 all obligations under State and Federal law, including
16 but not limited to the Federal Endangered Species Act,
17 16 U.S.C. § 1531, et seq., and all decisions of the
18 California State Water Resources Control Board
19 establishing conditions on applicable licenses and
20 permits for the project. The Secretary, in
21 consultation with other State and Federal agencies,
22 Indian tribes, and affected interests, is further
23 authorized and directed to:

24 . . .

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

(A) by September 30, 1996, the Secretary, after

1 Valley Project Improvement Act ("CVPIA").² Plaintiffs allege
2 that Interior manages TRD in a manner that results in less CVP
3

4 consultation with the Hoopa Valley Tribe, shall
5 complete the Trinity River Flow Evaluation Study
6 currently being conducted by the United States Fish and
7 Wildlife Service under the mandate of the Secretarial
8 Decision of January 14, 1981, in a manner which insures
9 the development of recommendations, based on the best
10 available scientific data, regarding permanent instream
11 fishery flow requirements and Trinity River Division
12 operating criteria and procedures for the restoration
13 and maintenance of the Trinity River fishery; and

14 (B) not later than December 31, 1996, the Secretary
15 shall forward the recommendations of the Trinity River
16 Flow Evaluation Study, referred to in subparagraph (A)
17 of this paragraph, to the Committee on Energy and
18 Natural Resources and the Select Committee on Indian
19 Affairs of the Senate and the Committee on Interior and
20 Insular Affairs and the Committee on Merchant Marine
21 and Fisheries of the House of Representatives. If the
22 Secretary and the Hoopa Valley Tribe concur in these
23 recommendations, any increase to the minimum Trinity
24 River instream fishery releases established under this
25 paragraph and the operating criteria and procedures
26 referred to in subparagraph (A) shall be implemented
27 accordingly. If the Hoopa Valley Tribe and the
28 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.

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

27 ² Pub. L. No. 102-575, § 3401-12, 106 Stat. 4600, 4706
28 (Oct. 30, 1992).

1 water and electricity being available to meet Interior's
2 contractual commitments to the water districts, federal water
3 service contractors, and power generators; and that Interior's
4 TRD management adversely impacts other parties, including the
5 public.

6 The TRD was authorized by an Act of Congress on August 12,
7 1955.³ Construction of the TRD was completed and operations
8 commenced in 1964. Doc. 43 at 5. The TRD transfers water from
9 the Klamath River Basin, which includes the Trinity River, in
10 Trinity County to the Sacramento River Basin. Its primary
11 function is to store Trinity River water for regulated diversion
12 to California's Central Valley for agricultural, municipal, and
13 industrial uses. The TRD's construction and operation resulted
14 in the diversion of up to ninety percent (90%) of the average
15 annual discharge into the Trinity River at Lewiston Dam
16 (1,234,000 AF of the 1,396,000 AF inflow), and blocked access to
17 109 miles of steelhead and salmon spawning and rearing habitat.
18 In response to declining fisheries and degraded habitat
19 conditions, Interior decided in 1981 to increase flows into the
20 Trinity River ranging from 140,000 AF to 340,000 AF annually,
21 with reductions in dry and critically dry years. In addition,
22 the United States Fish and Wildlife Service ("USFWS") was
23 directed to undertake a Flow Evaluation Study to assess fish
24 habitat at various flows, summarize the effectiveness of other
25 instream and watershed restoration activities, and recommend
26 appropriate flows and other measures necessary to better maintain

27
28 ³Pub. L. No. 84-386 (August 12, 1955).

1 favorable habitat conditions. The study began in October 1984
2 and was completed by a June 1999 report. In October 1984,
3 Congress enacted the Trinity River Basin Fish and Wildlife
4 Management Act⁴ to restore fish and wildlife populations to
5 pre-TRD levels. CVPIA § 3406(b)(23) requires, through the TRD,
6 an annual instream release of not less than 340,000 AF of water
7 into the Trinity River in order to meet federal trust
8 responsibilities to protect fishery resources of the Hoopa Valley
9 and Yurok Tribes and to meet the fishery restoration goals of the
10 Management Act. The TRD accounts for twenty-five percent (25%)
11 of the 2000 megawatts of CVP-generated electric power. Doc. 105
12 ¶ 12.

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

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

19 Doc. 42, Ex. I at 3-151 to 3-152 (DEIS). The spring-run chinook
20 migrates in the spring to summer, spawns in the early fall, rears
21 in winter-spring-summer, and makes its habitat for feeding in
22 shallow, slow-moving waters adjacent to higher water velocities.
23 The fall-run chinook migrates in the fall, spawns in the fall,
24 rears in winter-spring-summer, and makes its habitat in the same
25 areas as the spring-run chinook. The winter steelhead migrates
26 in the fall to winter, spawns between February and April, rears
27

28 ⁴ Public Law 98-541, 98 Stat. 2721.

1 year-round, and makes its habitat in areas of clean cobble where
 2 there is refuge from high velocities, where juveniles overwinter
 3 for one to two or more years. The summer steelhead migrates in
 4 the spring to summer, spawns between February and April, rears
 5 year-round, and makes its habitat in the same area as its related
 6 species. Doc. 42, Ex. M at 2-103 table 3-10 (FEIS).

7 In January 1998, the draft Trinity River Flow Evaluation
 8 Report was released. In June 1999, Interior, in consultation
 9 with the Hoopa Valley Tribe, published the Trinity River Flow
 10 Evaluation Final Report ("TRFEFR"). Doc. 42, Ex. H. The TRFEFR
 11 recommends increasing the Trinity River fish flows from the
 12 statutorily mandated 340,000 AF/year to between 369,000 and
 13 815,000 AF/year. Doc. 35 at ¶ 38 (first amended complaint).
 14 Specifically, the recommended annual water volumes for instream
 15 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	

26 TRFEFR xxxi; 241.

27 On October 19, 1999, the United States Bureau of Reclamation
 28

1 ("Bureau") and the USFWS released the draft "Trinity River
2 Mainstem Fishery Restoration Environmental Impact
3 Statement/Report" ("DEIS"), which described alternate approaches
4 for restoring and maintaining the Trinity River fishery. Doc. 35
5 at ¶ 38; see also Doc. 42, Ex. F (DEIS selected pages); Ex. I
6 (whole DEIS).

7 Interior published the availability of the draft EIS/EIR and
8 the commencement of a public comment period scheduled to end on
9 December 8, 1999. 64 Fed. Reg. 56364, 1999 WL 827447 (Oct. 19,
10 1999). The public comment period was extended until January 20,
11 2000. 64 Fed. Reg. 67584, 1999 WL 1078497 (Dec. 2, 1999); 64
12 Fed. Reg. 72357, 1999 WL 1247501 (Dec. 27, 1999).

13 On January 20, 2000, the water districts submitted written
14 comments⁵ criticizing the draft report, noting, *inter alia*, that
15 the draft report failed to analyze the preferred alternative's
16 potential adverse environmental impacts on federally listed
17 endangered or threatened fish species within the Sacramento River
18 system and the Sacramento-San Joaquin Delta ("Delta"), and also
19 failed to analyze how these adverse impacts, if any, could be
20 minimized or avoided. Doc. 35 at ¶¶ 39-40 & Ex. A.

21 On March 10, 2000, Westlands and San Luis sent a sixty-day
22 notice of intent to sue to Interior, threatening suit if Interior
23 did not undertake a formal ESA consultation on the TRFEFR. Doc.
24 92, Ex. A (declaration of Eric N. Robinson). On March 29, 2000,
25

26 ⁵ "Comments of the San Luis & Delta-Mendota Water
27 Authority on the Trinity River Mainstem Fishery Restoration
28 Environmental Impact Statement/Environmental Impact Report,"
dated January 19, 2000.

