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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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WESTLANDS WATER DISTRICT, SAN)
LUIS & DELTA-MENDOTA WATER)
AUTHORITY, and SAN BENITO COUNTY)
WATER DISTRICT,)
 Plaintiffs,)
SACRAMENTO MUNICIPAL UTILITY)
DISTRICT,)
 Plaintiff-Intervenor,)
NORTHERN CALIFORNIA POWER)
ASSOCIATION,)
 Plaintiff-Intervenor)
 v.)
UNITED STATES DEPARTMENT OF THE)
INTERIOR, ET AL,)
 Defendants,)
HOOPA VALLEY Tribe,)
 Defendant-Intervenor,)
YUROK Tribe,)
 Defendant-Intervenor.)

CIV F 00-7124 OWW DLB
MEMORANDUM DECISION AND
ORDER RE: FEDERAL
DEFENDANT'S MOTION TO
MODIFY INJUNCTION RE:
SUPPLEMENTAL EIS; DEFENDANT
HOOPA VALLEY TRIBE'S MOTION
FOR PARTIAL STAY PENDING
APPEAL AND FOR MODIFICATION
OF INJUNCTIVE RELIEF

Before the court is federal defendants' Motion to Modify

407

1 Injunction Re: Supplemental EIS, that requests a deadline
2 extension until July, 2004, in order to complete the required
3 supplemental environmental impact statement ("SEIS"). Also
4 before the court are defendant Hoopa Valley Tribe's Motion to
5 Stay Parts of the December 10, 2002 Decision, (Doc. 305) pending
6 appeal, and their Motion for Modification of Injunctive Relief.
7 The Hoopa Valley Tribe requests modification of the current
8 injunction, to allow flow volumes commensurate with the
9 "appropriate" water year type (i.e. normal, wet, or wetter water
10 year) as designated in the invalidated ROD.¹

11 Plaintiffs San Luis and Delta-Mendota Water Authority and
12 Westlands Water District ("plaintiffs") do not oppose federal
13 defendants' motion to extend the SEIS deadline to July, 2004.
14 Plaintiffs object to any implied reconsideration request by
15 federal defendants. Plaintiff Northern California Power Agency
16 (NCPA) submits a conditional non-opposition to federal
17 defendants' request for more time. NCPA conditions its non-
18 opposition on the "continued enforcement of the injunction
19 limiting interim releases to the Trinity River of 453,000
20 acre-feet per year." Doc. 352 at 1:21-23.

21 Plaintiff-intervenor Sacramento Municipal Utility District
22 (SMUD) opposes the Tribe's stay motion, but does not oppose the
23 Tribe's request to modify the injunction to allow for flows in
24 2003 which are commensurate with the water-year 2003 designation.
25 SMUD requests continuing court review of flow releases scheduled

26
27 ¹ As of this time, conditions in the Trinity River north of
28 the Sacramento-San Joaquin Delta are normal, and below normal
south of the Delta.

1 in 2004, "to determine appropriate interim flow levels pending
2 completion of the SEIS and issuance of a new ROD." Plaintiff-
3 Intervenor NCPA opposes the Tribe's motions. Plaintiffs oppose
4 the Tribe's motions. The federal defendants take no position on
5 the Tribe's motion. Long after the opposition deadline passed
6 for this motion, the Yurok Tribe submitted a "Notice of Non-
7 Opposition" to the Hoopa Valley Tribe's motion. Doc. 370, filed
8 February 20, 2003.

9 The motions were heard February 24, 2003. Additional time
10 was granted the parties to address evidentiary disputes raised at
11 the hearing and to respond to the Court's inquiry about what
12 flows were necessary to prevent a recurrence of fish die-off that
13 occurred in the 2002 water year.

14
15 I. FACTUAL AND PROCEDURAL BACKGROUND

16 This suit involves the United States Department of
17 Interior's ("Interior") administration of the Trinity River
18 Division ("TRD")² of the Central Valley Project ("CVP") and
19 Interior's implementation of Section 3406(b)(23)³ of the Central
20

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

25 ³ CVPIA §§ 3406(b) and (b)(23) read:

26 The Secretary, immediately upon the enactment of this title,
27 shall operate the Central Valley Project to meet all
28 obligations under State and Federal law, including but not
limited to the Federal Endangered Species Act, 16 U.S.C. §
1531, et seq., and all decisions of the California State

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3 Water Resources Control Board establishing conditions on
4 applicable licenses and permits for the project. The
5 Secretary, in consultation with other State and Federal
6 agencies, Indian Tribes, and affected interests, is further
7 authorized and directed to:

8 . . .

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

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

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

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

3 In October 1984, Congress enacted the Trinity River Basin
4 Fish and Wildlife Management Act⁵ ("1984 Act") to restore fish

5
6 Secretary and the Hoopa Valley Tribe. Costs associated with
7 implementation of this paragraph shall be reimbursable as
8 operation and maintenance expenditures pursuant to existing
9 law.

9 Central Valley Project Improvement Act, Pub. L. No. 102-575, §
10 3406(b)(23), 106 Stat. 4600, at 4720-21.

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

13 ⁵

13 SECTION 1: The Congress finds that --

14 (1) the construction of the Trinity River division of the
15 Central Valley project in California, authorized by the Act
16 of August 12, 1955 (69 Stat. 719), has substantially reduced
17 the streamflow in the Trinity River Basin thereby
18 contributing to damage to pools, spawning gravels, and
19 rearing areas and to a drastic reduction in the anadromous
20 fish populations and a decline in the scenic and
21 recreational qualities of such river system;

22 (2) the loss of land areas inundated by two reservoirs
23 constructed in connection with such project has contributed
24 to reductions in the populations of deer and other wildlife
25 historically found in the Trinity River Basin;

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

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

1 and wildlife populations to pre-TRD levels. The 1984 Act
2 included a finding that the TRD had contributed to a "drastic
3 reduction in the anadromous fish populations." Public Law 98-
4 541, Section 1(1). It directed that the restoration program
5 include:

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

8
9 be attributed solely to such activities or to the project;

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

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

19 TRINITY RIVER BASIN FISH AND WILDLIFE MANAGEMENT PROGRAM

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

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

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

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

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

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

(B) the effectiveness of the rehabilitation work.

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

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

- 1 (A) rehabilitate fish habitats in the Trinity River
between Lewiston Dam and Weitchpec;
2 (B) rehabilitate fish habitats in tributaries of such
river below Lewiston Dam and in the south fork of such
3 river; and
4 (C) modernize and otherwise increase the effectiveness
of the Trinity River Fish Hatchery.
5 (2) The establishment of a procedure to monitor (A) the
fish and wildlife stock on a continuing basis, and (B)
the effectiveness of the rehabilitation work.
6 (3) Such other activities as the Secretary determines
to be necessary to achieve the long-term goal of the
7 program.

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

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

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

1 Secretary to forward the TRFES recommendations to several
2 congressional committees no later than December 31, 1996. CVPIA
3 § 3406(b)(23)(B). If the Secretary and the Hoopa Valley Tribe
4 concurred in the TRFES recommended increases for Trinity River
5 instream fishery flow releases established under CVPIA
6 § 3406(b)(23)(B), such restoration flows were to be implemented
7 accordingly. *Id.* If they did not concur, the 340,000 AF minimum
8 flows must remain in effect unless increased by an act of
9 Congress, appropriate judicial decree or agreement between the
10 Secretary and the Hoopa Valley Tribe. *Id.*

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

28 In January 1998, the draft Trinity River Flow Evaluation

1 Report (TRFER) was released. In June 1999, Interior, in
 2 consultation with the Hoopa Valley Tribe, published the Trinity
 3 River Flow Evaluation Final Report ("TRFER"). The TRFER
 4 recommends permanently increasing the Trinity River fish flows
 5 from the statutorily mandated 340,000 AF/year to between 368,900
 6 and 815,200 AF/year, as follows:

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	

17 TRFER § 8.1, p. 241.

18 On October 19, 1999, the United States Bureau of Reclamation
 19 ("Bureau") and the USFWS released the draft "Trinity River
 20 Mainstem Fishery Restoration Environmental Impact Statement/
 21 Report" ("DEIS"), which described alternate approaches for
 22 restoring and maintaining the Trinity River fishery. Interior
 23 published the availability of the draft EIS/EIR and the
 24 commencement of a public comment period scheduled to end on
 25 December 8, 1999. 64 Fed. Reg. 56364, 1999 WL 827447 (Oct. 19,
 26 1999). The public comment period was extended until January 20,
 27 2000. 64 Fed. Reg. 67584, 1999 WL 1078497 (Dec. 2, 1999); 64

1 Fed. Reg. 72357, 1999 WL 1247501 (Dec. 27, 1999).

2 On January 20, 2000, San Luis & Delta-Mendota Water
3 Authority ("San Luis") submitted written comments⁶ criticizing
4 the DEIS, noting, inter alia, that the DEIS failed to analyze the
5 preferred alternative's potential adverse environmental impacts
6 on federally listed endangered or threatened fish species within
7 the Sacramento River system and the Sacramento-San Joaquin Delta
8 ("Delta"), and also failed to analyze how these adverse impacts,
9 if any, could be minimized or avoided. Doc. 35 at ¶¶ 39-40 & Ex.
10 A.

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

26 ⁶ "Comments of the San Luis & Delta-Mendota Water Authority
27 on the Trinity River Mainstem Fishery Restoration Environmental
28 Impact Statement/Environmental Impact Report," dated January 19,
2000.

1 in subparagraph (A) shall be implemented accordingly.”).

2 On May 8, 2000, Interior responded to San Luis' letter,
3 acknowledging that ESA “§ 7 consultation over potential effects
4 to species listed as either threatened or endangered under the
5 ESA . . . must be accomplished as part of the process of making a
6 decision on the Program.” It reassured that “no final decision
7 on the Program will be made until both the USFWS and NMFS have
8 issued biological opinions regarding implementation of the
9 Program, and that these opinions will be taken into consideration
10 in making such decisions.”

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

22 Also on October 12, 2000, the USFWS issued “Re[-]initiation
23 of Formal Consultation: Biological Opinion of the Effects of
24 Long-term Operation of the Central Valley Project and State Water
25 Project as Modified by Implementing the Preferred Alternative in
26 the Draft Environmental Impact Statement/Environmental Impact
27 Report for the Trinity River Mainstem Fishery Restoration
28 Program” (“USFWS BioOp”). On November 17, 2000, Interior

1 published notice of the availability of the final EIS/EIR
2 ("FEIS"). 65 Fed. Reg. 69512, 2000 WL 1711646 (Nov. 17, 2000).

3 On December 14, 2000, Westlands filed suit against
4 defendants, alleging three claims:

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

8 Doc. 1 at 15-24. That same day, Westlands 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")
11 with the Hoopa Valley Tribe, scheduled to be signed on Tuesday,
12 December 19, 2000. On December 15, the Hoopa Valley Tribe
13 intervened as a defendant in the case.

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

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

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

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

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

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

- 26 (1) maladministration of the ESA by the USFWS,
27 claiming that by "issuing a non-jeopardy
28 biological opinion that requires a major change in
CVP operations [i.e., preventing any upstream
movement of 0.5 km or more of the X2 water quality
standard], the USFWS has exceeded its authority
under the Endangered Species Act;"
- (2) maladministration of the ESA by NMFS, claiming
that NMFS acted arbitrarily and capriciously and
in excess of its authority under the ESA by
issuing a biological opinion that internally
conflicts, because it states on one hand that
"NMFS does not anticipate that implementation of
the proposed flow schedules will incidentally take
any SONCC coho salmon," and on the other hand,

- 1 prescribes RPMs to deal with incidental take;
2 (3) violation of NEPA by all defendants, claiming
3 that: (a) the draft and final EIS/EIRs do not
4 analyze the impacts of implementing the
5 requirements of the USFWS and NMFS biological
6 opinions; (b) the final EIS/EIR does not
7 adequately describe what CVP operational changes
8 will occur to protect or mitigate the adverse
9 effect upon listed fish, upon which the draft
10 EIS/EIR acknowledges implementation of the
11 preferred alternative may have a significant
12 adverse impact, and simply defers mitigation
13 consideration until later; (c) because the
14 biological opinions modified the proposed action
15 by creating new environmental impacts (or new
16 circumstances and information), the defendants
17 failed to supplement the EIS/EIRs to analyze these
18 impacts and publish the analysis for public
19 comment; (d) the draft and final EIS/EIR do not
20 fairly evaluate alternatives, and are in essence a
21 "post hoc rationalization to justify a course of
22 action decided upon before NEPA review even
23 began;" (e) the EIS/EIRs utilize improper
24 definitions of proper purpose by using the
25 "healthy river" standard rather than an objective
26 standard; and, (f) the final EIS/EIR, or a
27 supplement thereto, does not analyze the impact of
28 implementation of the preferred alternative on
California's current energy crisis; and,
(4) violation of the Administrative Procedure Act
("APA"), claiming that the TRFER's recommendations
adopted by the ROD are not based on the best
available scientific data in violation of CVPIA §
3406(b)(23)(A), and its conclusions are arbitrary
and capricious.

19 Doc. 35. The Yurok Tribe intervened as a defendant on January
20 19, 2001. On February 8, 2001, the Northern California Power
21 Agency ("NCPA") and the Sacramento Municipal Utility District
22 ("SMUD") intervened as plaintiffs over the opposition of the
23 Hoopa Valley and Yurok Tribes.⁷

24 The water districts filed a motion for preliminary
25

26 ⁷ 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 injunction on January 5, 2001 and NCPA and SMUD moved for a
2 preliminary injunction on February 6, 2001. A preliminary
3 injunction issued on March 22, 2001 limiting the amount of water
4 releases under the ROD to a total of 368,600 AF. All other
5 aspects of the ROD's Trinity River restoration plan were not
6 enjoined. The decision, made without a complete administrative
7 record, found plaintiffs were likely to succeed on the merits of
8 their claim because the two BioOps imposed significant
9 environmental impacts that were not analyzed in a supplemental
10 EIS/EIR ("SEIS") and the California energy crisis was a changed
11 circumstance that should have been evaluated, but was not.

