



1 judgment are completed.

2 On July 16, 2008, Plaintiffs filed a motion for summary  
3 judgment on their claim that the Bureau of Reclamation ("Bureau"  
4 or "Reclamation") violated and is violating section 7(a)(2) of  
5 the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), by  
6 executing and implementing the 28 Sacramento River Settlement  
7 Renewal Contracts ("SRS Contracts" or "Settlement Contracts"), on  
8 the grounds that the Bureau did not adequately consult with the  
9 United States Fish and Wildlife Service ("FWS") concerning the  
10 SRS Contracts and did not otherwise satisfy its affirmative duty  
11 to ensure that the contracts' execution and implementation will  
12 not likely jeopardize the continued existence of the threatened  
13 delta smelt or adversely modify its critical habitat. Doc. 680.  
14 Plaintiffs also raised similar challenges to the Bureau's  
15 execution and implementation of contracts between the Bureau and  
16 thirteen Delta Mendota Canal Unit ("DMCU") contractors. *Id.*

17 The Contract Decision denied Plaintiffs' motion as to the  
18 DMCU Contracts on the ground that Plaintiffs lack standing due to  
19 the DMCU Contracts' shortage provisions. Contract Decision, Doc.  
20 761, at 39-40. With respect to the SRS Contracts, however, the  
21 court ruled in Plaintiffs' favor on a number of threshold/  
22 jurisdictional issues, holding that: (1) Plaintiffs have standing  
23 to pursue their claims against the Bureau; and (2) implementation  
24 of the SRS Contracts constituted final agency action within the  
25 scope of the Administrative Procedure Act ("APA"), 5 U.S.C. §  
26 704. The district court also found that, assuming a third  
27 threshold issue did not bar Plaintiffs' claims, federal  
28 defendants' ESA § 7 consultation was unlawful and the Bureau did

1 not otherwise satisfy its section 7(a)(2) obligations. *Id.* at  
2 91.

3 A final ruling on the third threshold issue, whether and to  
4 what extent Plaintiffs' claims under ESA section 7(a)(2) are  
5 barred by the recent Supreme Court decision in *National*  
6 *Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct.  
7 2518, 2526 (2006), was withheld pending a complete analysis.  
8 *Home Builders* stands for the proposition that ESA section 7(a)(2)  
9 only applies to actions over which a federal agency exercises  
10 discretion. *Id.* The SRS Contractors maintain that the Bureau  
11 lacks discretion to operate the CVP in any manner that would  
12 interfere with their senior water rights, which, according to the  
13 SRS Contractors "emanate not from their contracts with [the  
14 Bureau], but from their own water rights, which are senior to  
15 Reclamation's." Doc. 707 at 14. Federal Defendants appear to  
16 concur with this assertion, at least in part, having argued: "It  
17 is not the settlement contracts that constrain Reclamation's CVP  
18 operations, but the senior water rights claimed by the settlement  
19 contractors." Doc. 742 at 4.

20 The inchoate Decision found that "the SRS Contracts were  
21 formed only after negotiation reflecting compromise over terms  
22 [such as] quantity of water to be delivered and timing of  
23 deliveries, over which the Bureau exercised some degree of  
24 discretion." Contract Decision at 69. The Decision also  
25 reviewed other authorities, some of which supported the SRS  
26 Contractors' view that the Bureau exercises no discretion over at  
27 least some portion of the water delivered under their contracts.  
28 *Id.* at 57-68.

1 Plaintiffs assert in their motion for certification for  
2 interlocutory appeal that:

3 [T]his Court has already made all necessary  
4 determinations to warrant summary judgment on [the] ESA  
5 § 7(a)(2) claim against the [SRS Contracts], by  
6 concluding that: (1) Plaintiffs have standing to  
7 challenge these contracts' execution and  
8 implementation, which constitute final agency actions;  
9 (2) [the Bureau] has discretion -- which it has  
10 exercised here -- to modify, among other terms, the  
11 base and project supply quantity terms in the  
12 settlement renewal contracts and to implement these  
13 contracts in a manner consistent with Federal and state  
14 environmental laws; and (3) [the Bureau] has not  
15 complied with ESA § 7(a)(2)'s procedural and  
16 substantive mandates applicable to contract renewal and  
17 implementation.