1 Interior forwarded the TRFEFR to Congress, pursuant to CVPIA §
2 3406(b)(23) ("the Secretary shall forward the recommendations of
3 the Trinity River Flow Evaluation Study . . . to the Committee on
4 Energy and Natural Resources and the Select Committee on Indian
5 Affairs of the Senate and the Committee on Interior and Insular
6 Affairs and the Committee on Merchant Marine and Fisheries of the
7 House of Representatives. If the Secretary and the Hoopa Valley
8 Tribe concur in these recommendations, any increase to the
9 minimum Trinity River instream fishery releases established under
10 this paragraph and the operating criteria and procedures referred
11 to in subparagraph (A) shall be implemented accordingly."). Doc.
12 35 at ¶ 42.

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

22 On October 12, 2000, the National Marine Fishery Service
23 ("NMFS") formally issued the "Biological Opinion for the Trinity
24 River Mainstem Fishery Restoration EIS and Its Effects on
25 Southern Oregon/Northern California Coast Coho Salmon, Sacramento
26 River Winter-run Chinook Salmon, Central Valley Spring-run
27 Chinook Salmon, and Central Valley Steelhead" ("NMFS BioOp").
28 Doc. 35 at ¶ 43; Ex. B. This opinion states that implementation

1 of the report will affect many aspects of the river, including
2 decreased water flows, and discusses reasonable and prudent
3 measures ("R&PMs") to minimize or avoid the preferred
4 alternative's impacts on federally listed fish. *Id.* at 43-45.

5 Also on October 12, 2000, the USFWS issued "Re[-]initiation
6 of Formal Consultation: Biological Opinion of the Effects of
7 Long-term Operation of the Central Valley Project and State Water
8 Project as Modified by Implementing the Preferred Alternative in
9 the Draft Environmental Impact Statement/Environmental Impact
10 Report for the Trinity River Mainstem Fishery Restoration
11 Program" ("USFWS BioOp"). *Id.* at ¶ 48 & Ex. C. On November 17,
12 2000, Interior published notice of the availability of the final
13 EIS/EIR. 65 Fed. Reg. 69512, 2000 WL 1711646 (Nov. 17, 2000).

14 On December 14, 2000, Westlands filed suit against
15 defendants, with three claims for relief for:

- 16 (1) "maladministration" of the Endangered Species Act
17 ("ESA") by the USFWS;
18 (2) maladministration of the ESA by NMFS; and
19 (3) violation of NEPA by all defendants.

20 Doc. 1 at 15-24. That same day, Westlands sought an emergency
21 court order to enjoin the defendant, Bruce Babbitt (as Secretary
22 of the Interior), from executing a Record of Decision ("ROD")
23 with the Hoopa Valley Tribe, scheduled to be signed on Tuesday,
24 December 19, 2000. On December 15, the Hoopa Tribe intervened as
25 a defendant in the case. Doc. 14.

26 The motion for a Temporary Restraining Order ("TRO") was
27 denied in open court on the afternoon of December 15, 2000, and
28 the confirming written order was entered on January 30, 2001.

1 Doc. 85. The TRO was not issued because at the time of the
2 December 15 hearing, Secretary Babbitt had not yet signed the
3 ROD. The signing was scheduled for December 19, 2000. Until the
4 ROD was signed, there was no "final agency action" that Westlands
5 could challenge and no authority existed to enjoin the Executive
6 from implementing the statutory function of reaching agreement
7 with the Indian Tribes on the Trinity River Restoration Plan.
8 *Id.* at 4-5.

9 On December 19, 2000, Secretary Babbitt and the Senior
10 Chairman of the Hoopa Valley Tribal Council signed the ROD. Doc.
11 35 at ¶ 51 & Ex. D. The ROD directs Interior's agencies "to
12 implement the Preferred Alternative as described in the FEIS/EIR
13 and as provided below," Doc. 35, Ex. D at 2, and "to implement
14 the reasonable and prudent measures described in the NMFS and
15 [USFWS] Biological Opinions," *id.* at 11.

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

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

1 that internally conflicts, because it states on one hand
2 that "NMFS does not anticipate that implementation of the
3 proposed flow schedules will incidentally take any SONCC
4 coho salmon," and on the other hand, prescribes R&PMs to
5 deal with incidental takes;

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

1 (4) violation of the Administrative Procedure Act ("APA"),
2 claiming that the TRFEFR's recommendations adopted by the
3 ROD are not based on the best available scientific data in
4 violation of CVPIA § 3406(b)(23)(A); and other conclusions
5 contained therein are arbitrary and capricious.

6 Doc. 35. The Yurok Tribe intervened as a defendant on January
7 19, 2001. Doc. 53. On February 8, 2001, the Northern California
8 Power Agency ("NCPA") and the Sacramento Municipal Utility
9 District ("SMUD") intervened as plaintiffs over the opposition of
10 the Hoopa Valley and Yurok Tribes. Doc. 118.⁶

11 On January 5, 2001, the water districts filed a motion for
12 preliminary injunction. Doc. 36. On February 6, 2001, NCPA and
13 SMUD also moved for a preliminary injunction. Docs. 107, 110. A
14 preliminary injunction issued on March 22, 2001 limiting the
15 amount of water releases under the ROD to a total of 368,600 AF.
16 All other aspects of the ROD's Trinity River restoration plan
17 were not enjoined. Doc. 136. The preliminary injunction was
18 based on a probability of irreparable injury through lost water
19 (which could not be replaced), a potential for electrical energy
20 loss damaging to the public, and harm to the salmonid species in
21 the Sacramento River. Doc. 136 at 28. The balance of hardships
22 favored plaintiffs and maintained the status quo. *Id.* at 30.
23 The decision found plaintiffs were likely to succeed on the
24 merits of their claim because the two BioOps impose significant
25

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

1 environmental impacts that were not analyzed in a supplemental
2 EIS/EIR. *Id.* at 49. The California energy crisis was a changed
3 circumstance that should have been evaluated, but was not.

4 On September 7, 2001, the United States, the water
5 districts, NCPA, and SMUD, but not the Tribes, entered into and
6 filed a stipulation to stay the proceedings in this case until
7 Interior issued a revised ROD following completion of a
8 supplemental Environmental Impact Statement ("SEIS"). Doc. 172.
9 The federal defendants and plaintiffs agreed that the preliminary
10 injunction would remain in place unless otherwise ordered by the
11 court. *Id.* at ¶ 11. In reaching the stipulation, the federal
12 defendants and plaintiffs considered other options including
13 converting the preliminary injunction into a final judgment on
14 the merits. *Id.* at ¶ 5. The defendant-intervenor Tribes did not
15 oppose the stay order, but did not join the stipulation because
16 of paragraphs eight⁷ and nine⁸ which they believed demanded

17
18 ⁷Paragraph eight states:

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

28 ⁸Paragraph Nine states:

The federal defendants have advised the parties to this
litigation that, through the SEIS scoping process, any
person or party will have the opportunity to present
other issues that they believe should be included in
the SEIS and that the federal defendants will carefully

1 actions not required by law. Doc. 176. They found the proposed
2 order "unobjectionable." *Id.* On October 8, 2001, the court
3 signed the stay order.