12 On September 7, 2001, the United States, the water
13 districts, NCPA, and SMUD, but not the Tribes, entered into and
14 filed a stipulation to stay the proceedings in this case until
15 Interior issued a revised ROD following completion of an SEIS.
16 The federal defendants and plaintiffs agreed that the preliminary
17 injunction would remain in place unless otherwise ordered by the
18 court. The defendant-intervenor Tribes did not oppose the stay
19 order, but did not join the stipulation because of paragraphs
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1 eight⁸ and nine⁹ which they believed demanded actions not
2 required by law. However, they found the proposed order

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4 ⁸ Paragraph eight states:

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

14
15 ⁹ Paragraph Nine states:

16 The federal defendants have advised the parties to this
17 litigation that, through the SEIS scoping process, any
18 person or party will have the opportunity to present
19 other issues that they believe should be included in
20 the SEIS and that the federal defendants will carefully
21 consider all such presentations. In addition to the
22 formal scoping and public comment processes under NEPA
23 and the CEQ regulations, the federal defendants will
24 use the available legal procedures to invite and
25 consider technical information and expert advice from
26 all sources. These procedures will allow scientific
27 and technical discussion among the scientists and
28 technical experts of the federal defendants,
plaintiffs, plaintiff-intervenors, and defendant-
intervenors, and others having such expertise, so as to
maximize the value of the scientific and technical
input from non-federal sources. The goal of these
procedures is to make the SEIS a thorough,
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 "unobjectionable." On October 8, 2001, the court signed the stay
2 order.

3 On March 14, 2002, the Tribes moved to modify the
4 preliminary injunction for water year 2002 alleging changed
5 circumstances. On April 19, 2002, the preliminary injunction was
6 modified to authorize the release of 468,600 AF of water into the
7 Trinity River for the purposes of fishery protection and
8 restoration for water year 2002. See Doc. 222. All other
9 aspects of the Trinity River restoration plan were not subject to
10 the injunction. The order modifying the preliminary injunction
11 also vacated the stay and set a schedule for disposition of the
12 case on the merits. Work on the SEIS slowed.

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

18 A December 10, 2002 a Memorandum Decision and Order was
19 issued resolving the cross-motions for summary judgment in favor
20 of plaintiffs and plaintiff-intervenors. Doc. 305. On January
21 24, 2003, defendants-intervenors Hoopa Valley Tribe filed a
22 notice of appeal to the Ninth Circuit. Doc. 323. On February
23 10, 2003 federal defendants filed a notice of appeal. Doc. 336.

24 Federal defendants filed the current motion to modify the
25 December 10, 2002, injunction on January 22, 2003, to extend the
26 period for completion of the SEIS. The Hoopa Valley Tribe filed
27 its motion for partial stay pending appeal and for modification
28 of injunctive relief on January 24, 2003.

1
2 II. STANDARD

3 E. Motion to Stay under F.R.C.P. 62(c)

4 Fed.R. Civ.P. 62 provides in relevant part:

5 (C) Injunction Pending Appeal. When an appeal is
6 taken from an interlocutory or final judgment
7 granting, dissolving, or denying an injunction,
8 the court in its discretion may suspend modify,
9 restore, or grant an injunction during the
10 pendency of the appeal upon such terms as to bond
11 or otherwise as it considers proper for the
12 security of the rights of the adverse party.

13 Fed.R. Civ.P. 62(c). "When a judgment is appealed, jurisdiction
14 over the case passes to the appellate court. The filing of a
15 notice of appeal generally divests the district court of
16 jurisdiction over the matters appealed." *McClatchy Newspapers v.*
17 *Central Valley Typographical Union No. 46, Intern. Typographical*
18 *Union*, 686 F.2d 731, 734 (9th Cir. 1982), cert. denied 316 U.S.
19 671 (1982), citing *Davis v. United States*, 667 F.2d 822, 824 (9th
20 Cir. 1982); see also *Moore v. Brewster*, 96 F.3d 1240 (9th
21 Cir.1996) (citing *Davis*); *Johnson v. B.H. Liquidation Corp.*, 17
22 F.3d 394, 394+ (9th Cir.1994) (citing *McClatchy Newspapers*);
23 *Taylor v. Wood*, 458 F.2d 15, 16 (9th Cir. 1972); *Sumida v. Yumen*,
24 409 F.2d 654, 656-57 (9th Cir. 1969), cert. denied, 405 U.S. 964
25 (1972); *Wright, Miller & Kane*, 11 Federal Practice and Procedure
26 § 2904 at 499, citing *McClatchy Newspapers*.

27 One exception to the general rule is Fed.R.Civ.P. 62(c)
28 which is "expressive of a power inherent in the court to preserve
the status quo where, in its sound discretion, the court deems
the circumstances so justify." *McClatchy Newspapers*, 686 F.2d at
734 citing 7 J. Moore, *Moore's Federal Practice* P 62.05, at 62-19

1 to 20 (2d ed.1979); see also *In re Padilla*, 222 F.3d 1184, 1190
2 (9th Cir.2000) (citing *McClatchy Newspapers*). However, Rule
3 62(c): "does not restore jurisdiction to the district court to
4 adjudicate anew the merits of the case after either party has
5 invoked its right of appeal and jurisdiction has passed to an
6 appellate court." *McClatchy Newspapers*, 686 F.2d at 734; see
7 also *Natural Resources Defense Council, Inc. v. Southwest Marine*
8 *Inc.*, 242 F.3d 1163, 1166 (9th Cir.2001). Rule 62(c) "codifies
9 the 'long established' and narrowly limited right of a trial
10 court 'to make orders appropriate to preserve the status quo
11 while the case is pending in (an) appellate court.' *Id.*, citing
12 *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th
13 Cir.1951); see also *Natural Resources Defense Council, Inc. v.*
14 *Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir.2001). After
15 an appeal "'a trial court may, if the purposes of justice
16 require, preserve the status quo until decision by the appellate
17 court.... But it may not finally adjudicate substantial rights
18 directly involved in the appeal.'" *McClatchy Newspapers*, 686
19 F.2d at 734-735 citing *Newton v. Consolidated Gas Co.*, 258 U.S.
20 165, 177 (1922); see also *Natural Resources Defense Council, Inc.*
21 *v. Southwest Marine Inc.*, 242 F.3d 1163, 1166 (9th
22 Cir.2001) (citing *McClatchy Newspapers*). "The standard for
23 evaluating stays pending appeal is similar to that employed . . .
24 in deciding whether to grant a preliminary injunction." *Lopez v.*
25 *Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

26 The governing considerations include:

- 27 (1) whether the stay applicant has made a strong
28 showing that he [or she] is likely to succeed on
the merits; (2) whether the applicant will be

1 irreparably injured absent a say; (3) whether
2 issuance of the stay will substantially injure the
3 other parties interested in the proceeding; and
4 (4) where the public interest lies.

5 11 Wright & Miller § 2904 at 501 citing *Virginia Petroleum*
6 *Jobbers Ass'n v. FDC*, 259 F.2d 921 (C.A.D.C. 1958); see also
7 *Direct Marketing Ass'n, Inc. v. Bennett*, 1991 WL 321945
8 (E.D.Cal.1991) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776
9 (1987)). A stay will be granted if the balance of equities
10 favors the applicant and the moving party demonstrates a
11 likelihood of success on the merits upon appeal. 11 Wright &
12 Miller § 2094 at 502; *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th
13 Cir.1983).

14 B. F.R.C.P. 65 Preliminary Injunction

15 The standards for a temporary restraining order (TRO) and a
16 preliminary injunction are essentially identical. See *City of*
17 *Tenakee Springs v. Block*, 778 F.2d 1402, 1407 (9th Cir. 1985).
18 There are two alternative tests to determine whether and when a
19 preliminary injunction should issue. *Stanley v. University of*
20 *Southern California*, 13 F.3d 1313, 1319 (9th Cir.1994). The
21 "traditional test" requires plaintiff to establish:

- 22 (1) a strong likelihood of success on the merits;
- 23 (2) the possibility of irreparable injury to the plaintiff
24 if the injunction is denied;
- 25 (3) the balance of hardships favors the plaintiff;
- 26 (4) the public interest favors granting the injunction.

27 *In re Paxil Litig.*, 2002 U.S. Dist. LEXIS 16221 (C.D. Cal. Aug.
28 16, 2002) citing *American Motorcyclist Ass'n v. Watt*, 714 F.2d

1 962, 965 (9th Cir. 1983); *San Luis & Delta Mendota Water Auth. v.*
2 *Pixley Irrigation Dist.*, 1999 U.S. Dist. LEXIS 22369 (E.D. Cal.
3 May 21, 1999) (citation omitted); *Barahona-Gomez v. Reno*, 167 F.3d
4 1228, 1234 (9th Cir.1999) citing *Los Angeles Memorial Coliseum*
5 *Commission v. National Football League*, 634 F.2d 1197, 1200 (9th
6 Cir.1980). Some courts have condensed the latter three factors
7 into a single element, which weighs the relative balance of
8 hardships to the plaintiff, defendant, and the public. See
9 *Tillamook County v. United States Army Corps of Eng'rs*, 288 F.3d
10 1140, 1143 (9th Cir. Or. 2002) citing *Alaska v. Native Village of*
11 *Venetie*, 856 F.2d 1384, 1389 (9th Cir.1988); *United States v.*
12 *Nutri-cology Inc.*, 982 F.2d 394, 398 (9th Cir. 1992).

13 Under the "reformed test," an injunction will issue if the
14 plaintiff can show either (1) a probable success on the merits
15 and a possibility of irreparable injury, or (2) a fair chance of
16 success on the merits, and the balance of hardships tipping
17 sharply in plaintiff's favor. *Connecticut v. NewImages of*
18 *Beverly Hills*, 2003 U.S. App. LEXIS 3782 *5-*6; see also,
19 *Tillamook County*, 228 F.3d at 1143; *Nutri-cology Inc.*, 982 F.2d
20 at 398; *Metro Pub. Ltd. v. San Jose Mercury News*, 987 F.2d 637,
21 639 (9th Cir. 1993); 13 Moore's Federal Practice, § 65.22[5][i]
22 (Matthew Bender 3d ed. 1997). The two alternatives in the above
23 test should not be treated as separate tests, but rather as
24 opposite ends of a continuum in which the necessity for showing
25 "irreparable harm increases as the probability of success on the
26 merits decreases." *Associated General Contractors of California,*
27 *Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th
28 Cir.), cert. denied, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d

1 390 (1992).

2 The basis for injunctive relief (preliminary or permanent)
3 in the federal courts has always been irreparable injury and the
4 inadequacy of legal remedies. *Stanley v. University of So.*
5 *California*, 13 F.3d 1313, 1320 (9th Cir. 1994); *Weinberger v.*
6 *Romero-Barcelo*, 456 U.S. 305, 312 (1982). Under either the
7 traditional or the reformed approach, to obtain a preliminary
8 injunction, the plaintiff must show that it is "likely" to
9 prevail on the merits. *Haitian Refugee Center, Inc. v.*
10 *Christopher*, 43 F.3d 1431, 1432 (11th Cir. 1995). As part of its
11 balancing of factors, the court weighs the competing claims of
12 injury and considers the effect on each party of the granting or
13 withholding of the requested relief. See *Stanley v. University*
14 *of Southern California*, 13 F.3d 1313, 1319 (9th Cir.1994); *Amoco*
15 *Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531
16 (1987).

17 18 III. DISCUSSION

19 A. Federal Defendants' Motion to Modify the Injunction and 20 Extend the Supplemental EIS Deadline

21 The December 10, 2002 Court Order imposed a 120 day deadline
22 by which the Federal defendants are required to complete the
23 Supplemental Environmental Impact Statement (SEIS). See Doc.
24 305. Federal defendants move for a fifteen month extension of
25 that deadline, until July 9, 2004. Defendants contend the court
26 has inherent discretion to modify its injunction under its equity
27 jurisdiction "to fashion equitable injunctive relief tailored to
28 the particular circumstances." Doc. 310 at 2.

1 Federal Defendants recognize that the December Order
2 requires they:

- 3 • "reconsider the scope and purpose in the SEIS," to
4 address the December Order finding "'competing
5 demands for use of CVP water objectives, which
6 although secondary to the more specific
7 restoration goals of (b) (23), should have been
8 given consideration in the NEPA review' to take
9 into account the restoration of fish and wildlife
10 populations in the Trinity Basin."
11 • "select [and examine] a different range of
12 alternatives, including, at a minimum, an
13 'Integrated Management' alternative as part of the
14 SEIS."
- "complete consultation under Endangered Species
Act and receive new biological opinions listing
mitigation measures before they publish the draft
SEIS for public comment," as to the reasonable and
prudent measures (RPMs) for salinity control (the
X2 position) and temperature control.
- "prepare an analysis of potential impacts on power
system reliability, with particular emphasis on
the Northern California market, and include that
analysis in the draft SEIS to allow public and
review."

15 Doc. 310 at 3-4.

16 Federal defendants contend that a supplemental EIS, which
17 complies with the court's December Order, cannot be completed
18 within 120 days because the order, "effectively requires that
19 Interior conduct an extensive and thorough reexamination of the
20 entire EIS." Doc. 310 at 4. An SEIS was commenced in 2001,
21 after Interior executed a contract with its consultant, CH2M
22 Hill. That SEIS was to respond to the preliminary injunction to
23 consider "the impacts of the RPM mitigation (X2 and temperature
24 control) and the power system reliability." Doc. 310 at 5.
25 Interior's consultant, Ch2M Hill, provided an initial 12 month
26 SEIS schedule to be completed January 2004, and implies an SEIS
27 that complies with the Court's Order will take up to 36 months.
28 Federal defendants suggest a less comprehensive SEIS can be done

1 more swiftly: "if the Court should indicate that its Memorandum
2 Opinion can be interpreted in a narrower manner (e.g., if the
3 revision of the purpose and need statement is construed to
4 require a less drastic revision), then the federal defendants
5 might be able to accelerate the SEIS process to some degree."
6 Doc. 310 at 5-6.