11 Doc. 770-2 at 3.

12 Plaintiffs oversimplify the Contract Decision and the  
13 complexity of applying *Home Builders* to the intricate contractual  
14 relationship between the Bureau and the SRS Contracts, a  
15 relationship which is defined by a complex mosaic of federal and  
16 state statutory commands. The Decision is in the process of  
17 resolving these issues:

18 This scenario does not allow for the straightforward  
19 application of *Home Builders*' relatively bright-line  
20 rule. Here, in contrast to *Home Builders*, there are no  
21 enumerated statutory criteria (either federal or state)  
22 guiding the Bureau's negotiation and execution of the  
23 Settlement Contracts. On the one hand, the Bureau is  
24 legally bound to comply with non-conflicting state  
25 law, see CVPIA § 3406(b), including SWRCB Decision 990,  
26 which directed the United States to reach a settlement  
27 agreement with the Sacramento River water users and  
28 precludes the Bureau from operating the projects in the  
29 absence of mutually agreed-upon Settlement Contracts.  
30 On the other hand, the Bureau negotiated settlements  
31 that contain[] shortage provisions which compromise the  
32 SRS Contractors' claimed senior rights.

33 If the SRS Contractors held adjudicated senior rights  
34 to divert water in a finite quantity from the  
35 Sacramento River, and the SRS Contracts simply embodied  
36 the Bureau's obligations to ensure that its operation  
37 of the CVP did not impede the SRS Contractors'

1 specifically quantified senior rights, the Bureau would  
2 lack discretion under Home Builders and any section  
3 7(a)(2) challenge to the SRS Contracts would be barred.  
4 However, the SRS Contracts were formed only after  
5 negotiation reflecting compromise over terms as to  
6 quantity of water to be delivered and timing of  
7 deliveries, over which the Bureau exercised some degree  
8 of discretion.

9 It would be arbitrary and capricious for the court to  
10 ignore the existence of the SRS Contractors'  
11 substantial senior rights, which have been recognized  
12 and are real under federal and state law, although not  
13 definitely quantified. These senior rights are beyond  
14 the reach of the ESA. If the Base Supply is used as a  
15 proxy for the senior rights, it is an imperfect one,  
16 because: (a) the Base Supply is defined by the  
17 contracts themselves and was the product of  
18 negotiation; and (b) the Shasta Critical Year shortage  
19 provision affords the Bureau discretion over a quarter  
20 of the Base Supply under certain circumstances.

21 To resolve the applicability of Home Builders to the  
22 Settlement Contracts and to narrow the issues in this  
23 case, it is necessary for the Federal Defendants and/or  
24 the Settlement Contractors to present evidence on the  
25 nature and extent of their claimed senior water rights.  
26 If, arguendo, this evidence establishes that the  
27 Settlement Contractors hold senior rights to a certain  
28 volume of water, it is appropriate to determine as a  
matter of law that the Bureau lacks any discretion  
under Home Builders over that volume of SRS Contract  
water.

18 Contract Decision at 68-71.

19 The SRS Contractors have been laboring under the assumption  
20 that they will be given an opportunity to present evidence  
21 relevant to the extent of the United States' discretion over the  
22 renewal of the settlement contracts. See Reporter's Transcript  
23 of Proceedings held on Dec. 3, 2008, at 28. Until the district  
24 court has an opportunity to fully complete the *Home Builders*  
25 analysis, based in part on facts which will be presented in the  
26 ongoing proceedings, there is nothing for Plaintiffs to appeal.  
27 No final order has yet been entered on the summary judgment  
28 motion regarding the SRS Contracts.

1 Plaintiffs are free to contribute their legal views and  
2 analysis in opposition to the SRS Contractors' evidence before  
3 the *Home Builder's* analysis is completed. Whether Plaintiffs are  
4 correct in their contention that *Home Builders* does not exempt  
5 the Bureau's compliance with the ESA because the agency exercised  
6 discretion to negotiate supply and quantity terms in the  
7 settlement renewal contracts must be fully heard and decided.

8 Hearing Plaintiffs' premature motion on March 2, 2009 will  
9 substantially interfere with the ongoing summary judgment  
10 proceedings and will impede the decision-making process now in  
11 progress. Accordingly, Plaintiffs' motion for certification for  
12 interlocutory appeal or in the alternative for reconsideration of  
13 the November 19, 2008 memorandum decision is DENIED WITHOUT  
14 PREJUDICE. Plaintiffs may offer their legal arguments and any  
15 evidence as opposition to the SRS Contractors' evidence and  
16 argument. Until a final decision on the pending summary judgment  
17 motion is entered, Plaintiffs' motion is premature.

18  
19 SO ORDERED

20 DATED: February 12, 2009

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22           /s/ Oliver W. Wanger            
23 Oliver W. Wanger  
24 United States District Judge  
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