4 On March 14, 2002, defendant-intervenor Tribes moved to
5 modify the preliminary injunction for water year 2002 alleging
6 changed circumstances. Docs. 183-84. The water districts, SMUD,
7 and NCPA opposed. Docs. 191, 196 & 199. The federal defendants
8 filed a "response" stating that they will "continue to abide by
9 the terms of the Joint Stipulation and Request for Stay," but do
10 not take a position on the defendant-intervenors' motion. Doc.
11 194. In response to plaintiffs' oppositions, defendant-
12 intervenors filed numerous additional declarations containing new
13

14
15 consider all such presentations. In addition to the
16 formal scoping and public comment processes under NEPA
17 and the CEQ regulations, the federal defendants will
18 use the available legal procedures to invite and
19 consider technical information and expert advice from
20 all sources. These procedures will allow scientific
21 and technical discussion among the scientists and
22 technical experts of the federal defendants,
23 plaintiffs, plaintiff-intervenors, and defendant-
24 intervenors, and others having such expertise, so as to
25 maximize the value of the scientific and technical
26 input from non-federal sources. The goal of these
27 procedures is to make the SEIS a thorough,
28 comprehensive, and scientifically sound document, as
required by NEPA and the CEQ regulations. When
completed, the federal defendants will prepare a
revised ROD. In conjunction with the SEIS and revised
ROD, the federal defendants will consult with FWS and
NMFS under ESA § 7, as appropriate. The SEIS, revised
ROD, and any biological opinions will be subject to
legal challenge on any legally cognizable grounds in
this or independent litigation by any party.

1 evidence. Docs. 205-212. Plaintiffs object to the new evidence.

2 Oral argument was heard April 15, 2002. On April 17, 2002
3 an additional hearing was held to receive the testimony of
4 Chester Bowling, the CVP Operations Manager. Further oral
5 argument was heard on April 19, 2002. At the April 19, 2002
6 hearing an oral ruling was made. A written order modifying the
7 injunction issued that afternoon.

8
9 II. LEGAL STANDARD

10 A district court has the inherent authority to modify a
11 preliminary injunction in consideration of new facts. *A&M*
12 *Records, Inc. v. Napster, Inc.*, 2002 WL 449550, *4 (9th Cir.
13 2002); *American-Arab Anti-Disrimination Comm. v. Reno*, 119 F.3d
14 1367, 1375 (9th Cir. 1997), *vacated on other grounds* by 525 U.S.
15 471 (1999) (holding that denial of motion to dissolve preliminary
16 injunction was proper where movant had not shown changed
17 circumstances); *United States v. Oregon*, 769 F.2d 1410, 1416 (9th
18 Cir. 1985) ("[T]he court retains the power to modify the terms of
19 its injunction in the event that changed circumstances require
20 it."); *see also System Federation No. 91 v. Wright*, 364 U.S. 642,
21 647 (1961) ("There is also no dispute but that a sound judicial
22 discretion may call for the modification of the terms of an
23 injunctive decree if the circumstances, whether of law or fact,
24 obtaining at the time of its issuance have changed, or new ones
25 have arisen."). "Moreover, it is improper to use a motion to
26 dissolve an existing preliminary injunction to try to relitigate
27 on a fuller record preliminary injunction issues already
28 decided." *American-Arab Anti-Discrimination Comm.*, 119 F.3d at

1 1375.

2
3 III. DISCUSSION

4 Defendant-intervenors move to modify the preliminary
5 injunction to permit the federal defendants to release to the
6 Trinity River in 2002 the amount of water recommended in the ROD
7 for a normal water year, 646,900 AF. While they use the term
8 "modify," in effect they ask that the injunction be dissolved.
9 The injunction limited the amount of water released to the
10 Trinity River in the 2000-2001 water year to the amount the ROD
11 recommended for critically dry years. If the preliminary
12 injunction is modified each year to conform to current hydrologic
13 conditions, the practical consequence is that the ROD will be
14 implemented as written, albeit with yearly court approval. This
15 impermissibly involves the court in the management of the CVP and
16 thwarts Interior's compliance with the law.

17
18 A. LACHES

19 Plaintiffs argue that the Tribes knew about water year
20 2002's hydrology in January, but did not bring this motion until
21 March 14, the eve of the date on which the increased flows would
22 commence. Plaintiffs argue that the delay in bringing the motion
23 prejudiced them because had it been brought in January, then the
24 merits of the case could have been reached sooner and assuming
25 success on the merits, the alleged harm caused by increasing the
26 flows to the Trinity River would not occur. To the extent
27 plaintiffs are arguing laches, they have not demonstrated
28 unreasonable delay or prejudice caused by the Tribes' motions.

1 For laches to apply, there must be a showing of unreasonable
2 delay and prejudice. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 951
3 (9th Cir. 2001). Here, defendant-intervenors' delay in bringing
4 the motion was not imprudent. The Bureau releases its relatively
5 firm allocation numbers and water projections for the water year
6 in April. Defendant-intervenors' argument was based on the
7 hydrology of water year 2002. This is the time when their motion
8 must be made. Further, any delay brought by the bringing of the
9 motion was more of an inconvenience than prejudice.
10 Inconvenience does not amount to prejudice.

11
12 B. CHANGED CIRCUMSTANCES

13 Defendant-intervenors seek to modify/dissolve the
14 preliminary injunction based on three alleged changes in
15 circumstances: 1) the 2002 water year is wetter than the water
16 year in which the preliminary injunction was granted; 2) Interior
17 is taking longer than estimated to complete the SEIS; and 3) the
18 California energy crisis is over.

19 When the preliminary injunction was entered, the court and
20 the parties anticipated that the case would be heard and decided
21 within or soon after the 2001 water year. Doc. 137 at 26:22-
22 27:3, 43:9-11. Since that time several things have changed. On
23 September 7, 2001, plaintiffs and the federal defendants agreed
24 to stay decision on the merits until after a new SEIS was
25 completed. The defendant-intervenors did not agree, but did not
26 object, except as to the scope of the EIS to be undertaken in a
27 September 19, 2001 statement of non-opposition. The stay issued
28 October 8, 2001. The 2001-2002 water year is projected to be a

1 wetter water year.

2 Defendant-intervenors rely in part on footnote 56 of the
3 March 23, 2001 order for preliminary injunction, to support their
4 argument that the injunction was based on the water year 2001
5 hydrology. Footnote 56 states: "[The amount of water allowed to
6 be released to the Trinity River under the injunction] is used
7 because the government predicts that the 2001-2002 water year
8 will be critically dry, which under the preferred alternative
9 only requires releasing an additional 28,600 acre-feet of water.
10 Releases under the ROD are limited to this volume until the
11 decision on the merits can be done." Doc. 136 at 55:26-28. SMUD
12 in turn argues that the injunction was not based on water year
13 hydrology and therefore the change in hydrology is not a change
14 in circumstances. "[T]he footnote statement cannot mean that the
15 preliminary injunction was intended to implement the ROD flows.
16 If so, then the Court's determination that the plaintiffs
17 demonstrated irreparable harm sufficient to enjoin the ROD would
18 be meaningless, and the plaintiffs might as well not have filed
19 suit. Indeed, the [second] sentence of the footnote relied on by
20 the Tribes indicates that this Court intended the injunction to
21 remain in place until the issues raised by the plaintiffs were
22 addressed." Doc. 199 at 13:4-11. The court did intend for the
23 injunction to remain in place until the issues raised by the
24 plaintiffs were addressed, however at that time it appeared that
25 the merits of the case would be addressed within water year 2001
26 or soon thereafter. Now, because of an extended stay of the
27 litigation and delayed time table for preparing the SEIS, the
28 merits of the case may not be reached until 2004.