7 Responding to Westlands' critique that Federal Defendants
8 were actually seeking reconsideration, Federal Defendants' reply
9 brief acknowledges their motion is confusing and specifically
10 state they "do not request reconsideration." Federal defendants
11 clarify their earlier comment, "any clarification of the tasks
12 [Mr. Urkov] must confront as project manager for Interior's
13 consulting firm in preparing the SEIS could expedite [or perhaps
14 delay] the ability to adhere to the 18-month schedule."

15 Interior admits that a "delay of up to three years" would
16 not conform to the court's directive "to proceed expeditiously
17 with the restoration of the Trinity River." Doc. 310 at 6:4-8.
18 Interior "reluctantly" has instructed CH2M Hill to prepare an 18
19 month schedule for the SEIS. *Id.* at 6:9-12. Federal defendants
20 aver they will "make every effort to see that they stay on track
21 to meet this deadline," however "they are constrained to advise
22 the Court and to notify the other parties that any number of
23 unforeseen circumstances could arise that might require Interior
24 to return to the Court to seek a further adjustment of the
25 deadline." Doc. 310 at 6. Interior concludes plaintiffs will
26 not be harmed by extending the SEIS deadline 15 months, due to
27 the court's injunctive relief for flows of 453,000 acre-feet of
28 annual release of water to the Trinity River until the SEIS is

1 completed.

2 Interior submits a declaration of Mike Urkov, the SEIS
3 project manager at CH2M Hill. Mr. Urkov's declaration questions
4 the feasibility of Interior's proposed 18 month timeline. Mr.
5 Urkov explains the 18 month timeline assumes the following:
6 "revisions to the project purpose are relatively minor, computer
7 modeling results are somewhat similar to previous results, and
8 conditions required by the Endangered Species Act (ESA)
9 consultation do not require additional modeling." Doc. 311 at
10 5:25-27, 6:1. Mr. Urkov admits, "major revisions to project
11 purpose requiring complete overhaul of alternatives and starting
12 ESA consultation from scratch could result in a completion date
13 in 2006." Doc. 311 at 5:3-5. The SEIS could be completed in
14 early 2004 if "no change to project purpose and relatively quick
15 ESA consultation" occurred. Doc. 311 at 5:5-7.

16 The difficulties and processes, which will impact the
17 supplemental EIS timeline, include:

- 18 • CALSIM analysis used to determine the effects of
19 the biological opinions and provide data for
20 analysis of energy generation, subject to review
21 by USBR and the California Department of Water
22 Resources. Issues which may affect CALSIM results
23 include: changes to b(2) water accounting;
24 listings or delistings of fish species under the
25 ESA; and, long-term water contract renewals.
- 26 • Re-evaluation of the purpose statement of
27 subsequent alternatives, which would "likely
28 require numerous meetings and coordination
sessions to revisit the many policy decisions made
during the six-year preparation period of the
EIS/EIR."
- Reinitiation of consultation with issuing agencies
(National Marine Fisheries Service and the U.S.
Fish and Wildlife Service); any new terms and
conditions imposed by reconsultation "could
require more supplemental analysis, which would
further complicate the task of preparing a
competent document."

- a minimum sixty-day public review period and corresponding response time to deal with public comments (ten months were spent responding to public comments during the EIS process).

Doc. 311 at 3-6.

Mr. Urkov explains that the computer modeling system, PROSIM, used for the EIS has been replaced with a new, more detailed system, CALSIM, and this change may also impact the timeline. Doc. 311 at 3:18-19. Mr. Urkov advises any timeline is speculative "until the revised project purpose statement is defined." *Id.* at 4:8-23. This implies that a supplemental EIS, which conforms with the December 2002 Order, could take a number of years:

revision of the project purpose and alternatives has the potential to set the Supplemental EIS/EIR process back to where we were in spring 2001, and potentially require considerable additional time and effort. CH2M Hill estimates that the completion of all of the above tasks [complying with the Court's Order], including modeling and analysis of additional alternatives, cannot be completed within the 120 day deadline... and, based on the administrative processes, difficult policy issues, and coordination effort required to prepare the original EIS/EIR, could take a number of years.

Doc. 311 at 6:2-12.

Plaintiff-Intervenor Sacramento Municipal Utility District (SMUD) does not oppose federal defendants' motion for a fifteen month deadline extension. Doc. 329 at 2:10-11. SMUD acknowledges that a valid SEIS "must correct the legal deficiencies of the existing EIS by incorporating, among other things, a revised purpose and alternatives and analysis, including an alternative that integrates flow increases with other management measures." *Id.* at 2:6-10. SMUD opposes federal defendants' motion "to the extent it incorporates and relies on

1 the accompanying Declaration of Michael Urkov." *Id.* at 2. SMUD
2 contends Mr. Urkov's July 9, 2004 deadline which "assumes that
3 revisions to the project purpose are relatively minor..." is
4 inconsistent "with the federal defendants recognition of the
5 requirements of this Court's order." *Id.* at 2:19-22. SMUD
6 asserts that any deadline which assumes little change to the
7 project purpose or alternatives "would violate this Court's
8 Order," would violate NEPA, and would violate the ESA. *Id.* at
9 2:26-28. SMUD requests the court clarify that the SEIS "must
10 correct the legal deficiencies of the existing EIS as identified
11 in this Court's December 10, 2002 Memorandum Decision and Order."
12 Doc. 329 at 3. The order speaks for itself.

13 Plaintiffs San Luis and Delta-Mendota Water Authority and
14 Westlands Water District ("plaintiffs") do not oppose extending
15 the SEIS deadline to July 2004. Doc. 349 at 2. Plaintiffs
16 oppose any request by the federal defendants which appears to
17 seek permission "to do an SEIS that does not address all defects
18 that the Court identified in its summary judgment ruling." *Id.*
19 at 2:9-13.

20 Plaintiffs contend federal defendants' moving papers are
21 unclear as to whether the SEIS will adequately address the
22 deficiencies that the court identified in Interior's NEPA
23 analysis and the NEPA schedule attached to Mike Urkov's
24 declaration does not encompass an SEIS that complies with the
25 court's order. Doc. 349 at 3:9-12. Plaintiffs point out Mike
26 Urkov's statement that the 18 month schedule assumes revisions to
27 the project purpose are relatively minor. *Id.* at 3:12-21.
28 Plaintiffs assert Mr. Urkov's declaration lacks foundational

1 facts concerning the level of resources he will commit to meet
2 his schedule, and suggest more resources may have to be committed
3 in order to meet appropriate deadlines.

4 Plaintiffs argue federal defendants' motion suggests the
5 court change its Order to allow defendants to meet a 15 month
6 extension. Doc. 349 at 4:18-28 (citing to defendant's statement
7 that, "if the court should indicate that its Memorandum Opinion
8 can be interpreted in the narrower manner..."). Plaintiffs argue
9 defendants' implied request does not cite new law or evidence to
10 support reconsideration. Federal Defendants clarify they do not
11 request reconsideration. Plaintiffs argue defendants should be
12 granted the time necessary "to fill all their obligations in
13 accordance with all applicable statutes," but "should not be
14 excused from those obligations." *Id.*

15 The Hoopa Valley Tribe agrees 120 days is insufficient to
16 complete the SEIS, however the Tribe requests federal defendants'
17 motion be denied and the Tribe's Motion for Partial Stay be
18 granted instead. Doc. 240 at 1. The Tribe contends Mike Urkov's
19 declaration contradicts federal defendants' 18 month schedule.
20 *Id.* at 2:7-12. The Tribe argues "federal defendants' evidence
21 establishes that twice that amount of time will be required to
22 undertake 'a thorough re-examination of the entire EIS.'" *Id.* at
23 2. The Tribe claims an SEIS prepared under an 18 month schedule
24 is unlikely to satisfy the December Court Order. *Id.* at 2:14-18.
25 The Tribe argues federal defendants' proffered schedule is "a
26 house of cards" because it omits essential structural elements
27 necessary for a careful and thorough EIS/SEIS. *Id.* at 3. The
28 Tribe asserts items omitted from the 18 month schedule, but

1 included in the 36 month schedule, illustrate the 18 month
2 schedule's deficiencies:

3 (1) scoping of project purpose and need; (2)
4 finalizing new purpose statement; (3) development of new
5 alternatives (and re-development of alternatives analyzed
6 in Draft SEIS in response to re-defined purpose); (4)
7 computerized modeling of impacts of both new and
8 re-defined alternatives on power reliability, CVP
9 operations, Trinity fishery restoration and Trinity and
10 Sacramento River water temperature; (5) development of a
11 preliminary preferred alternative; (6) analysis of
12 groundwater, socioeconomic and other secondary impacts;
13 and (7) confirming the preferred alternative.

9 Doc. 340 at 3 n. 3.

10 The Tribe predicts plaintiffs will challenge the adequacy of
11 NEPA compliance in an SEIS completed under Mr. Urkov's 18 month
12 schedule assumptions. Doc. 340 at 4:3-6. The Tribe also objects
13 to an SEIS which includes the integrated management alternative,
14 because it has allegedly already been extensively analyzed. Doc.
15 340 at 5:12-21, citing Franklin declaration, Exhibits 5, 6 and 7.

16 The Tribe argues the new range of alternatives and major
17 steps required by the December Order "may be unnecessary," and
18 "an inequitable waste of time and resources," should the Tribe
19 succeed on appeal. Doc. 340 at 6-7. The Tribe contends a grave
20 injustice to the tribal and public interest would occur, at the
21 expense of meaningful fishery restoration, by allowing an SEIS
22 "re-do" to delay the SEIS. The Tribe asserts plaintiffs' rights
23 are not the only rights at issue, as the Tribe's property rights
24 in its fishery trust assets "will not be protected by adoption of
25 the 18-month schedule at the cost of drought year flow regimes."
26 *Id.* at 8.

27 In essence, the Tribe requests the court allow the current
28

1 SEIS to continue as planned in 2001, without regard to the
2 December 10, 2002 Court Order.

3 In response to opponents' contentions that Federal
4 defendants' 18 month timeline is contradicted by its own
5 consultant's testimony, federal defendants reply: "Interior...
6 has the ultimate responsibility to provide the directions and
7 guidance and ensure the project stays on target and on track.
8 Interior clearly recognizes that, to comply with the Court's
9 rulings, a revised statement of purpose and need is required,
10 along with a different range of alternatives." Doc. 358 at 4.
11 Federal Defendants "remain confident that [the SEIS] tasks can be
12 accomplished within the 18-month schedule." *Id.* Defendants
13 acknowledge a revised purpose and need statement "will not take
14 months or years to complete, but can and must be drafted far more
15 expeditiously." *Id.* Federal Defendants assert interior need not
16 "start from scratch in developing a new set of alternatives, but
17 can draw extensively from the prior EIS, making adjustments as
18 required to comply with the Court's order." *Id.* at 4-5.
19 According to Federal Defendants, Interior and its consultants
20 "have already made substantial progress identifying the
21 alternatives to be considered in the SEIS." Doc. 358 at 5.

22 Federal Defendants acknowledge its consultant's concerns,
23 but emphasize their own responsibility for complying with their
24 proposed 18 month schedule and assure all parties such a deadline
25 is feasible, barring any unforeseen circumstances: "Interior has
26 concluded that the concerns raised by the department's
27 consultants and by the Tribe's declarant do not justify
28 abandoning the 18-month schedule." Doc. 358 at 5. Federal

1 defendants qualify, however, that the schedule "is not a binding
2 mandate," but is "simply a management tool to assist and guide
3 the decision-making process by identifying certain discrete tasks
4 and establishing target dates for completion." *Id.*

5 Federal defendants reject NCPA's conditional non-opposition,
6 and argue the request for an extended SEIS deadline is "entirely
7 independent of the Court's decision on the flow levels for 2003
8 and 2004" while the SEIS is pending. Doc. 358 at 6. Federal
9 defendants disagree with the Tribe's interpretation of defendants
10 motion and supporting declaration that 36 months are required to
11 revise the SEIS and acknowledge they are responsible, not their
12 consulting firm, for meeting the court's deadline. An 18 month
13 schedule will "impose tremendous demands on Interior, the
14 consultants, the interested parties, and the public." *Id.* at 8.
15 Defendants contend the Tribe's additional argument, that the SMUD
16 "alternative" has already been rejected and should not be
17 reconsidered, is irrelevant given the court's December mandate
18 that an integrated management alternative be given a "hard look"
19 under NEPA. Federal defendants agree with the Tribe's claim that
20 the 18-month schedule will do nothing to protect fishery
21 resources. Federal Defendants reject the Tribe's suggestion that
22 no changes be made to the SEIS currently underway, pending the
23 appeal, and observe such an action would "delay a new decision on
24 flows and other elements of the restoration process for at least
25 three years, until 2006."

26 Federal defendants clarify the SEIS will comply with the
27 December order and include, without limitation:

28 a revised statement of purpose and need, a different

1 range of reasonable alternatives, at least one integrated
2 management alternative, the supplemental assessment of
3 ESA consultation and mitigation measures for listed
4 species, and supplemental analysis of the impact of the
5 alternatives on power system reliability, including the
6 Northern California electricity market. The SEIS will
7 adhere to the procedures and requirements of NEPA and the
8 CEQ regulations, including public comment on the draft
9 SEIS and responses to those comments in the final SEIS.