1 SMUD argues, however, that the Hoopa Valley Tribe knew that
2 the SEIS would not be completed before the 2003 water year prior
3 to filing its statement of non-opposition to the stay. It bases
4 this argument on the fact that the Hoopa Valley Tribe is a co-
5 lead agency along with the Bureau and the USFWS for the Trinity
6 River Mainstem Fishery Restoration Program's NEPA compliance.
7 Doc. 178, Attch. 1 at 1. The Statement of Work for the SEIS was
8 issued by the Bureau on August 9, 2001 stating that the goal was
9 to have the preferred alternative implemented in the 2003 water
10 year. *Id.* at 3. The fact that the Hoopa Valley Tribe is a co-
11 lead agency along with the Bureau implies but does not prove that
12 it had knowledge prior to signing its statement of non-opposition
13 that the SEIS would not be completed and the preferred
14 alternative implemented until the 2003 water year. By not
15 opposing the stay in September 2001, when defendant-intervenors
16 knew that the merits of the case would not be reached within or
17 close to the 2001 water year, plaintiffs argue that they should
18 not be heard to complain.

19 SMUD also argues, citing *Security & Exchange Comm'n v.*
20 *Coldicutt*, 258 F.3d 939 (9th Cir. 2001), that defendant-
21 intervenors must show that the existing injunction creates a
22 hardship beyond that anticipated by the Court when it issued the
23 injunction. The injunction at issue in *Coldicutt* was a permanent
24 injunction that was challenged under Fed. R. Civ. P. 60(b).
25 Preliminary injunctions are not final judgments modifiable under
26 Rule 60(b). *Prudential Real Estate Affiliates, Inc. v. PPR*
27 *Realty, Inc.*, 204 F.3d 867, 880 (2000) ("[A] preliminary
28 injunction is not a 'final judgment, order, or proceeding' that

1 may be addressed by a motion under Rule 60(b)."). The section of
2 Coldicutt from which SMUD quotes is entitled "Rule 60(b)(5)
3 Requirements." Coldicutt, 258 F.3d at 941. Coldicutt does not
4 apply to this proceeding.

5 The Tribes argue that the California energy crisis no longer
6 exists and this is a changed circumstance. To the extent that
7 defendant-intervenors argued that this affects the March 22, 2001
8 memorandum decision's analysis of the likelihood of success on
9 the merits, failure to consider the energy crisis was only one of
10 several errors made by Interior in adopting the ROD. As to the
11 balance of hardships, plaintiffs provide contrary evidence to
12 show the energy crisis still exists. There is a material dispute
13 whether there has been a change in circumstances related to the
14 California energy crisis. Based on the information provided to
15 the court, it appears that the effect of implementation of the
16 ROD is materially adverse to electrical power generated by the
17 CVP.

18 A material changed circumstance that justifies re-
19 examination of the preliminary injunction is the fact the SEIS
20 will not be completed until 2004, at the earliest. At the time
21 the preliminary injunction was entered the parties and the court
22 expected that the merits of the case would be decided before
23 water releases to the Trinity River under the ROD would increase
24 based on current hydrology. The April 18, 2001 Scheduling
25 Conference Order listed the following deadlines: 1) Discovery
26 cut-off, October 1, 2001; 2) last date to lodge the
27 administrative record, June 25, 2001; 3) last date to file any
28 administrative record motions, July 23, 2001; 4) last date to

1 file any opposition, August 6, 2001; 5) administrative record
2 hearing, August 27, 2001; 6) settlement conference, September 13,
3 2001; 7) last date to file dispositive motions, October 15, 2001;
4 8) last date to file opposition, November 13, 2001; 9) last date
5 to file replies, December 3, 2001; and 10) hearing date on cross-
6 motions for summary judgment, January 7, 2002. On June 21, 2001,
7 an order was entered on all parties' joint stipulation and
8 request to stay the deadline to file the administrative record.
9 On September 20, 2001, defendant-intervenors filed a statement of
10 non-opposition to the joint stipulation to stay the case. This
11 was after the scheduled date to hear administrative record
12 motions. By then it was apparent the merits would not be reached
13 before April 21, 2002, and that the preliminary injunction would
14 remain in effect after that date. Nonetheless, defendant-
15 intervenors' non-opposition statement specifically provides:
16 "the Order Granting Preliminary Injunction shall be in force and
17 effect until otherwise ordered by this Court." Doc. 177. SMUD
18 asserts that if it had known at the time the stay was signed that
19 the defendant-intervenors considered the preliminary injunction
20 dependant upon the hydrology of each water year, it would not
21 have stipulated to stay the litigation, and that the litigation
22 would have been completed by this time. Doc. 199 at 8-9.

23 Defendant-intervenors knew not later than September 2001
24 that the preliminary injunction would be in effect past April 21,
25 2002 if a stay was granted, but signed a non-opposition to the
26 stay. All parties knew in September that the 2002 water year
27 hydrology might be different. To this extent, the "changed
28 circumstances" of different hydrology were foreseeable. Although

1 the defendant-intervenors foresaw the likelihood the injunction
2 would remain in effect into the 2002 water year, they did not
3 know until December 2001, that the SEIS would take several years
4 to complete. None of the parties or the court intended for this
5 litigation to drag on until 2004, in fact at the time the
6 preliminary injunction was issued, resolution of the case was
7 projected to occur in early 2002, well before the date on which
8 water releases to the Trinity River increase based upon the
9 current water year's hydrology. A fundamental premise of the
10 preliminary injunction was that the lawsuit would be quickly
11 decided. Defendant-intervenors' acquiescence in the stay does
12 not bar their raising changed circumstances to seek to modify the
13 injunction.

14
15 C. MERITS OF THE PRELIMINARY INJUNCTION

16 1. The Preliminary Injunction Standard

17 Two alternative tests exist to determine whether and when a
18 preliminary injunction should issue. The "traditional test"
19 requires a plaintiff to establish: 1) the significance of the
20 threat of irreparable harm to plaintiff if the injunction is not
21 granted; 2) the state of the balance between this harm and the
22 injury that granting the injunction would inflict on the
23 defendant; 3) the probability that plaintiff will succeed on the
24 merits; and 4) the public interest favors granting the
25 injunction. *Textile Unlimited, Inc. v. A..BMH & Co., Inc.*, 240
26 F.3d 781, 786 (9th Cir. 2001). Some courts condense the first,
27 second, and fourth factors into a single element, which weighs
28 the relative balance of hardships to the plaintiff, the

1 defendant, and the public. *Alaska v. Native Village of Venetie*,
2 856 F.2d 1384, 1389 (9th Cir. 1988).

3 The second test is the "alternative" two-prong test, which
4 provides that a preliminary injunction may be granted if the
5 movant demonstrates either: 1) a probability of success on the
6 merits and irreparable injury, or 2) serious questions going to
7 the merits and the balance of hardships tips sharply in its
8 favor. *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097,
9 1100 (9th Cir. 1998). These two alternatives should not be
10 treated as separate tests, but rather as opposite ends of a
11 continuum in which the necessity for showing "irreparable harm
12 increases as the probability of success decreases." *Id.* "A
13 preliminary injunction is not a preliminary adjudication on the
14 merits, but a device for preserving the status quo and preventing
15 the irreparable loss of rights before judgment." *Textile*
16 *Unlimited, Inc.*, 240 F.3d at 786.

17 The district court is vested with reasonable discretion
18 when determining whether to grant a preliminary injunction. *A &*
19 *M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir.
20 2001) ("A district court's decision to grant a preliminary
21 injunction is generally reviewed for an abuse of discretion.").

22 23 2. Irreparable Injury

24 The starting point for alleged harm to the parties is the
25 facts deemed proven without further proceedings in the April 18,
26 2001 scheduling order:

27 4. Implementation of the ROD will affect
28 endangered and threatened species in the Trinity River,
Klamath River, Sacramento River, and Sacramento/San

1 Joaquin Delta and designated critical habitat.

2 5. Implementation of the ROD will affect the
3 availability of water supplies for CVP contractors and
4 for CVP power generation, with resulting environmental
5 and socio-economic impacts.