10
11 Federal defendants claim no party seriously challenges an
12 extension of time is warranted "at least through July 9, 2004, to
13 prepare an SEIS that responds to the Court's findings and
14 conclusions in the Memorandum Decision." Doc. 358 at 11. They
15 acknowledge they must "move expeditiously" to comply with the
16 court order and meet the federal trust responsibility owed the
17 Tribes.

18
19 Federal Defendants present, as their only evidence for the
20 need of an extension, a declaration from their consultant which
21 contradicts defendant's own assertions that a revised SEIS can be
22 completed within eighteen months. Defendants' reply assures the
23 parties and the court that despite Interior's consultant's
24 misgivings, federal defendants are "confident" they can meet an
25 eighteen-month deadline. Yet Defendants then qualify that
26 assurance by asserting that if more than eighteen months is
27 needed, defendants will return to the court to "ask" for more
28 time. It may be that the most reasonable approach is to engage a
29 consultant who will assign priority and bring the necessary
30 resources to bear on the required preparation of a lawful SEIS in
31 view of the continuing violation of law in failing to restore the
32 Trinity River.

33
34 Defendant's motion to modify the injunction to provide an

1 18-month extension of time for completion of the SEIS is GRANTED.
2 The 120 day deadline is extended until July 9, 2004. Defendants
3 are ORDERED to provide the court and parties with status updates,
4 via fax and U.S. Mail, on June 20, 2003, and January 20, 2004.
5

6 B. Hoopa Valley Tribe's Motion for Partial Stay Pending Appeal

7 The Hoopa Valley Tribe makes two requests that effect the
8 December 10, 2002, modification of injunction: 1) that the SEIS
9 currently underway be stayed pending appeal; and 2) the
10 injunction, which caps releases under the Trinity River Mainstem
11 Fishery Restoration Record of Decision at 453,000 acre-feet, be
12 modified and the amount of releases increased.

13 1. Standard of Review

14 The Tribe moves to modify the injunction under Fed.R.Civ.P.
15 62(c),¹⁰ and for a Stay pending appeal under Fed.R.Civ.P. 62(d).¹¹
16 The Tribe argues the applicable legal standard for a stay pending
17 appeal is the Ninth Circuit's "alternative" two-prong test, under
18 which an applicant must demonstrate either: 1) a probability of
19

20 ¹⁰ FRCP 62(c) states: "when an appeal is taken from an
21 interlocutory or final judgment granting, dissolving, or denying
22 an injunction," a court may, in its discretion, "suspend, modify,
23 restore, or grant an injunction during the pendency of [and]
appeal upon such terms as to bond or otherwise as it considers
proper."

24 ¹¹ FRCP 62(d) states: "when an appeal is taken the
25 appellant by giving a supersedeas bond may obtain a stay subject
26 to the exceptions contained in subdivision (a) of this rule. The
27 bond may be given at or after the time of filing the notice of
28 appeal or of procuring the order allowing the appeal, as the case
may be. The stay is effective when the supersedes bond is
approved by the court.

1 success on the merits and or irreparable injury, or; 2) serious
2 questions going to the merits and that the balance of hardships
3 tips sharply in its favor. Doc. 316 at 3 citing Moore's Federal
4 Practice § 65.22[5][i][i] (ed ed.2000); *Rucker V. Davis*, 237 F.3d
5 1113, 1117 (9th Cir.2001) (en banc) (citations omitted); *Gentala*
6 *v. City of Tucson*, 213 F.3d 1055, 1060-61 (9th Cir.2000). The
7 Tribe contends a District Court is vested "with reasonable
8 discretion when determining whether to grant a stay." *Id.* at 4
9 citing *A & M Records, Inc. V. Napster, Inc.*, 239 F.3d 1004, 1013
10 (9th Cir.2001) (citations omitted).

11 SMUD assumes the continuum standard applies, citing *Idaho*
12 *Sporting Congress Inc., v. Alexander*, 222 F.3d 562, 565 (9th
13 Cir.2000). Plaintiffs San Luis and Delta-Mendota Water
14 Authority, Westlands Water District, and San Benito County Water
15 District ("plaintiffs"), rely on the traditional stay test for
16 62(c):

17 (1) whether the stay applicant has made a strong
18 showing that he [or she] is likely to succeed on the
19 merits; (2) whether the applicant will be irreparably
20 injured absent a stay; (3) whether issuance of the stay
will substantially injure the other parties interested
in the preceding; and (4) where the public interest
lies.

21 11 Wright & Miller, Federal Practice and Procedure, § 2904 at
22 501. Plaintiffs aver that, when determining whether to stay an
23 injunction, the Ninth Circuit applies the district court
24 preliminary injunction standard cited in *Hodel* and *Lopez*. Doc.
25 350 at 5. The court must "weigh[] the competing claims of injury
26 and consider[] the effect on each party of the granting or
27 withholding of the requested relief." *Id.* at 6 citing *Amoco*
28 *Production Company v. Village of Gambell, Alaska*, 480 U.S. 531

1 (1987).

2 The NCPA argues Rule 62(d) ("Stay upon Appeal") does not
3 apply because it authorizes the court to grant a stay when
4 appellant posts a "supersedeas bond," which the Tribe has not
5 done. The text of 62(d) allows for posting the bond "at or after
6 the time of filing the notice of appeal or of procuring the order
7 allowing the appeal, as the case may be." Fed.R.Civ.Pro 65(d).
8 NCPA contends the Tribe's motion to modify the injunction and
9 allow full ROD flows pending appeal should be evaluated under the
10 four prong *Bennett/Hilton* test, applied by the Eastern District
11 of California court in 1991. *Direct Marketing Association Inc.*
12 *v. Bennett*, 1991 WL 321945 (E.D. Cal.1991) quoting *Hilton v.*
13 *Braunskill*, 481 U.S. 770, 776 (1987). The *Bennett/Hilton* test to
14 "suspend, modify, restore, or grant" an injunction pending
15 appeal, is identical to the preliminary injunction test cited in
16 *Wright and Miller, supra*.

17 NCPA argues the alternative/continuum test presented by the
18 Tribe was rejected in *Bennett*, which acknowledged the existence
19 of the continuum test "outside the Rule 62(c) context." NCPA
20 contends the Tribe has provided no case law applying the
21 continuum test to a Rule 62(c) motion. NCPA cites *Digital*
22 *Communications Network, Inc. v. AB Cellular Holding*, 1999 WL
23 1044234 (C.D. Cal.1999), for the proposition that, "when a party
24 has 'not cited the Court to any authority justifying the
25 application of the... [continuum] standard to an application for
26 an injunction pending appeal' it should find that 'standard
27 inapplicable.'" NCPA's interpretation of *Bennett* is misplaced.
28 *Bennett* did not reject the alternative test; it applied both the

1 traditional and the alternative tests to a request to stay an
2 injunction pending appeal. See *Direct Marketing Association Inc.*
3 *v. Bennett*, 1991 WL 321945 at *3 (E.D. Cal.1991)

4 The Tribe requests a stay and modification of injunctive
5 relief. "The standard for evaluating stays pending appeal is
6 similar to that employed by district courts in deciding whether
7 to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d
8 1432, 1435 (9th Cir.1983) citing *Nevada Airlines, Inc. v. Bond*,
9 622 F.2d 1017, 1018 n. 3 (9th Cir.1980). "In this circuit there
10 are two interrelated legal tests for the issuance of a
11 preliminary injunction. These tests are 'not separate' but
12 rather represent 'the outer reaches of a single continuum.'" *Id.*
13 citing *Los Angeles Memorial Coliseum Commission v. National*
14 *Football League*, 634 F.2d 1197, 1201 (9th Cir.1980) (internal
15 quotation marks omitted). "At one end of the continuum, the
16 moving party is required to show both a probability of success on
17 the merits and the possibility of irreparable injury.... At the
18 other end of the continuum, the moving party must demonstrate
19 that serious legal questions are raised and that the balance of
20 hardships tips sharply in its favor. *Id.*, citing *Los Angeles*
21 *Memorial Coliseum Commission*, 634 F.2d at 1201; *Miss Universe*,
22 605 F.2d at 1134. "[T]he relative hardship to the parties" is
23 the "critical element" in deciding at which point along the
24 continuum a stay is justified.... In addition...the public
25 interest is a factor to be strongly considered." *Id.* (citations
26 omitted).

27 In the Ninth Circuit, a motion to stay an injunction is
28 evaluated using the alternative "continuum" test; a motion to

1 modify an injunction is evaluated using the traditional four
2 prong injunction test.

3 2) Hoopa Valley Tribe's Motion to Stay December Injunction
4 that Requires Interior Modify the SEIS Currently Underway

5 a. Probable Success on the Merits and the Possibility
6 of Irreparable Injury

7 1. Probability of success on the merits

8 The Tribe contends it is likely to succeed on the merits of
9 its appeal because "1) the EIS did not in fact adopt an
10 impermissibly narrow statement of purpose and need; and... 2)
11 this Court was mistaken in concluding that the EIS did not
12 consider a reasonable range of alternatives." Doc. 316 at 4. The
13 Tribe asserts the SEIS should not be redefined and restarted now,
14 as it has been "underway for over a year based on this Court's PI
15 order." Doc. 316 at 5. That order was an interim preliminary
16 injunction which was finalized in February 2003, after full
17 hearing of the merits of the case.

18 i. Probability of Success as to the "EIS
19 Statement of Purpose and Need" Issue

20 The Tribe argues that "appellate courts" accord government
21 agencies "considerable discretion" in defining the purpose and
22 need of a proposed action project." *Id.* citing *Friends of*
23 *Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th
24 Cir.1998); *City of Angoon v. Hodel*, 803 F.2d 1016 at 1021 (9th
25 Cir.1996) (citing *Lathan v. Bringegar*, 506 f.2d 677, 693 (9th
26 Cir.1974) ("the preparation of [an EIS] necessarily calls for
27 judgment, and that judgment is the agency's.)) The Tribe
28 contends "this Court misinterpreted the specific statutory

1 context giving rise to the need for the proposed action, and
2 hence unduly intruded on Interior's discretion to define the
3 purpose of that action." Doc. 316 at 5.

4 The Tribe asserts the court was mistaken when it applied a
5 "broader purpose" to the proposed action, which would encompass
6 examining an integrated management program combining increased
7 flows with non-flow measures. Doc. 316 at 5. The court's
8 comments that "CVPIA specific minimum flows and direction to
9 formulate permanent T[rinity] R[iver] restoration flows and TRD
10 operating criteria, take precedence," therefore, contradict the
11 court's conclusion that the EIS "should have nonetheless been
12 guided by 'the more general language in 1984 act.'" *Id.*
13 According to the Tribe, "the citation to the 1984 act in the
14 introductory phrase of § 3406(b)(23) does not govern the scope of
15 the agency's proposed action." *Id.* The Tribe contends Interior
16 was specifically tasked by Congress "to implement one particular
17 method, namely increased 'instream ... flow requirements,'" *Id.*
18 inferentially, to the exclusion of any other consideration. *Id.*
19 This contention was fully considered in the decisions that gave
20 effect to all the statutory provisions calling for Trinity River
21 restoration.

22 The Tribe also argues the December Decision "gives
23 insufficient credence to the statutory scheme's concern with
24 restoration of the historic fishery resource, rather than merely
25 with stock augmentation by artificial means." Doc. 316 at 6. In
26 support, the Tribe cites multiple references to "naturally
27 reproducing runs" in the CVPIA. See Doc. 316 at 6:26-28,7:1-4.
28 The Tribe also cites to the 1996 Amendment of the 1984 Act, which

1 "clarified the importance of naturally reproducing runs and a
2 limited role of hatcheries under the 1984 act," stating:

3 Section 3(c) of Public Law 104 - 143 amended
4 Section 2(a)(1)(C), directing that the Trinity River
5 Fish Hatchery be managed to: 'best serve its purpose of
6 mitigation of fish habitat loss above Lewiston Dam,
7 while not impairing efforts to restore and maintain
8 naturally reproducing anadromous fish stocks within the
9 basin.'

10 Doc. 316 at 7 citing 110 Stat. 1339 (1996).

11 The Tribe further disputes the court's determination that
12 habitat restoration within the tributaries, not simply the
13 mainstem of Trinity, be examined. The Tribe contends this
14 interpretation is incorrect because Congress chose to mandate the
15 use of instream flows "to restore the physical and biological
16 attributes of the pre-TRD mainstem." Doc. 316 at 8 citing CVPIA
17 § 3406(b)(23)(A). The Tribe contends "other actions throughout
18 the Trinity basin address other aspects of fishery restoration,"
19 therefore the current purpose and need identified in the EIS
20 reasonably focuses on "but one piece of [the] puzzle." Doc. 316
21 at 8:12-28.

22 The Tribe argues the court misinterpreted CVPIA § § 3402(f)
23 and 3406(b) to require Interior balance fishery restoration goals
24 against the needs of other CVP water users. Doc. 316 at 8. The
25 Tribe maintains Trinity Basin fish and wildlife needs take
26 precedence over the needs of any other CVP water users and cites
27 to a 1979 Interior Department Solicitor's interpretation of
28 Section 2 of the 1955 Trinity River Division Act:

 [I]n authorizing the Trinity River Division of the
 CVP in 1955, Congress specifically provided that in-basin
 flows (in excess of a statutorily prescribed minimum)
 determined by the Secretary to be necessary to meet
 in-basin needs take precedence over needs to be served by

1 out-of-basin diversion....

2 Congress' usual direction that the Trinity River
3 Division be integrated into the overall CVP, set forth at
4 the beginning of section 2, is expressly modified by and
made subject to the provisos that followed giving
specific direction to the Secretary regarding in-basin
needs.

5 Doc. 316 at 9:11-18 citing Memorandum from the Solicitor to
6 Assistant Secretary-Land and Water Resources, Proposed
7 Contract with Grasslands Water District, 3-4 Dec. 7, 1979).

8 The December decision did not "require" Interior "to
9 balance" any such interests. Rather it found unreasonable
10 Interior's choice not to include an alternative that
11 considered whether Trinity River restoration could be
12 accomplished while minimizing harm to other CVP interests
13 and other CVP service areas, and the environment.

14 The Tribe simply reargues the points it advanced on summary
15 judgment and now quarrels with the analysis that underlies the
16 decision, in what is a de facto motion for reconsideration.
17 These arguments were closely analyzed, evaluated and rejected in
18 the 143 page Memorandum Decision, December 20, 2002. The Tribe
19 disagrees with the court's statutory interpretation, yet offers
20 no new case law or facts to justify reconsideration or to support
21 the finding it is likely to succeed on the merits of its appeal.
22 The substantive legal issues do not favor staying the injunction
23 in view of the threat to other species in the Delta.

24
25 ii. Probability of Success as to the
26 "EIS Range of Alternatives" Issue

27 The Tribe asserts it will succeed in its appeal regarding
28 the decision that Interior did not assess a sufficient range of

1 alternatives, because the court "improperly focused on the number
2 rather than the range of alternatives evaluated." Doc. 316 at
3 10. The Tribe argues that NEPA "does not requires [sic] that
4 every conceivable alternative be considered; rather, the statute
5 requires that the agency consider an adequate range or spectrum
6 of alternatives." *Id.* This disagreement with the court's
7 conclusion is no more than argument. Not to consider an
8 alternative that sought to evaluate if the river restoration
9 could be accomplished while managing flows to also mitigate harm
10 to all CVP constituents is categorically unreasonable.

11 The Tribe contends the EIS explored an appropriate range of
12 alternatives. The preferred alternative, which "incorporates a
13 range of restoration activities, including a variable annual flow
14 regime, mechanical channel rehabilitation, sediment management,
15 ... [and] mitigation measures on top of the panoply of hatchery
16 and harvest management programs already in existence... is
17 inherently an integrated management approach." Doc. 316 at
18 10:18-22, 11:1. According to the Tribe, "this Court improperly
19 substituted its judgment for that of the agency in concluding
20 that some other package of actions would present a more
21 appropriate integrated alternative." The December Decision
22 states:

23 Section 1502.14 of the CEQ regulations requires
24 agencies to '[r]igorously explore and objectively
25 evaluate all reasonable alternatives,' to include a 'no
26 action' alternative, and a preferred alternative.
27 However, agencies are not required to include 'every
28 alternative device and thought conceivable by the mind
of man.' [Citation omitted]. 'The range of
alternatives that must be considered in the EIS need
not extend beyond those reasonably related to the
purposes of the project.' [Citation omitted].

1 When determining whether a reasonable range of
2 alternatives was considered, the 'touchstone' is
3 whether the EIS's 'selection and discussion of
4 alternatives fosters informed decision-making and
5 informed public participation.' [Citation omitted].
6 NEPA does not require the consideration of
7 alternatives: whose effect cannot be reasonably
8 ascertained; whose implementation is remote or
9 speculative; which are infeasible, ineffective, or
10 inconsistent with basic policy objectives; or which are
11 not significantly distinguishable from alternatives
12 actually considered, or; which have substantially
13 similar consequences. [Citation omitted]. However, 'an
14 agency cannot define its objectives in unreasonably
15 narrow terms' to restrict the range of reasonable
16 alternatives. [Citation omitted]. The 'rule of
17 reason' guides both the choice of alternatives and the
18 extent to which an EIS must discuss each alternative.
19 [Citation omitted]....

20 Interior has discretion not to use [certain]
21 measures as stand-alone alternatives; however,
22 Plaintiffs are correct that Interior did not take a
23 hard look at, or consider in-depth, a fully integrated
24 management alternative that reduced variable flow
25 increases in conjunction with other management
26 prescriptions. Because NEPA requires fair
27 consideration of reasonable (feasible) alternatives,
28 including discussion of the alternatives and opposing
viewpoints, to avoid undue narrowing of the means of
achieving the purpose of an EIS, an SEIS should have
been prepared. [Citation omitted].

Doc. 305 at 95-101.

 The Tribe unfairly characterizes the decision, as it did not
conclude that "some other package of actions" would "present a
'more appropriate' integrated alternative." The Decision
concluded the alternatives examined in the EIS did not satisfy
NEPA, primarily because the narrowly defined purpose focused on
maximum flows and gave no consideration whether a combination of
other measures would permit reduced flows to accomplish the
statutory objective. In sum, a reasonable and meaningful
alternative to restore the fishery while minimizing adverse
impacts on the rest of the CVP, was ignored.

1 The Tribe cites *Kootenai Tribe of Idaho v. Veneman*, Nos. 01-
2 35472, 01-35539, 01-35476 (9th Cir.Dec.12, 2002), Slip Op. at 41,
3 for the principle that an EIS "is not inadequate for failing to
4 consider alternatives that are less restrictive of development
5 interests... when the purpose of an action is environmental
6 conservation or restoration." Doc. 316 at 11:4-9. The relevant
7 *Kootenai Tribe dicta* states:

8 The NEPA alternatives requirement must be
9 interpreted less stringently when the proposed agency
10 action has a primary and central purpose to conserve and
11 protect the natural environment, rather than to harm it.
12 Certainly, it was not the original purpose of Congress in
13 NEPA that government agencies in advancing conservation
14 of the environment must consider alternatives less
15 restrictive of developmental interests. See 42 U.S.C.
16 §§ 4231 et seq.

17 * * *

18 [G]iven that the conservation and preventative goals
19 of the Forest Service in promulgating the Roadless Rule
20 are entirely consistent with the policy objectives of
21 NEPA, [footnote omitted] as well as with the Forest
22 Service's own mission, [footnote omitted] it would turn
23 NEPA on its head to interpret the statute to require that
24 the Forest Service conduct an in-depth analysis of
25 environmentally damaging alternatives that are
26 inconsistent with the Forest Service's conservation
27 policy objectives. [Citation omitted].

28 *Kootenai Tribe*, 01-34572, 01-35539, slip op. at 36, 40.

 In *Kootenai Tribe*, the Forest Service included three
alternatives in its EIS prior to establishing the Roadless Rule.
All three alternatives encompassed a near total ban on road
construction within identified "roadless" forest acreage. The
Forest service's policy objective in promulgating the rule was
to: "prohibit[] activities that have the greatest likelihood of
degrading desirable characteristics of inventoried roadless areas
and [to] insur[e] that ecological and social characteristics of

1 inventoried roadless areas are identified and evaluated through
2 local land management planning efforts." *Kootenai Tribe*, slip
3 op. at 37.

4 *Kootenai Tribe* is inapposite; all three alternatives
5 considered by the Forest Service were viable and comported with
6 the valid purpose of the Service's proposed rule and
7 environmental conservation policy. The alternative the decision
8 invalidated actually violated NEPA. Here, the purpose of the
9 ROD's EIS itself has been ruled invalid because it was too
10 narrowly defined, in violation of NEPA, and the alternative
11 selected has major impacts to the environment which were not
12 reasonably analyzed. Two of the three Trinity River Restoration
13 alternatives were not considered viable; two were "extreme
14 alternatives" which predetermined the maximum flow "alternative."
15 In *Kootenai Tribe*, environmental concerns were not presented on
16 both sides of the issue as they are here.¹² Requiring Interior
17 comply with NEPA and conduct in-depth analysis of an integrated
18 management or other viable alternatives does not "turn NEPA on
19 its head," nor does it direct "in-depth analysis of
20 environmentally damaging alternatives ... inconsistent" with the
21

22 ¹² See Doc. 305 at 61: "whether a major change in CVP
23 operations will further directly impact South-of-Delta water
24 users through increased upstream releases and reduced Delta
25 pumping, or will impact other environmental programs or species
26 through the use of the limited (b) (2) water account, remains
27 undetermined.... Whenever CVP water is diverted to a different
28 use, an impact is experienced throughout the system. The effects
on the Preferred Alternative from the X2 RPM pose potential
unquantified but significant environmental and other
consequences."

1 Trinity River Fishery Restoration mandate encompassed in CVPIA
2 § 3406 23(b). To the contrary, it calls for analysis of
3 potentially damaging environmental consequences in the Sacramento
4 Delta and River that have unreasonably gone unconsidered.

5 Plaintiffs contend the Tribe asks the court to reconsider
6 its summary judgment rulings, but does not meet the standard for
7 reconsideration. The Tribe revisits its summary judgment
8 arguments to support its motion for a stay, not for
9 reconsideration. Plaintiffs claim the Tribe's "conclusory
10 assertion that it is likely to win its appeal, because the 'Court
11 incorrectly failed to conclude that further NEPA review is
12 irreconcilable with the mandate of CVPIA § 3406(b)(23)' is no
13 more persuasive now than it was before." Doc.350 at 8.

14 Plaintiff-Intervenor SMUD strongly opposes a stay. SMUD
15 points out the Tribe meets none of the factors justifying a stay.
16 SMUD contends the only result of a stay "would be to further
17 delay the completion of a valid SEIS and further delay the
18 Secretary's ability to make a valid decision regarding flows in
19 the Trinity River." Doc. 330 at 2. SMUD argues that because the
20 December Decision is "firmly grounded in the facts of this case
21 and consistent with federal NEPA law, the Tribe is highly
22 unlikely to convince the Ninth Circuit to reverse this Court's
23 decision." *Id.* at 4. SMUD revisits each of the Tribe's
24 arguments, and points out that they have already been considered
25 and rejected on summary judgment. *Id.* at 5.

26 Plaintiff-Intervenor NCPA contends the Tribe has not made a
27 strong showing that they are likely to succeed on the merits as
28 the Tribe "offer[s] nothing more than a regurgitation of the

1 arguments previously made in their motion for summary judgment
2 and in opposition to that of... SMUD." Doc. 351 at 10.

3 The Tribe's reply reiterates its dispute with the court's
4 decision regarding the adequacy of the EIS. Plaintiffs and
5 Plaintiff-Intervenors are correct; the Tribe presents nothing new
6 other than disagreement with the summary judgment decisions made
7 on the substantive law issues interpreting the relevant
8 environmental statutes.

9
10 2. Possibility of Irreparable Injury

11 The Tribe conflates its "stay" arguments with its arguments
12 to modify the injunction to ignore the flow release cap. The
13 Tribe's arguments regarding "irreparable injury" center solely on
14 its perceived need for a modified injunction that increases the
15 water flows to ROD levels, pending the outcome of its appeal or
16 SEIS completion.¹³ The Tribe offers no argument as to how it
17 will be irreparably injured if its Stay request is denied. Flows
18 have not been at "ROD levels" in the Trinity River since
19 construction of the Trinity Unit. The Tribe claims, without any
20 evidentiary support, that any additional SEIS analysis and
21 modeling "will discard the product of nearly two years of work on
22 an SEIS and take additional time and resources away from Trinity
23 restoration." These actions will "further damage the Tribe's
24 property rights in its trust asset." Doc. 316 at 14. A stay is
25 required, "to avoid further expense and delay," the Tribe argues
26 "it is imperative that the Department of Interior and other co-

27
28 ¹³ This motion is discussed infra at 51-52.

1 lead agencies not be forced to start new extensive and
2 complicated analyses that may be deemed unnecessary on appeal."
3 Doc. 316 at 1.

4 Plaintiffs contend the Tribe's motion for a stay, based on
5 the premise that the revised SEIS might be deemed unnecessary
6 after appeal, is foolish because it risks new delays in carrying
7 out fishery Restoration. Doc. 350 at 9. Plaintiffs contend
8 that, were the SEIS process to go forward, "flawed as it is," and
9 were the Tribe to lose its appeal, the process would be at square
10 one and "that much further behind where it needs to be for a
11 lawful, effective fishery Restoration program to occur." Doc.
12 350 at 9. "If the actual SEIS is limited to those narrow issues
13 described in the March 25, 2002, NOP, the United States will
14 break its promise [to complete an SEIS], violate NEPA again,
15 jeopardize fishery Restoration efforts, and invite continued
16 litigation." *Id.* at 10.

17 The record shows that the unlawfully narrowed alternative
18 and EIS purposes are the result of bad faith tactics by Trinity
19 County. Plaintiffs point to the Tribe's prior continuous efforts
20 to "subvert the NEPA process by demanding a truncated SEIS" and
21 suggests the Tribe "cannot now be heard to complain that the
22 Court's summary judgment decision must be stayed 'to avoid
23 further expense and delay' by Interior being 'forced to start new
24 extensive and complicated analysis.'" *Id.* at 12. Plaintiffs
25 accurately note a stay is a form of equitable relief that
26 requires clean hands. A partial cause of the illegality of the
27 EIS and ROD results from the unclean hands of Trinity County,
28 which aided the Tribe in unreasonably narrowing the purpose of

1 the FEIS.

2 Plaintiffs note that Interior and the Tribe were on notice
3 that a narrow FEIS "would not cure the original EIS's
4 inadequacies, would invite further litigation and ultimately
5 would delay fishery Restoration." *Id.* at 13. Plaintiffs contend
6 this knowledge makes it inequitable to impose upon plaintiffs and
7 Plaintiff-Intervenors additional irreparable harm by issuing a
8 stay of the court's injunction requiring a modified SEIS.

9 Plaintiffs accuse the Tribe of requesting a stay as part of its
10 "ongoing strategy to prevent the development and consideration of
11 information that may reveal less environmentally damaging fishery
12 restoration alternatives to the dynamic alluvial river approach
13 recommended." Doc. 350 at 13.

14 Plaintiff-Intervenor SMUD does not address the irreparable
15 injury prong, except to note that a stay would allow Interior to
16 go forward with a legally insufficient SEIS, which would "only
17 further exacerbate the delay of which the Tribe itself
18 complains." *Id.* at 12.