6 The harm claimed by plaintiffs is harm to Sacramento River
7 fish, loss of irreplaceable water and the concomitant effect on
8 California's economy, reduced water to hydroelectric plants, and
9 the public interest in maintaining a functional public electric
10 power system. The harm claimed by defendant-intervenors is harm
11 to the Trinity River salmon, the Hoopa Valley and Yurok Tribes'
12 trust rights to fisheries that can provide a moderate standard of
13 living; and the public interest in recreational and commercial
14 fishing.

15 a. Harm to Plaintiffs

16 Plaintiffs allege three general categories of harm: 1) harms
17 to Sacramento River and Delta fish; 2) the loss of water to the
18 water district plaintiffs and power providers; and 3)
19 exacerbation of California's energy problems.

20 i. Sacramento River Fish

21 Unlike the Trinity River Basin, the 2002 Sacramento Valley
22 water year is likely to be "dry." Doc. 185 at ¶ 5. In
23 evaluating the harms in the March 22, 2001 opinion the court
24 stated:

25 [NCPA] alleges that "alarming increases in mortality of
26 all four chinook salmon runs in the Sacramento River
27 occur with implementation of the Preferred
28 Alternative." See Doc. 31 at ¶ 4(a) (declaration of
 fisheries biologist Paul Bratovich). For example, Mr.
 Bratovich opines that a ten-percent (10%) mortality
 increase for fall-run chinook salmon occurs in fifty-

1 five percent (55%) of the sixty-nine years modeled
2 under the preferred alternative, up to a high of 100.3
3 percent in 1947. See id. at 3:22-4:5. Similar
4 mortality increases are experienced for the other
5 chinook salmon runs (greater than 10% mortality
6 increase occurs 51% of time for late-fall-run chinook
7 salmon, with a high of 507.8% in 1939; greater than 10%
8 mortality increase occurs 57% of time for winter-run
9 chinook salmon, with a high of 348.8% in 1932; greater
10 than 10% mortality increase occurs 57% of time for
11 spring-run chinook salmon, with a high of 107.9% in
12 1947). See id. at 4:5-28.

13 Doc. 136 at 26:18-27:5. Michael E. Aceituno, the Area Supervisor
14 for NMFS, declared: "Winter-run salmon may be adversely affected
15 if the Tribes' motion results in less water being diverted to the
16 CVP and this impedes Reclamation's ability to meet the
17 temperature criteria in the RPA of the winter-run CVP-OCAP BiOp.
18 With the exception of critically dry water years, Trinity Basin
19 exports to the Sacramento River under proposed Trinity Division
20 operational changes may result in an estimated 5.0 percent
21 increase in the number of months that violations of the winter-
22 run CVP-OCAP BiOp temperature criteria may occur." Doc. 205 at ¶
23 6. He declares that these violations would increase the losses
24 of the early life stages of winter-run chinook⁹ by less than one
25 percent, which is within the limits of precision of the Bureau's
26 model. *Id.* Mr. Bratovich argues that the one percent difference
27 in mortality rate is misleading because it "is reached only by
28 using absolute differences instead of relative differences. When
change relative to the No Action Alternative is assessed,
significant increases in winter-run mortality occur resulting

⁹The average winter-run chinook salmon run from 1987-1992
was 388 fish. The 1997-1999 average was 2,220 fish. Doc. 132 at
¶ 7.

1 from the Preferred Alternative." Doc. 31 at 5:5-8. Mr. Aceituno
2 argues that even though there could be harm to the Sacramento
3 River salmon, there are several short-term measures that can be
4 taken to mitigate the harm, including: 1) The Bureau can spread
5 end-of-month and end-of-year draw down levels between Shasta and
6 Trinity reservoirs; 2) the Bureau can work with the Upper
7 Sacramento River Temperature Task Group to better manage cold
8 water resources; 3) the Bureau in conjunction with the b(2)
9 interagency team can "exercise flexibility" in applying b(2)
10 minimum flows in the Upper Sacramento River; 4) low level outlets
11 at Shasta Dam can be used to compensate for inefficiencies of the
12 Temperature Control Device.¹⁰ Doc. 205 at ¶ 7. The DEIS found
13 that if the preferred alternative were implemented "[t]here
14 would be significant adverse impacts to Sacramento River fall (1
15 percent) and winter (2 percent) chinook salmon runs (Table 3-15).
16 These impacts would be significant." Doc. 44, Ex. I at 3-176.

17 Dissolution of the preliminary injunction would harm
18 Sacramento River salmon, however there appear to be short-term
19 remedies to mitigate some of the harm.

20

21 ii. Loss of Water to the Water Districts

22 Mr. Rosekrans declares FEIS modeling shows that
23 implementation of the ROD will in the long-term reduce project
24 deliveries by 80,000 AF. Doc. 210 at ¶ 8. This number is lower

25

26 ¹⁰It appears that implementation of some of these
27 alternatives might have effect on other harms alleged by
28 plaintiffs and the means by which they, in turn, might be
mitigated.

1 than the average increase in releases to the Trinity River
2 (283,000 AF) because of reduced spills attributable to
3 implementation of the ROD. *Id.* Of the 80,000 AF reductions,
4 50,000 AF will be south-of-Delta and 30,000 AF will be north-of-
5 Delta. *Id.* Thaddeus L. Bettner, the water districts' expert,
6 declares that if Westlands water supply is reduced, Westlands and
7 its members will try to make up the lost water by increasing
8 ground water pumping and seeking supplemental water supplies from
9 other CVP contractors and state water project contractors. Doc.
10 192 at ¶ 5. In his opinion the needed water will not be found
11 because the already overdrafted groundwater aquifer cannot
12 provide sufficient water to make up the loss, and supplemental
13 water from other sources will not be available due to physical
14 and political constraints. *Id.* As a result, land will go
15 fallow. *Id.* Chester Bowling in his testimony also stated that
16 buying replacement water would be difficult.

17 Mr. Bettner further declares that the amount of water needed
18 to farm within Westlands is 2.5 AF per acre and that the current
19 average crop value in the District is \$1,800 per acre. Doc. 192
20 at ¶ 6. According to Mr. Bettner implementing the ROD would
21 result in significant financial losses to Westlands members.¹¹
22 Further he estimates that for every \$1 of on-farm income there is
23 \$3.50 of revenue for agriculture-related businesses. *Id.* at ¶ 7.

24
25 ¹¹It appears that Mr. Bettner relies on the DEIS and not the
26 FEIS to determine the amount of water that Westlands would lose
27 under the ROD. He does not provide the percentage of south-of-
28 Delta water that Westlands is entitled to so it is not possible
to calculate the exact dollar amounts of the losses Westlands and
the agriculture-related businesses would sustain under the ROD.

1 He also states that there is one permanent worker for every 60
2 acres in production and that for land taken out of production
3 would result in lost positions.

4 Defendant-intervenors argue that there would be no impact in
5 water year 2002 to the water districts because the Bureau would
6 drawdown storage in the Trinity and Shasta reservoirs to meet the
7 increased releases to the Trinity River. The water districts
8 argue that drawing down reservoir storage in water year 2002
9 impacts future year's allocations. Defendant-intervenors argue
10 that future year harm is speculative because it is possible if
11 water year 2003 is wet that the storage reduction could be made
12 up and plaintiffs would not be harmed at all by the increased
13 releases in water year 2002. Mr. Bowling testified: 1) reduced
14 storage could impact future allocations; 2) if 2002 is a wet
15 year, the reduction could be made up without impacting the
16 farmers; but 3) there is no way to ensure that future allocations
17 will not be reduced based on water year 2002 reservoir drawdowns.
18 Risk of loss of storage is finite but not defined. The harm to
19 the plaintiffs provides an equitable basis for an injunction.