19 NCPA asserts the Tribe has failed to demonstrate any
20 irreparable injury "in requiring DOI to complete the SEIS
21 required by the Order." Doc. 351 at 10. NCPA asserts the
22 completion time difference between the narrowly scoped SEIS and
23 the broader scoped SEIS is a matter of months (Spring, 2004 vs.
24 July, 2004) and therefore, the Tribe cannot possibly show
25 irreparable harm. Doc. 351 at 10. The Tribe rejoins that
26 requiring federal defendants to revise the EIS currently underway
27 wastes resources which could otherwise be "devoted to other
28 aspects of the fishery restoration program." Doc. 360 at 4.

1 The Tribe has not shown how it will be irreparably harmed if
2 a stay is not issued and Interior goes forward with a modified
3 SEIS to comply with the law. The flows allowed have previously
4 been represented by the Tribe to be sufficient to avoid
5 irreparable harm. Moreover, no affidavit is submitted to say
6 such flows will cause irreparable harm. The balance of all
7 restoration measures are going forward. The Tribe's comment that
8 the additional work required "will discard the product of nearly
9 two years of work" is both inaccurate and misleading. Federal
10 defendants have stated the existing SEIS will not be scrapped; it
11 will be fully utilized and expanded upon. The Tribe's
12 conclusion that an SEIS complying with the court's order will
13 "take additional time and resources away from Trinity
14 restoration" and will "further damage the Tribe's property rights
15 in its trust asset" is completely unsupported by any showing that
16 any resource committed to Trinity River restoration will not be
17 devoted to that purpose. The only restoration measures not being
18 implemented are the ROD's flow regime. The flow regime
19 undeniably threatens environmental harm to the Sacramento Delta
20 and River, that has not been lawfully evaluated nor reasonable
21 mitigation alternatives given the hard look an EPA requires.

22 The Tribe has not met the stay or modification requirement
23 to show a "combination of probable success on the merits and the
24 possibility of irreparable injury."

25

26 B. Serious Legal Questions are not Raised; the
27 Balance of Hardships Does Not Tip Sharply in
28 Moving Party's Favor

1 1) Serious Legal Questions

2 The Tribe minimally addresses how "serious legal questions"
3 are raised by its Motion to Stay the December injunction
4 mandating federal defendants revise the SEIS. The only
5 acknowledgment by the Tribe that it must meet this standard is
6 the conclusory statement: "these legal challenges speak directly
7 to a central issue of this case, namely the ability to timely
8 complete Interior's ongoing SEIS on the Trinity ROD ... The
9 Tribe's appeal presents serious legal questions upon which the
10 Tribe has a significant probability of success." Doc. 316 at
11 4:15-18.

12 Neither SMUD nor the plaintiffs address this prong. NCPA
13 argues the Hoopa "have not shown any dispute among courts or
14 commentators regarding the propriety of artificially narrowing
15 the statement of purpose and range of alternatives considered
16 under NEPA." Doc. 351 at 11. No difficult question of law is
17 presented. The requirements of NEPA and the ESA are
18 straightforward. The record below shows the deficiencies in
19 Interior's process and the motives that drove the agency to a
20 post hoc rationalization justifying an illegally narrowed purpose
21 to meet a time deadline.

22 The Tribe's reply improperly places the burden of proof on
23 its opponents and claims that plaintiffs have not demonstrated an
24 absence of substantial questions going to the merits of the
25 order. Doc. 360 at 1. The Tribe's reply suggests its
26 disagreement with the outcome of this case is sufficient to
27 create "serious questions of law." Doc. 360 at 2.

28

1 2. Balance of Hardships

2 The Tribe's focus on the balance of hardships centers
3 entirely on modification of flow releases above the present cap
4 of 453,000 acre-feet until the SEIS is completed. The Tribe does
5 not address how the balance of hardships requires a Stay of the
6 December injunction that orders Interior to revise the SEIS to
7 comply with NEPA.

8 Neither SMUD nor the plaintiffs address this prong. NCPA
9 argues the balance of hardships does not tip in favor of an
10 unlawfully narrowly-scoped SEIS (the status quo) because the only
11 hardship cited by the Tribe is delay. The delay in replacing an
12 unduly narrow to fair and reasonably-scoped SEIS, after a Hoopa
13 loss on appeal, is much greater than a possible delay of having
14 the SEIS go forward, as ordered in December. Doc. 351 at 11.
15 NCPA points out that the public interest in the environment is
16 harmed if the court allows Interior to violate NEPA and the ESA
17 by implementing an illegal ROD.

18 The Tribe's reply contends the balance of hardships tips in
19 its favor because, should it prevail on appeal, the government
20 will have wasted time in revising the current SEIS. The Tribe
21 argues that should it lose on appeal, "any delay from the
22 issuance of a stay pales in comparison to the delay that
23 necessarily will result from the expansive scope of the SEIS
24 contemplated by plaintiffs, which cannot be completed before
25 2006." The federal government acknowledges the SEIS completion
26 cannot be delayed until 2006. More harm will be caused by a
27 stay. Significantly more time will be lost (at least a year or
28 more in the appellate process) if Interior proceeds with its

1 current SEIS and the Tribe loses its appeal. At that point,
2 Interior will be required to start the SEIS process over to
3 comply with the law. In contrast, if the Tribe wins on appeal
4 the work on the SEIS will have been completed or will be in its
5 final stages and the information generated will directly aid
6 Interior in protecting the entire environment served by the CVP.
7 The Tribe has not shown how the balance of hardships favors
8 staying the injunction, this factor weighs against granting the
9 stay.

10 The Tribe has not met the alternative test to demonstrate a
11 combination of serious legal questions with the balance of
12 hardships tipped sharply in its favor.

13 The Hoopa Valley Tribe's Motion to Stay the December
14 Memorandum Decision requiring that Interior modify and complete
15 an SEIS to comply with NEPA is DENIED.

16

17 b) Hoopa Valley Tribe's Motion to Modify the Injunction Re
18 2003 Flow Releases

19 A motion to modify an injunction is evaluated using the
20 traditional four prong injunction test, which requires plaintiff
21 establish:

- 22 (1) a strong likelihood of success on the merits;
23 (2) the possibility of irreparable injury to the
24 moving party if the injunction is denied;
25 (3) the balance of hardships favors the moving
26 party;
27 (4) the public interest favors granting the
28 injunction.

26 i) A Strong Likelihood of Success on the Merit

27 Were the Tribe to succeed on appeal, the December Order
28 enjoining flow releases exceeding 453,000 AF ("dry year"

1 conditions) pending a revised SEIS would likely be dissolved and
2 the existing ROD implemented. This result would allow for flows
3 in 2003 commensurate with the ROD water year type designation.
4 The Tribe contends that, because it is likely to succeed on
5 appeal and because any release less than a "wet" or "wetter year"
6 flow would damage fishery restoration efforts, the injunction
7 should be modified to allow for the ROD water year-type release
8 in 2003.

9 Given the current snowpack and forecast data, the Tribe
10 expects 2003 to be designated "wet" or "wetter" by the California
11 Department of Water Resources. Doc. 316 at 1-2 citing
12 Declaration of Scott McBain. Accumulated inflow into Trinity
13 reservoir as of January 13, 2003, was 154 percent of the 15 year
14 average and storage in Trinity reservoir at that time was 110
15 percent of the 15 year average. Doc. 316 at 2. Mr. McBain
16 predicts 2003 "will be at least normal, and most likely wetter
17 than normal." Doc. 318 at 2. Mr. McBain opines:

18 As of January 14, total precipitation in Reading
19 was at 148% of average (as measured from July 1, 2002
20 to January 14, 2003); precipitation in Eureka was at
21 156% of average (as measured from July 1, 2002 to
22 January 14, 2003) [citation omitted]. Trinity
23 Reservoir storage as of January 14, 2003 was 98% of
24 average and 69% of capacity. The water content of the
25 Northern Sierra Nevada Snowpack is 23.4 inches, which
26 is 173 percent of average. [citation omitted]. A map of
27 snowpack in the Western United States as of January 1,
28 2003 produced by the NOAA shows the Trinity mountains
at over 150% of normal. [citation omitted]....

By way of comparison, water year 2002 was 110% of
normal for the January forecast, and because the
February - April 2002 period was very dry, the actual
overall runoff volume reduced to only 85 percent of
normal. This resulted in a NORMAL water year based on
the Trinity River Mainstem Fishery Restoration Record
of Decision (ROD) water year classification
methodology.... water year 2002 was slightly dryer by
this time than current conditions, and even though the

1 remaining four months were unusually dry, the resulting
2 water year was still a NORMAL year. Therefore, because
3 the predicted runoff volume for 2003 is larger than any
4 of the last five years (four of those five years were
5 NORMAL, WET, or EXTREMELY WET water years), the
6 corresponding water year will almost certainly be at
7 least be [sic] a NORMAL year. If precipitation remains
8 near normal through April, the corresponding water year
9 designation would likely be in the WET category. If
10 precipitation decreases substantially, than the water
11 year designation would likely be in the NORMAL
12 category, and if precipitation maintained at higher
13 than normal levels as has occurred during October -
14 December 2002 period, the water year designation would
15 likely be EXTREMELY wet.

16 Doc. 318 at 2-4. Later climatic conditions prove these
17 opinions to be inaccurate.

18 Chester Bowling, Operations Manager for the Bureau of
19 Reclamation, expects 2003 to be a "wet" water year "under
20 existing conditions." Doc. 362 ¶ 4 at 2. According to the
21 Tribe, at a minimum, "the water year designation will likely
22 be normal." Doc. 316 at 2. This has changed, as of March
23 18, 2003, the water year-type is normal in northern
24 reservoirs and below normal in the southern reservoirs. The
25 Tribe argues the injunction capping flows to a maximum "dry
26 year" designation (453,000 AF) when 2003 is predicted to be
27 wet or wetter under the ROD, "undermines the legislative
28 mandate [sic] restoration and damages the Tribe's property
and trust interest in a restored fishery."

29 The Tribe is unlikely to succeed on its appeal to prevent a
30 revised SEIS which complies with NEPA. Until the revised SEIS is
31 completed, potential significant environmental impacts related to
32 the ROD's designated water year flow releases is at best unknown,
33 and likely to produce adverse impacts. The Tribe's reply
34 provides no new arguments why it is likely to prevail on appeal.

1 b. Possibility of Irreparable Injury to the Moving
2 Party if Injunction is Denied

3 The Tribe contends low flows in the Trinity and Klamath
4 systems "were a contributing cause of the September 2002 fish
5 kill" in the Klamath River. Doc. 316 at 11 citing declaration of
6 Harry Rectenwald. According to the Tribe, "over half of the
7 total fish killed in September of 2002 appear to have been of
8 Trinity origin." *Id.* at 12. Because of this tragedy,
9 "protection of the progeny of the surviving spawners of 2002 is
10 of paramount importance to the maintenance and restoration of the
11 fishery." *Id.* The Tribe submits Michael Orcutt's declaration to
12 support its argument that there is a "critical need for optimal
13 conditions in 2003 for the survival of the progeny of the
14 depressed 2002 chinook, coho runs." *Id.*

15 Mr. Orcutt, Director of the Hoopa Valley Tribal Fisheries
16 Department, provides a lengthy history of: the Tribe's right to,
17 and cultural use of, salmonid fish stocks; the well-known decline
18 of Trinity River fisheries and its impact on the Tribes; and the
19 urgency of restoring ESA listed Trinity River coho. Mr. Orcutt
20 opines Trinity River fall chinook populations increased in 2000
21 and 2001, compared to 1999, but drastically decreased in 2002.
22 Doc. 321 ¶¶ 13, 14 at 6. Because of this decrease,

23 it is critical that the progeny of these fish
24 experience optimal growth and survival conditions. This
25 year's relatively depressed returns of all Chinook and
26 coho salmon, must be allowed to realize its potential
27 with good rearing and smelting conditions for their
28 progeny, as provided by the ROD's flow recommendations.
In 2003, the 2001 brood year will be migrating downstream
and 2002 progeny will be rearing.

28 *Id.* ¶ 15 at 6.

1 Mr. Orcutt asserts the ROD stream flow regimes represent
2 "the best available science" to restore the Trinity Basin fish
3 populations. The ROD's temperature and flow targets for
4 critically dry and dry years,

5 provide MARGINAL water temperatures for juvenile
6 and smolt outmigration. Perpetuating additional
7 continuous years of MARGINAL water temperatures will
8 not recover the fishery as mandated by law. Extending
9 low flow conditions into next year is adopting a policy
10 that condones salmon population decline. Normal and
11 wetter water years provide flows to achieve OPTIMAL
12 water temperatures, and will provide significantly
13 better juvenile and smolt outmigration survival.
14 Further, normal and wetter year ROD stream flows
15 provide necessary water to enable long-term stream
16 channel changes which help establish fishery habitat
17 for subsequent generations of fish arising from progeny
18 of the depressed 2002 adult coho and chinook spawners.

19 Doc. 321 ¶ 16 at 6-7. Mr. Orcutt suggests that, "further delays
20 to the ROD implementation will hinder the ability to continue the
21 mainstem restoration effort critical to success of the
22 restoration objective." Doc. 321 ¶ 17 at 7. Mr. Orcutt's
23 opinion does not show a probability of "irreparable injury" to
24 the Tribe; the opinion demonstrates the possibility of
25 "significantly better juvenile and smolt outmigration" with
26 increased flows. Many experts for other parties seriously
27 dispute the issue of what effect 2002 flows had on the Klamath
28 River fish die-off and attribute the cause to mismanagement of
flows rather than lack of volume.

29 The Tribe contends "the flows provided in the Order are not
30 adequate to avoid further damage to the Tribe's property right in
31 the Trinity fishery that is held in trust by the United States."
32 Doc. 316 at 1. Harry Rectenwald's declaration states restoration
33 efforts directed at Trinity River should: "consider the continual

1 use of dry and critically dry year flow prescriptions, regardless
2 of the water year type, to be incapable of attaining fishery
3 Restoration goals." Doc. 320 at 4. The Tribe observes the court
4 exercised its equitable discretion in 2002, a "normal" water
5 year, and allowed for a release of 468,600 AF; "the Court found
6 'little potential harm to plaintiffs' in the 2002 releases."
7 Doc. 316 at 2 citing Memorandum Decision at 39, Doc. 224. The
8 amount released in 2002 was "insufficient to achieve measurable
9 progress towards fishery restoration." Doc. 316 at 2.

10 Therefore, "continuation of dry year flows will further damage
11 the already precarious state of the Trinity River fishery." *Id.*
12 Because the court found little potential harm to plaintiffs in
13 the 2002 "normal year" releases, and 2003 is predicted to be a
14 "wet" or "wetter year," the Tribe asks the court to exercise its
15 equitable jurisdiction and modify the injunction and remove the
16 cap, which will allow for the appropriate water designation year
17 flow in 2003. This argument ignores that conditions in the
18 Sacramento Delta and south are below normal and adverse impact is
19 expected to species in that region, compared to 2002 when
20 conditions in the south were normal.

21 SMUD contends the existing interim flows "will protect
22 fishery resources in the Trinity River basin while the federal
23 defendants prepare an analysis that complies with NEPA." Doc.
24 330 at 12. NCPA restates the court's summary judgment decision
25 that enjoining full ROD flows pending compliance with NEPA was
26 required "'to avoid irreparable injury' to Trinity River
27 resources as well as Sacramento River-Delta resources and all CVP
28 water users. Doc. 351 at 4 citing Order at 143. NCPA argues the

1 Tribe has not shown irreparable harm if it does not receive full
2 ROD flows pending appeal. Doc. 351 at 7. NCPA disputes the
3 Tribe's argument that increased flows are required to avoid
4 another "fish kill tragedy." *Id.* citing the DFG report. NCPA
5 points out the court previously stated "it does not wish to
6 'decide the permanent increase in the amount of water that should
7 flow into the Trinity River.'" *Id.* citing Order 138.

8 The CVPIA sets the annual Trinity River flows at 340,000 AF
9 pending adoption of a lawful ROD, or court decision if the
10 340,000 statutory limit is inadequate. The Tribe's reply
11 improperly places the burden of proof on opposing parties:
12 "plaintiffs have not demonstrated harm in normal or wetter years
13 that is greater than what they would experience under the order."
14 Doc. 360 at 5. Under Ninth Circuit law, the moving party (i.e.
15 the Tribe) must demonstrate the likelihood of irreparable harm if
16 the injunction is not modified. The Tribe has shown increased
17 flows may improve restoration efforts and that 2003 will likely
18 be a normal year in the north, but below normal in the south.
19 There will be more water in the river under 2003 water year
20 conditions. However, the Tribe has not demonstrated what minimum
21 flow is necessary in 2003 to avoid irreparable harm if the
22 453,000 AF cap remains in place pending completion of an SEIS
23 that complies with NEPA.

24

25 c. Balance of Hardships

26 The Tribe contends, "equity demands that the Tribe's
27 property rights in the Trinity River fishery, as well as the
28 interests of communities depending upon commercial export

1 fishing, and river based recreation, share in the increased
2 benefits of the more abundant water supply afforded by wetter
3 water years." The current flow-cap injunction would "be
4 inequitable, and [would] jeopardize natural resources in this
5 wetter water year." Doc. 316 at 13. The water year is not
6 "wetter" as the Tribe claims. This classification was based on
7 now obsolete data. The Tribe contends the balance of hardships
8 tips in its favor. The Tribe attributes the fish killed at
9 Klamath River to "low flows in the Trinity and Klamath systems...
10 which allowed an outbreak of common pathogens to spread swiftly
11 through an above average run of fall chinook." Doc. 316 at 11
12 citing California Department of Fish and Game report attached to
13 Declaration of Harry Rectenwald, Doc. 320. Mr. Rectenwald states
14 "the main contributing factors to the fish kill were density
15 dependent as the run size was above average." Doc. 320 at 2.
16 Increasing the river flows could have alleviated the problem:
17 "based upon historical records, the only factor that could be
18 controlled at the time of the kill to ameliorate the condition
19 was the amount of flow provided to the lower Klamath by releases
20 from major up stream reservoirs." *Id.*

21 The Fish and Game report outlines "potential contributing
22 factors," including pathogens, flow, River runs size, run-time,
23 air and water temperatures, toxic substances and fish passage.
24 Doc. 310 attachment 1 at ii. The cause of death was "disease
25 from the ciliated protozoan *Ichthyophthirius multifiliis* (ICH) and
26 the bacterial pathogen *Flavobacter columnare* (Columnaris)." Doc.
27 310 attachment 1 at 4. "High water temperatures and low flows
28 present in September favored amplification (rapid development) of

1 ICH... [the parasite's] life cycle is temperature dependent and
2 accelerated with warmer temperatures." *Id.* The warmer water
3 temperatures also allowed *Columnaris* to multiply and "explode,"
4 as the bacteria is "present at all times in the aquatic
5 environment." *Id.* at 7. The Department of Fish and Game (DFG)
6 compared flows between 1988 and 2002; several years had similar
7 or lower average flows than September 2002 (1988, 1991, 1992,
8 1994) without any fish kill. *Id.* at 10. Prior to 1988, however,
9 "average September flows never approached the low level observed
10 during 2002." *Id.* The DFG has concluded that based upon modeled
11 unimpaired historical flows, "the Scott and Shasta rivers could
12 not have contributed a substantial amount of flow to the Klamath
13 River during September 2002 to have prevented the fish kill, even
14 if all agricultural diversions had ceased." *Id.*

15 Plaintiffs argue that lifting the injunction will cause
16 irreparable harm to them as already decided in the prior
17 preliminary injunction and summary judgment decisions.
18 Plaintiffs cite the first preliminary injunction proceeding in
19 2001, where "the Court found that 'the balance of hardships
20 favors plaintiffs" because, "plaintiffs adequately establish the
21 probability of irreparable [environmental] injury [if full ROD
22 flows were allowed pending resolution of the lawsuit]: lost water
23 for current deliveries and [stor]age, which cannot be replaced;
24 and additionally, a potential for electrical energy loss, [all
25 of] which will adversely impact the human environment as well as
26 salmonid species in the Sacramento River." Doc. 350 at 16
27 citing Doc. 136 at 30:9-12, n. 33. At the second preliminary
28 injunction hearing, April 2002, plaintiffs note, "the Court

1 found: 'Implementation of the ROD will affect endangered and
2 threatened species in the Trinity River, Klamath River,
3 Sacramento River and Sacramento/San Joaquin Delta and designated
4 critical habitat... Implementation of the ROD will affect the
5 availability of water supplies for CVP contractors and for CVP
6 power generation, with resulting environmental and socio-economic
7 impacts." Doc. 350 at 16 citing Doc. 224 at 23-24. The court
8 modified the injunction to allow for release of an additional
9 100,000 AF of CVP water, in 2002 only, (to 469,000) based upon
10 testimony that the harm to plaintiffs could be mitigated with the
11 limited increases, if other CVP interests would not be harmed.
12 The Bureau did not use the 100,000 AF for Trinity River purposes
13 in 2002.

14 Plaintiffs observe any harm related to flow releases, was
15 evaluated and led to the flow-cap injunction. The summary
16 judgment found the ROD's EIS was based upon inadequate
17 environmental studies and did not comply with NEPA or the ESA,
18 especially as to ROD flow release impacts on plaintiffs, CVP
19 water users, and the environment in the Sacramento River and
20 Delta. Plaintiffs contend modifying the flow-cap injunction
21 would "increase irreparable harm threatened against plaintiffs
22 after they won this lawsuit." Doc. 350 at 18 (emphasis in
23 original). Removing the flow-cap injunction would deplete CVP
24 storage, possibly reduce CVP water delivery, and add to the
25 chronic shortage in CVP water delivery. *Id.* Environmental
26 impacts include: groundwater overdraft, land subsidence, and
27 fallowing and air pollution. Doc. 350 at 18-19.

28 Plaintiffs further allege full ROD flows may harm the

1 Trinity fishery by disrupting spawning gravel habitats. Doc. 350
2 at 23 citing Harvey Decl. 331 at ¶ 8. Dr. Harvey contends gravel
3 deficits will occur with "wet" or "wetter" flow releases of 1500
4 CFS and 11,000 CFS respectively. Such deficits would require
5 between two and fourteen ten-ton truckloads of gravel
6 replacement, per day, over the course of the year. Doc. 331 at ¶
7 8 at 5. Dr. Harvey concludes "release of flows in excess of
8 647,000 AF, with peak discharge is in excess of 6,000 cfs is
9 likely to cause significant damage to the spawning gravels on the
10 Trinity River." *Id.* at ¶ 9 at 5.

11 Plaintiffs dispute the Tribe's conclusion that full flows
12 could have prevented the Klamath River fish kill or can prevent a
13 recurrence. Plaintiffs point out fall releases under the ROD are
14 450 CFS, "regardless of year type." Doc. 350 at 19. This level
15 of release would not have prevented the Klamath fish kill. *Id.*
16 The DFG report confirms this conclusion. Doc. 320, attachment 1
17 at 5-7. Plaintiffs dispute the Tribe's claim that increased ROD
18 flows are required to reverse declining anadromous fish
19 populations, citing the declaration of Donald Chapman, "there is
20 'no significant trend in natural spawner abundance over time.'" *Id.*
21 Doc. 350 at 21 citing Doc. 347 ¶ 3. According to plaintiffs, "in
22 the Trinity River, large numbers of natural spawners do not
23 necessarily result in large returns of spawning adults when their
24 progeny return to spawn four years later, and small spawning
25 escapements have produced relatively large returns of spawning
26 adults." *Id.* citing 347 at ¶ 4. Plaintiffs note that if the
27 water year turns out to be wetter than a dry year, as predicted,
28 "precipitation within the watershed would increase stream flows

1 within the tributaries to the Trinity River, supplying better
2 than 'dry year' flows into mainstream." Doc. 350 at 22.

3 SMUD does not oppose the Tribe's request to increase flows
4 in 2003 commensurate with the water year type, "in the interests
5 of cooperation." Doc. 330 at 3. SMUD requests the court address
6 the issue again in 2004, and use "evidence collected as a result
7 of any increased flow in 2003," to determine the appropriate flow
8 levels for 2004. Doc. 330 at 1. SMUD avers, "as a matter of
9 law, the ROD cannot be implemented without a NEPA analysis that
10 analyzes the impacts of the ROD flows against the reasonable
11 range alternatives." Doc. 330 at 2. Thus, "there is absolutely
12 no legal basis for implementation of ROD flows before the SEIS is
13 completed." *Id.* SMUD asserts it has already demonstrated that
14 implementing ROD flows "would irreparably harm SMUD's interests."

15 NCPA accuses the Tribe of ignoring the substantial injury to
16 plaintiffs, if ROD flows are implemented without a thorough and
17 legal SEIS. Doc. 351 at 8. NCPA contends the Tribe's motion
18 ignores "the impact of full ROD flows on (1) endangered species
19 in the Sacramento River and Delta and (2) power system
20 reliability." *Id.*

21 The Tribe rejoins that "plaintiffs will not be harmed to any
22 greater extent by [full flows] than they otherwise would be by
23 the dry year flows ordered by this court." In contrast, full
24 flows will "prevent further habitat degradation and consequent
25 irreparable harm to the Tribe's fishery." Doc. 360 at 1. The
26 Tribe contends that if it wins its appeal, "federal defendants
27 will have needlessly devoted and essentially wasted considerable
28 time and resources that could have otherwise been devoted to

1 other aspects of the fishery restoration program, such as
2 ensuring ESA compliance for Trinity Division operations or moving
3 forward on non-flow measures of the ROD." *Id.* at 4. In reply,
4 the Tribe acknowledges that ROD flows "would not have completely
5 ameliorated conditions that led to the September 2002 the Klamath
6 fish kill." However, "normal or higher flows will improve
7 chinook smolt survival, thus offsetting the loss of chinook fry
8 production due to unspawned adults killed in September 2002, and
9 will improve successful passage and growth of the smolts through
10 the lower mainstem Klamath River." Doc. 360 at 8. Restoration
11 efforts to date, "have failed to restore the fishery to its pre-
12 TRD levels." *Id.* at 9. The Tribe contends no party has
13 challenged "the Tribe's evidence that normal-year flows are
14 necessary to achieve meaningful fishery restoration." Under the
15 current order, "harm to the fishery, in the form of further
16 habitat degradation, will inevitably occur." *Id.* In their
17 supplemental responses to the second Bolling Declaration
18 requested by the court, plaintiff-intervenors have made such a
19 showing.

20 The Tribe places the burden of proof on its opposing
21 parties, and repeatedly suggests that because opposing parties
22 have not shown "credible evidence to counterbalance the need for
23 normal year flows in a normal water year," the Tribe's motion
24 should be granted.

25 The balance of hardships was painstakingly considered in the
26 December 20, 2002 Memorandum and Order. Non-flow ROD measures
27 are proceeding without restraint. The Tribe offers no evidence
28 that any resource will be diverted from a non-flow measure to

1 comply with NEPA. To the contrary, full flow measures have the
2 potential to harm all other parties, the environment, and the
3 public interest due to Interior's failure to prepare an EIS that
4 complied with NEPA and the ESA.

5 Regarding non-flow measures, the December 20 Decision
6 concludes: "considering the totality of all factors, the balance
7 of hardships weighs heavily against enjoining the non-flow
8 measures in the ROD and the implementation of the ROD EIS of
9 critically dry and dry year flows." Doc. 305. "The Sacramento
10 River and Delta ESA listed species are not harmed by immediately
11 implementing the ROD's non-flow measures and permitting the use
12 of critically dry and dry year flows provided by the ROD. Any
13 harm to the NEPA decision-making process by allowing these
14 measures to go forward is overwhelmingly offset by the benefit to
15 the Trinity River fishery and need to discharge the federal trust
16 obligation owed to the Indian Tribes." Doc. 305 at 128.