20
21 iii. California's Energy Crisis

22 David Marcus, defendant-intervenor's expert on electrical
23 power resources, states that the California Energy Commission
24 ("CEC") projects in its November 1, 2001 report that California
25 will have adequate capacity in the summer of 2002 to meet normal
26 peak loads, plus the additional loads associated with a once-in-
27 ten years heat wave, plus required operating reserves, plus

1 another 2000 MW.¹² Doc. 208 at ¶ 7. He asserts that this
2 forecast is conservative because: 1) it assumes a peak load in
3 the summer months that is between 2000 and 2600 MW higher than
4 once-in-ten year heat wave conditions; 2) it assumes less than a
5 one percent increase in conservation programs during 2002; 3) it
6 assumes new resource additions from November 1, 2001 through
7 August 1, 2002 of 4267 MW, of which 1604 are already on line. He
8 also states that new generation capability in Arizona will allow
9 greater exports to California and that wet year conditions in the
10 Pacific Northwest will allow greater exports to California from
11 that area.

12 Donald B. Dame, the Assistant General Manager of NCPA's
13 Power Management Business Unit, argues that despite the CEC's
14 projections the power crisis in California is not over. He
15 declares that events since the time the November 1, 2001 report
16 was released have changed the situation and the CEC's forecasts
17 are not always reliable. Mr. Dame declares that the Enron
18 situation has led to new weakness in electricity-related
19 companies. "[T]he crisis of confidence that sparked Enron's
20 collapse prompted one or more bond-rating agencies to downgrade
21 the debt of such independent power companies as Calpine and
22

23 ¹²In connection with their original motion defendant-
24 intervenors submitted the declaration of Mark Oliver who
25 declared: "The California Energy Commission estimates that
26 sufficient resources will be available to meet Statewide peak
27 load in 2002 even given a very hot summer." NCPA objected to Mr.
28 Oliver's qualifications to testify as to the California energy
supply. This objection is well taken, Mr. Oliver is not
qualified and his statements related to power supply will not be
considered.

1 Mirant to high-yield, or 'junk,' status." Doc. 197 at 8:26-9:1.
2 This is significant, he explains, because power supply is a
3 capital intensive industry. *Id.* at 4:21-22. As a result, fewer
4 power plants are being constructed than anticipated. For
5 instance, the California ISO reported that twenty-nine projects
6 totaling 1,773 MW were canceled in 2001 and thirty-three projects
7 totaling 2,888 MW have been cancelled so far in 2002. *Id.* at
8 8:15-16. In January, Calpine announced it was putting thirty-
9 four power-plant projects on hold. *Id.* at 9:2-3. The FERC staff
10 has also stated that it projects of 32,000 MW of power projected
11 to come online over the next five years, almost 15,000 MW has
12 been tabled or cancelled. *Id.* at 8:23-25. The CEC announced
13 that it will revise its forecast because of the delays on new
14 plants coming on line. Dame Supp. Decl. Ex. D.

15 Mr. Dame opines that the CEC projection is unreliable for
16 other reasons. First, long-range planning has become disjointed
17 since California deregulated the market and as a result, the ISO
18 dispatches generators in such a way as to use up limited
19 resources prior to the summer peak periods.¹³ This has resulted
20 in poor predictions by the CEC.¹⁴ Second, much of the reason
21

22 ¹³For instance, he declares: "[I]n January 2001 . . . the
23 ISO dispatched our Alameda combustion turbines for over 20% of
24 their available annual operating hours in that one month. We are
25 limited by air emissions constraints. Those combustion turbines
26 are looked to by NCPA as a peaking resource, most valuable, for
27 reliability purposes, during the summer peaking season." Doc.
28 197 at 6:14-18.

¹⁴Mr. Dame cites the CEC's price forecasts issued at the end
of 1998 that stated it expected the average energy price in 2001

1 there was such a reduced demand in the summer of 2001 was due to
2 the recessionary economy. It is unknown what the effect an
3 improving economy will have on demand. Third, a large number of
4 the state's generators are over 30 years old and break down at a
5 higher rate. For instance, CEC assumes an average outage level
6 of 3,550 MW during August, however last August the average outage
7 was 4,229 MW.¹⁵ The CEC November 2001 report referred to by
8 plaintiffs predicted outages of 6,750 MW for January and 7,500 MW
9 for February. *Id.* at 11. However, the actual outage levels were
10 11,166 MW and 12,702 MW. *Id.*

11 There has been a sharp decline in the amount of power
12 flowing into and out of California, approaching zero at some
13 points. *Id.* at 10. The fragility of the California electric
14 system is increased because the reserve margin in California is
15 only 7 percent, compared to elsewhere in the United States where
16 it is 15 percent or higher. *Id.* at 9. James A. Tracy, SMUD
17 Director of Business Planning and Budget, notes that the electric
18 supply in 2003 could be problematic if: 1) economic growth
19 outpaces projections; 2) dry year conditions occur in the Pacific
20 northwest or in California; 3) cancellations of new generation
21 facilities continue; 4) energy conservation declines; 5) energy
22 demand elsewhere in the West increases; and 5) planned

23 _____
24 to be \$27.80 Mwh, whereas the actual average was \$112.38 Mwh.
25 *Id.* at 7.

26 ¹⁵Mr. Dame states that because this is an average half of
27 the days had higher outage rates and that forced outages tend to
28 occur "when equipment is used intensively or cycled repeatedly as
it is during the peak summer months." *Id.* at 10:23-25.

1 transmission expansions are delayed. Doc. 202 at 3-4.

2 Mr. Bowling testified that releasing the additional water to
3 the Trinity River would impact power generation, both because of
4 decreased diversion to the Sacramento River and because some of
5 the peak flows called for under the ROD would exceed the
6 generation capacity at the Trinity power plant. Spreck
7 Rosekrans, a senior analyst employed by Environmental Defense,
8 declares: "While the total amount of energy would be reduced if
9 diversions to the powerhouses were reduced, there would still be
10 plenty of water to run the powerhouses at maximum capacity during
11 hours of peak demand for electricity." Doc. 210 at ¶ 11.
12 "[A]ssuming that a 'normal' year release . . . is made to the
13 Trinity River . . . and that the diversion to the Central Valley
14 is reduced by the entire amount, distributed proportionately over
15 the period from March 2002 to February 2003, there would still be
16 enough water in the peak load months of August and September to
17 run the Carr and Spring Creek powerplants at maximum capacity for
18 8 hours a day on all weekdays." *Id.* at ¶ 12. Mr. Rosekrans
19 statement is based on the releases proposed by defendant-
20 intervenors. Mr. Bowling declares releasing higher flows to the
21 Trinity River would reduce storage in the Trinity and Shasta
22 Reservoirs and "[t]he reduced storage does affect the potential
23 to refill the reservoirs in future years." Doc. 185 at ¶ 6.
24 According to Mr. Rosekrans the electrical system could possibly
25 still use the power plants during the peak hours during the peak
26 months in 2002, he does not opine on how the releases would
27 effect power in 2003 or later.

28 Plaintiffs have established by a preponderance of the

1 evidence that the California energy crisis still exists and is
2 likely to continue. Plaintiffs show that a reduction in power
3 generated with the TRD could adversely affect the stability of
4 the California energy system and thereby the health and welfare
5 of the citizens of California, which could result in irreparable
6 harm. The harm is threatened, it cannot be calculated, but is
7 more than speculative.

8
9 b. Harm to Defendant-Intervenors¹⁶

10 The injuries claimed by defendant-intervenors are harm to
11 the Trinity River salmon; the Hoopa Valley and Yurok Tribes'
12 trust rights to fisheries that can provide a moderate standard of
13 living; and the public interest in recreational and commercial
14 fishing.

15
16
17
18 ¹⁶The water districts and SMUD argue that defendant-
19 intervenors admitted that the amount of water released to the
20 Trinity River under the preliminary injunction would not harm the
21 fishery. Docs. 191, 199. Mr. Schlosser, the attorney for the
22 Hoopa Valley Tribe, said: "Now if this remains a critically dry
23 year, the ROD calls for an additional 29,000 acre feet. And so
24 if the Court were to permit the 29,000 acre feet called for by
25 the ROD in a critically dry year, we do not contend the fishery
26 will be further damaged by that." Doc. 137 at 21:6-10. His
27 comment was made in a context where it was assumed the
28 preliminary injunction would probably not extend far beyond a
critically dry year. Mr. Williams, the Yurok Tribe's attorney,
said: "The additional 29,000 acre feet, I cannot tell you will
solve the problems of the Yurok people. It won't." Doc. 137 at
30:2-4. Defendant-intervenors did not admit that extending the
preliminary injunction beyond a critically dry year would not
cause them harm.

1 i. Trinity River Salmon

2 In 2000, the estimated adult run of coho salmon was 15,532;
3 the 2001 adult run was estimated at 30,000. Doc. 186 at ¶¶ 6-7.
4 The 1977-1999 average was 15,959. *Id.* at ¶ 6. In 2000, Trinity
5 River fall-run chinook adult run size was estimated at 58,293.
6 Doc. 189 at ¶ 13. In 2000, 24,704 chinook spawned naturally in
7 the Trinity River Basin. *Id.* In 2001, the number of natural
8 spawners was estimated at 37,295. *Id.*

9 Dr. William J. Trush, credits these increased numbers, not
10 to the flows in place under the preliminary injunction, but to
11 combination of favorable ocean conditions and the higher flows
12 when the returning fish were juveniles (1995-1998). Doc. 211 at
13 ¶ 7. "Adults returning to the river to spawn are typically 3 and
14 4 years old, so they would have hatched and reared in the Trinity
15 River during WY 1997 and 1998. Water years 1995-1998 were very
16 wet and substantial Safety of Dams flows were released." *Id.* at
17 7:11-15.

18 Dr. Trush declares that limiting Trinity River releases to
19 the critically dry year level would harm the Trinity River
20 salmonid habitat by allowing riparian encroachment onto gravel
21 bars created artificially in 1991-1993 and by a 1997 flood. *Id.*
22 at ¶ 4. He declares that one to three-year-old hardwood
23 seedlings have colonized the gravel bars and that flows exceeding
24 5000 cfs remove one and two-year-old seedlings. *Id.* After the
25 third year, seedlings can withstand floods that scour twice as
26 deep as the surface layer of the gravel bar and are resistant to
27 increased flows. He concludes it is important for high flows to
28 remove the one to two-year-old seedlings in 2002. *Id.* Three-

1 year-old seedlings may not be removed by normal year flows, but
2 would be damaged, limiting their growth over the next several
3 years. *Id.* at ¶ 5. Providing normal year flows in 2002 should
4 increase young-of-year production which will increase the adult
5 escapement rate, which in turn will help population recovery.
6 *Id.* at ¶ 8.

7 Jay D. Glase, another expert for the Tribes, declares that
8 in addition to improving the salmonids' physical habitat, higher
9 flows in 2002 will improve the temperature in both the Trinity
10 River and the lower Klamath River, increasing survivability of
11 salmonids. Doc. 212 at ¶ 8. He concludes that if critically dry
12 year flows are continued for the next two to three years there
13 will likely be decreased survivability of juvenile and adult
14 salmonids in the Trinity Basin which will lead to decreases in
15 returning adult salmonids that would effect the next three to
16 four generations (6-10 years). *Id.* at ¶ 10.

17 Plaintiffs' expert, however, declared that since Trinity
18 River releases were increased by Congress to 340,000 AF (less
19 than the amount under the preliminary injunction) there has been
20 no trend of decline in the Chinook salmon population. Doc. 201
21 at ¶ 3.

22 Defendant-intervenor's experts show likely harm to the
23 recovery effort of the salmonids in the Trinity River if
24 critically dry year flows are continued to the Trinity River for
25 the next several years.

26
27 ii. Hoopa Valley and Yurok Tribes' Trust Rights

28 The Department of Interior's Solicitor issued an opinion in

1 1993 that the Hoopa Valley Tribe and the Yurok Tribe have a
2 "right to harvest quantities of fish on their reservations
3 sufficient to support a moderate standard of living' for
4 ceremonial, subsistence, and commercial purposes." Doc. 206 at ¶
5 5. Consequently, the tribes are entitled to 50 percent of the
6 harvestable in-river fishery. *Id.* Salmon are central to many of
7 the Hoopa Valley Tribe's cultural and religious ceremonies and
8 have historically been the mainstay of the Native American
9 economy in the area. Doc. 189 at ¶ 3.

10 Since construction of the Lewiston Dam there has been an 80
11 to 90 percent reduction in the number of chinook salmon fall-run
12 spawners and a 60 to 90 percent decrease in the steelhead
13 population. *Id.* at ¶ 4. Due to low numbers of salmon in the
14 Trinity River, the Tribes have been unable to exercise their full
15 fishing rights. *Id.* at ¶ 7. In three of the past five years,
16 the harvest of fall chinook salmon by the Hoopa Valley Tribe
17 averaged approximately 2,900. This is 1.3 fish per tribal
18 member. *Id.* at ¶ 9. This amount of fish has not provided a
19 "moderate standard of living." *Id.* at ¶ 6. In the 1990 U.S.
20 Census the unemployment rate on the Hoopa Valley Indian
21 Reservation was 29.6 percent, triple the Humboldt County average
22 of 8.6 percent. *Id.* According to the census the poverty rate on
23 the reservation was 40.7 percent. *Id.*

24 As discussed above the salmon in the Trinity River will
25 likely benefit from increased flows, with a corresponding benefit
26 to the Tribes' standard of living.
27
28

1 iii. Public Interest

2 The reduced number of Trinity River salmon has impacted
3 recreational and commercial fishing opportunities. *Id.* at ¶ 8.
4 Commercial landings of chinook salmon have dropped from an
5 average of 618,600 in 1976-1980 to 407,740 in 1995-1999. *Id.*
6 The limitations on fishing for Trinity chinook have reduced the
7 number of sports fishermen visiting Eureka and Trinidad. Doc.
8 207 at ¶ 2.

9
10 c. Balance of Hardships

11 On one side there is harm to the Sacramento River fish which
12 could arguably be minimized if the Bureau and other agencies work
13 together in water management to mitigate the harm. There are
14 presently unquantifiable but real threats to water user
15 plaintiffs in availability of CVP water for their contracts and
16 similarly unquantifiable but real threats to the electric energy
17 supply. On the other side there is harm to the Trinity River
18 salmonids and the Tribes' trust rights. The harm is to the
19 recovery effort, i.e. improved conditions, not to the status quo.
20 Another set of harms to be balanced is the harm to the water
21 districts and the harm to the Tribes. There is a public interest
22 in a stable electric power system to be balanced against the
23 public interest in commercial and recreational fisheries. The
24 balance of hardships is roughly equal. The purpose of a
25 preliminary injunction is maintain the status quo to prevent
26 irreparable injury prior to litigation on the merits. *Textile*
27 *Unlimited, Inc. v. A.BMH Co., Inc.*, 240 F.3d 781, 786 (9th Cir.
28 2002). Plaintiffs have shown that they will be harmed if the

1 status quo changes, defendant-intervenors have shown that they
2 will be harmed if the status quo is not changed. As discussed
3 below, plaintiffs have shown that they are likely to succeed on
4 the merits of their claim, the balance of hardships tips in favor
5 of maintaining the status quo, subject to ultimate implementation
6 of Section 3406(b)(23), the validity of which is not challenged
7 by plaintiffs or the power intervenors. Under this balance of
8 hardships, Mr. Bowling the CVP operations manager has testified
9 that the potential of irreparable harm can be reduced by releases
10 of approximately 100,000 AF of CVP water, which can be managed so
11 as not to adversely impact plaintiffs or the power users.