17 In contrast, regarding ROD flow measures, the decision
18 concludes:

19 the balance of the hardships does favor enjoining
20 the implementation of the ROD permanent recommended
21 flows above the 452,608 AF level, pending full
22 compliance with NEPA and ESA. There are ESA listed
23 species on both sides of the balance and other impacts
24 on the CVP water users which have not been properly
25 subjected to a 'hard look.' NEPA's purpose is to
26 prevent the agency from making a decision that it will
27 later regret. The bureaucratic tendency to choose an
28 option simply because it has already been implemented
is a harm to the environment that is real.

29 Congress has set the minimum release of 340,000
30 acre-feet a year of water as a failsafe to prevent
31 further degradation of the Trinity River pending
32 Interior's lawful completion of scientific study of the
33 issues. Congress' finding deserves deference.

34 The court has no inclination to, nor should it,
35 substitute its judgment to decide the permanent
36 increase in the amount of CVP water that should flow

1 into the Trinity River. This would result in judicial
2 micro-management of the Trinity River Restoration.

3 Doc. 305 at 128-129.

4 The Tribe has provided information which suggests there is
5 additional water in the CVP, overall, and that the federal
6 defendants flow scenarios may prevent another fish die-off.

7
8 d. Public Interest

9 The Tribe argues that modifying the flow cap injunction
10 serves the public interest because it will insure "that the trust
11 responsibility is met and restoration of the Trinity fishery will
12 proceed expeditiously," Doc. 316 at 15, and that "the public
13 interest will also be served by staying that portion of this
14 Court's Order in which capped flows at 453,000 AF or [sic]
15 subsequent years run [sic] out to be normal or wetter water
16 years." *Id.* at 16. It is not in the public interest to order
17 flow releases which have not been adequately studied under NEPA
18 and the ESA, especially when the environmental impacts on the
19 Sacramento River and Delta are unknown, but expected to be
20 adverse, until subjected to future study.

21 3) Procedural concerns

22 "Federal Rule of Civil Procedure 62(c) 'codifies the 'long
23 established' and narrowly limited right of a trial court 'to make
24 orders appropriate to preserve the status quo while the case is
25 pending in (an) appellate court.'" *McClatchy Newspapers*, 686
26 F.2d at 734, citing *United States v. El-O-Pathic Pharmacy*, 192
27 F.2d 62, 79 (9th Cir. 1951). "When a judgment is appealed,
28

1 jurisdiction over the case passes to the appellate court. The
2 filing of a notice of appeal generally divests the district court
3 of jurisdiction over the matters appealed." *McClatchy Newspapers*
4 *v. Central Valley Typographical Union No. 46, Intern.*
5 *Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982), cert
6 denied 316 U.S. 671 (1982) (emphasis added) (citations omitted).
7 Although a District Court may preserve the status quo through a
8 stay, where circumstances so justify, Rule 62(c): "does not
9 restore jurisdiction to the district court to adjudicate anew the
10 merits of the case after either party has invoked its right of
11 appeal and jurisdiction has passed to an appellate court."
12 *McClatchy Newspapers*, 686 F.2d at 734.

13 The Tribe requests a modified injunction which does not
14 maintain the status quo. The Tribe requests the ROD full flow
15 releases be implemented, even though the ROD's EIS has been
16 adjudicated as unlawful due to interior's failure to comply with
17 NEPA and the ESA. The Tribe attempts to "adjudicate anew the
18 merits of the case" in order to avoid the flow-cap order which
19 enjoins some of the ROD's flow measures. The court has
20 jurisdiction to maintain the status quo while this case is on
21 appeal. Absent changed circumstances, "equitable jurisdiction"
22 exists, as suggested by the Tribe, to reconsider the summary
23 judgment arguments and modify the injunction to allow for full
24 flow measures, until a lawful SEIS is completed. The 2002
25 modified injunction, which allowed for flows up to 469,000 AF,
26 was issued prior to a final judgment and appeal in this case
27 under different conditions. The Tribe's comparisons to that
28 modification are misplaced.

1 4) Evidentiary Disputes

2 Plaintiffs object to alleged hearsay evidence submitted by
3 the Tribe: exhibits 5, 6 and 7 to the declaration of Robert F.
4 Franklin. Plaintiffs also object to paragraphs 7 through 13 in
5 Mr. Franklin's second declaration. SMUD submitted a partial
6 joinder to this objection long after the deadline passed for
7 filing opposition to this motion. SMUD's Partial Joinder, Filed
8 February 21, 2003, Doc. 372.

9 Exhibits 5, 6, & 7 include hearsay regarding discussions
10 about SMUD's alternative measure. This evidence is not relevant
11 to the motions under consideration. The December decision is not
12 under reconsideration; therefore, there is no reason to consider
13 documents relating to the study of specific alternative measures.
14 Exhibits 5, 6 and 7 are ordered STRICKEN from the record.
15 Paragraphs 7 through 13 of Mr. Franklin's second declaration are
16 ordered STRICKEN for the same reason.

17
18 IV. SUPPLEMENTAL BRIEFING

19 Pursuant to the Court's request, Chester Bowling filed a
20 supplemental declaration February 27, 2003, regarding evolving
21 storage conditions and the likely effect of increased releases to
22 protect against a recurrence of the fish-kill and the potential
23 effect on the Sacramento Delta environment and on other CVP
24 interests. As of March 25, 2003, all CVP reservoirs show storage
25 in excess of the 15 year average accumulated in-flow, and
26 accumulated precipitation reports show in excess of the 15 year
27 average in the northern Trinity and Shasta Reservoirs; but below
28 average in the southern New Melones, Millerton, and Folsom

1 Reservoirs. The Bolling Declaration further shows snowpack in
2 the Central and Southern Sierra Nevada mountains to be below
3 average, while the water content of the snowpack in Shasta and
4 Trinity Basins is higher than average. Higher than average
5 releases from Shasta, Folsom and Oroville Reservoirs were
6 required in February to meet the X2 standard. Trinity Reservoir
7 diversions into the Sacramento River-Delta were also required in
8 February to meet water quality objectives imposed by law.

9 Mr. Bolling further opines that he "cannot state that an
10 increase to Trinity River releases above the 453,000 AF specified
11 by the Court can be made without potential adverse impacts to CVP
12 water and power users. Because of the current disparity of
13 hydraulic conditions between the Northern and Central CVP
14 watersheds, the February operations forecast relied heavily on
15 water regulated from Trinity and Shasta Reservoirs to satisfy
16 project purposes and obligations. Dry conditions in February
17 have done nothing to improve the situation." Dry conditions
18 continued through March of 2003.

19 Instead of directly answering the Court's question about
20 what minimum flow releases were required to sustain Trinity River
21 restoration goals and to prevent a recurrence of lower Klamath
22 River fish-kill through the auspices of the Fish and Wildlife
23 Service and related agencies, Federal Defendants recommend three
24 alternate scenarios directed toward preventing a fish-kill in
25 2003, which vary in additional water releases to the Trinity
26 River from 34,805 acre feet to 69,206 acre feet depending upon
27 the timing and duration of the additional water releases
28 specified.

1 The Tribe and all Plaintiffs vigorously criticize the
2 Federal Defendants' proposal. The Tribe criticizes the Bolling
3 Declaration for leaving unanswered the essential question of what
4 operational tools and procedures the Bureau has at its disposal
5 to minimize or avoid impacts to South of Delta allocations while
6 fulfilling fishery restoration mandates. In large measure, the
7 February 27 hydrology report does not address the Court's
8 concerns. These concerns are also unaddressed by the FEIS and
9 ROD which contributes to the ROD's illegality.

10 The Tribe notes that the Bolling Declaration does not
11 support the 2003 water year's operational constraints for
12 deliveries of 60% of contract for South-of-Delta water users,
13 complaining diversions from the Trinity River are wrongfully at
14 the expense of Trinity River fishery restoration. The Bolling
15 Declaration does not specify which existing or contemplated "CVP
16 water and power users" may experience potential adverse impacts
17 from increased Trinity flows, or how such an impact, if it
18 arises, would be distributed among the various categories of CVP
19 users. The Bolling Declaration does not specify or quantify
20 "potential adverse impact" that he "cannot say will not occur."
21 The Tribe notes that additional releases to South-of-Delta users
22 usually occur after each year's February forecast.

23 The Tribe questions X2 management for Sacramento or American
24 River temperatures resulting from potentially reduced cold water
25 storage. Because this problem only arises when storage drops
26 "below 600,00 acre feet in Trinity Reservoir and 1.9 million acre
27 feet in Shasta Reservoir," and the projected end of September
28 carry-over storage in both reservoirs for water year 2003 is well

1 above those minimums, carry-over storage "should not be a
2 problem." The Tribe makes three additional legal arguments,
3 including their points 6 and 7 that absolute priority must be
4 given to the Trinity Fishery without regard to any competing CVP
5 use.

6 All Plaintiffs and Intervenors strongly criticize and oppose
7 the Federal Defendants' Klamath River flow proposals. They note
8 that the lower Klamath River is supplied in part by releases from
9 another water system besides the Trinity River and Trinity or
10 Shasta Reservoirs. All complain that there is no sound
11 scientific or factual support to show that the proposed August-
12 September flow scenarios will materially improve the lower
13 Klamath River fishery conditions that actually caused the 2002
14 fish die-off. They argue flow releases are already 113,000 acre
15 feet above the CVPIA statutory minimum of 340,000 acre feet. The
16 Districts, SMUD and Power Generators all assert that: no certain
17 cause for the fish-kill has been identified; there is no
18 certainty that the same conditions will exist in the fall of
19 2003; there is no basis to conclude temperature reduction would
20 simulate upstream migration; and no data to establish temperature
21 reduction will occur by the proposed flow scenarios. They
22 complain of a potential threat to another sensitive aquatic
23 species, the yellow legged frog, is caused by the Federal
24 Defendants' proposal.

25 All Plaintiffs state that the hydraulic conditions for any
26 increase of flows above the 453,000 acre foot release mandated by
27 the Court order will threaten CVP water delivery impacts in 2003;
28 will jeopardize the 1.49 million acre feet and end-of-September

1 storage requirements in Shasta Reservoir; and may cause further
2 reductions in 2003 water allocations to CVP contractors. All
3 point to the cases pending in the Northern District of
4 California, Civ. No. C02-2006 SBA and related case No. C00-01955
5 SBA which specifically address the lower Klamath River
6 conditions. Additional points are raised by expert declarations
7 for the Districts, SMUD and the Power Generators that seriously
8 question the efficacy of the February 27 Bureau response.

9 Additional problems are described as problematic for other
10 fish and wildlife species in the Trinity River due to historical
11 low flow status during August and September of the water year. A
12 surge in Trinity Reservoir stored releases during a natural low
13 flow will have unintended consequences which may affect spring
14 run Chinook salmon, Sacramento river fish, including winter run
15 Chinook salmon and other threatened species, as well as other
16 wildlife that inhabit the Trinity River's riparian zone during a
17 natural low-flow period. Low-flow releases at Iron Gate Dam are
18 referred to by a Yurok Tribe biologist in the Northern District
19 case as being the likely cause of the 2002 fish-kill. In
20 substance, the Plaintiffs and Intervenors argue that measures
21 should not be utilized in this case to address the lower Klamath
22 River problem which is already before the Northern District
23 Court.

24 In the final analysis, environmental hardships on both sides
25 must be balanced. The Bureau needs authority within the exercise
26 of its reasonable discretion to utilize additional flows up to
27 and including 50,000 additional acre feet in the 2003 water year
28 in the event that the Trinity River fishery will be damaged by

1 the absence of such flows and only if such water is not available
2 from an alternate source as may be prescribed in the Northern
3 District case. The risks of threatened environmental harm to the
4 Sacramento Delta and the south are too great to justify going
5 beyond such releases until a lawful SEIS has been completed.

6 V. CONCLUSION

7 Federal defendants' evidence is sufficient to warrant a
8 modified injunction to extend the SEIS completion deadline to
9 July 2004.

10 The Tribe has not shown the errors of law necessary to
11 justify a stay of the injunction. Its evidence concerning the
12 2003 water year, when balanced against hardships to all,
13 justifies a limited modification of the injunction for 2003,
14 pending appeal, to permit the Bureau to use up to 50,000
15 additional acre feet of CVP water for Trinity River restoration,
16 only if such water is not made available to the lower Klamath
17 River in the Northern District cases.

18 IT IS ORDERED:

19 1. Federal defendants' motion to modify the December 20,
20 2002 injunction is GRANTED; Federal defendants shall complete the
21 SEIS on or before July 9, 2004. Federal Defendants shall provide
22 progress reports to the Court and parties, by fax and U.S. Mail,
23 on June 20, 2003, and January 20, 2004.

24 2. The Hoopa Valley Tribe's motion to stay the December
25 injunction, which requires federal defendants to revise the SEIS
26 is DENIED.

27 3. The Hoopa Valley Tribe's motion to modify the injunction
28 to allow for full-flow releases commensurate with the applicable

1 ROD water year-type, pending appeal, is GRANTED to allow the
2 Bureau, in exercise of its reasonable discretion, to use up to
3 50,000 additional acre feet of CVP water in the 2003 water year,
4 only if such water is not available as a result of the Northern
5 District cases.

6 DATED: April 4, 2003.



Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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U. S. District Court
Eastern District of California
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CERTIFICATE OF SERVICE

I hereby certify that this document was served on all parties listed below by FAX on April 4, or April 7, 2003.

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Deputy Clerk

United States District Court
for the
Eastern District of California
April 7, 2003

* * 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 April 7, 2003, 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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