12 13 2. Likelihood of Success on the Merits

14 The March 22, 2001 memorandum decision and order found that
15 plaintiffs had a fair chance of success on the merits based on
16 incomplete NEPA review of the effects of the two BioOps, and the
17 effect of implementation of the ROD on the changed circumstances
18 from California's energy crisis. Doc. 136 at 53. The Tribes
19 argue that the California energy crisis is over, but only apply
20 their analysis to the balance of the hardships, not likelihood of
21 success on the merits. Even if they argue that the non-existence
22 of the energy crisis effects the likelihood of success on the
23 merits decision, it does not negate that part of the March 22,
24 2001 decision. The holding that a lawful NEPA review of the
25 effects of the two BioOps must be done is not disputed.
26 Additional evidence adduced at the hearing suggests that the
27 characterization of 2002 as a "normal" water year ignores the
28 Sacramento Delta and conditions south of the Delta. The current

1 finding of the likelihood of success on the merits justifies
2 continued injunctive relief, even without the finding related to
3 the California energy crisis.

4
5 3. Modification of the Injunction

6 All parties have shown that they face likely irreparable
7 harm. Defendant-intervenors have shown that if water releases to
8 the Trinity River remain at the critically dry-year level the
9 salmonid species in that river and the Tribes will be harmed.
10 The plaintiffs show that increased flows to the Trinity River
11 will harm them. The balance of equities is roughly equal, but
12 opposing. Plaintiffs have also shown that they are likely to
13 succeed on the merits of their NEPA claim.

14 Mr. Bowling testified that up to 80,000-100,000 AF of water
15 is "noise in the system." This amount of water could be released
16 to the Trinity River with little potential harm to plaintiffs.
17 Releasing an additional 100,000 AF of water to the Trinity River
18 in water year 2002 would equitably balance the hardships between
19 the parties, while minimizing the threat of harm to all. The law
20 requires the Trinity River fishery to be restored. The
21 preliminary injunction is modified to allow federal defendants to
22 release up to 468,600 AF of water to the Trinity River, provided
23 that the Bureau manages releases to maximize fishing
24 opportunities and CVP water deliveries, and so that such releases
25 in no way reduce or otherwise adversely affect, any CVP power or
26 water user in water year 2002 or in the future as a result of the
27 2002 water year Trinity River releases. The Bureau is also free
28 to release additional water to the Trinity River from any

1 available source provided that any additional releases above
2 468,600 AF are made on the absolute and express condition that
3 such releases shall not accrue to the detriment of CVP storage in
4 any CVP reservoir or to the detriment of any CVP power or water
5 user during water year 2002 or in the future. The modification
6 of the preliminary injunction is intended to reflect water year
7 2002 conditions only and has no precedential effect.

8
9 D. LIFTING THE STAY

10 Given the extended time required to complete the SEIS and
11 the continuing harms alleged by both plaintiffs and the Tribes,
12 the most equitable course of action for all parties is to lift
13 the stay and to proceed immediately to decide the merits of this
14 case. The value of water is time-sensitive. All the parties,
15 with the exception of the federal defendants, have an interest in
16 resolving this dispute as soon as possible so that predictable
17 water allocation can be determined. Time is very much of the
18 essence.

19 The water-district plaintiffs state they could move for
20 summary judgment on the NEPA issues "quickly" because the
21 relevant documents and declarations explaining them have already
22 been submitted to the court in connection with the preliminary
23 injunction hearing. The NEPA violations were extensively
24 analyzed in the March 22, 2001 memorandum decision and order.
25 The NEPA claims are ripe for decision. A decision on the merits
26 may moot the preliminary injunction issue. At oral argument the
27 parties stated that they could be ready for a decision on the
28 merits by the middle of the summer.

1 The federal defendants shall file the administrative record
2 by May 10, 2002. Cross motions for summary judgment shall be
3 filed no later than May 30, 2002; oppositions not later than June
4 14, 2002; and replies shall be filed not later than June 21,
5 2002. The hearing on the cross-motions for summary judgment will
6 be held July 2, 2002 in Courtroom 2 at 9:00 a.m. A scheduling
7 conference will be held May 28 at 9:00 a.m. to set the schedule
8 for the remainder of the case.

9
10 IV. CONCLUSION

11 Defendant-intervenors' motion to modify the preliminary
12 injunction is GRANTED in part, and DENIED in part. The May 3,
13 2001 preliminary injunction is MODIFIED to allow the federal
14 defendants to release, for water year 2002 only, an additional
15 volume of 100,000 acre-feet of water to supplement the
16 statutorily authorized release of 340,000 AF into the Trinity
17 River, plus the minimum 28,600 AF for critically dry years
18 already taken into account for water year 2002, by the Bureau's
19 CVP Operations Manager. This additional release shall be made
20 for fishery protection and restoration needs of the Trinity
21 River, resulting in a total maximum release of CVP water to the
22 Trinity River in water year 2002 not to exceed 468,600 AF,
23 PROVIDED THAT the Bureau shall manage the release into the
24 Trinity River of the additional 100,000 AF to maximize fishing
25 opportunities, and CVP water deliveries, so that such release in
26 no way reduces or otherwise adversely affects, any CVP power or
27 water user, or CVP contractor at any time in the current water
28 year or in the future.

1 The federal defendants are not restrained during water year
2 2002 from releasing additional volumes of water from any
3 available source to restore the Trinity River, including water in
4 excess of the total volume of 468,600 AF authorized by this
5 modification, PROVIDED that any such additional release above
6 468,600 AF is made on the absolute and express condition that
7 such water use to the Trinity River shall not accrue to the
8 detriment of CVP storage in any CVP reservoir or to the detriment
9 of any CVP power or water user anywhere else in the system in the
10 current water year or the future. Additional allocations of CVP
11 water to CVP water contractors based on current hydrologic
12 conditions, if any, for water year 2002, shall be made as if this
13 order had not been issued.

14 The preliminary injunction shall continue in effect to the
15 extent that all other Trinity River restoration activities
16 specified by the Record of Decision (i.e., activities other than
17 Trinity River instream flow releases) may proceed. The Tribes'
18 Motion to Modify Preliminary Injunction is DENIED in all other
19 respects.

20 This order is not intended to have claim or issue preclusion
21 effect and is intended to address the unique change of conditions
22 existing as of April 19, 2002 for water year 2002.

23 The Order to Stay Litigation entered on October 11, 2001, is
24 VACATED.

25 The following schedule is set for disposition of this case:

26 May 10, 2002: Last date for federal defendants to file
27 and serve the Administrative Record;

28 May 30, 2002: Last date to file motions for summary

1 judgment;

2 June 14, 2002: Last date to file responses and
3 opposition briefs:

4 June 21, 2002: Last date to file reply briefs;

5 July 2, 2002: Hearing on cross-motions for summary
6 judgment.

7

8 SO ORDERED.

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10 DATED: 5-3-02

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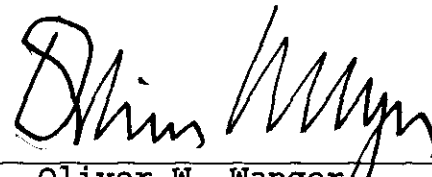
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Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
May 6, 2002

* * 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 May 6, 2002, 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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Deputy Clerk