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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DELTA SMELT CONSOLIDATED
CASES

1:09-CV-407 OWW DLB

SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY, *et al.* v.
SALAZAR, *et al.* (1:09-cv-407
OWW DLB)

MEMORANDUM DECISION RE CROSS
MOTIONS FOR SUMMARY JUDGMENT
RE REASONABLE AND PRUDENT
ALTERNATIVE CLAIMS (Docs.
230 & 236).

STATE WATER CONTRACTORS v.
SALAZAR, *et al.* (1:09-cv-422
OWW GSA)

COALITION FOR A SUSTAINABLE
DELTA, *et al.* v. UNITED
STATES FISH AND WILDLIFE
SERVICE, *et al.* (1:09-cv-480
OWW GSA)

METROPOLITAN WATER DISTRICT
v. UNITED STATES FISH AND
WILDLIFE SERVICE, *et al.*
(1:09-cv-631 OWW DLB)

STEWART & JASPER ORCHARDS *et*
al. v. UNITED STATES FISH
AND WILDLIFE SERVICE (1:09-
cv-892 OWW DLB)

I. INTRODUCTION

This case is before the court on the parties' cross motions for summary judgment to adjudicate the United States Fish and Wildlife Service's ("FWS") December 15, 2008 biological opinion ("BiOp" or "2008 BiOp") regarding the impact of coordinated operations of the Central

1 Valley Project ("CVP") and State Water Project ("SWP")
2 (the "Projects") on the threatened delta smelt, prepared
3 pursuant to Section 7(a)(2) of the Endangered Species Act
4 ("ESA"), 16 U.S.C. §§ 1536(a)(2). Because the BiOp found
5 that planned Project operations would jeopardize the
6 continued existence of the delta smelt and/or adversely
7 modify its critical habitat, FWS proposed a Reasonable
8 and Prudent Alternative ("RPA") that imposes certain
9 operating restrictions on the Projects.
10

11 Plaintiffs in all five consolidated cases
12 ("Plaintiffs") argue that FWS was required to make
13 certain findings in the text of the BiOp related to the
14 RPA, namely whether (1) the RPA is consistent with
15 continued operations of the SWP and CVP, (2)
16 implementation of the RPA is economically and
17 technologically feasible, and (3) the RPA is capable of
18 being implemented within the legal authority and
19 jurisdiction of the operators, the Bureau of Reclamation
20 ("Reclamation") and the California Department of Water
21 Resources ("DWR"). Doc. 237. Real Party in Interest,
22 California Department of Water Resources ("DWR") filed a
23 brief in support of Plaintiffs' motion. Doc. 246.
24 Federal Defendants oppose. Doc. 274. Plaintiffs and DWR
25 replied. Docs. 295 & 300.
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1 Federal Defendants cross-move for summary judgment on
2 this claim, arguing that the RPA satisfies the
3 requirements of the ESA and its regulations because:

4 (1) Reclamation and FWS "worked together
5 throughout the consultation process, to identify
6 an RPA that will avoid jeopardy";

7
8 (2) If the entire record is examined, the RPA
9 satisfies all of the criteria set forth in the
10 ESA and its regulations; and (3) the ESA does
11 not permit Federal Defendants to balance the
12 survival of the Delta smelt against the
13 potential economic effects of the RPA.

14 Doc. 231.

15
16 Plaintiffs oppose this motion, insisting that:

17 (1) FWS cannot satisfy the relevant requirements
18 by arguing that they collaborated with
19 Reclamation because:

20 (a) FWS has ultimate responsibility for the
21 RPAs,

22 (b) FWS has a duty to examine the relevant
23 requirements on the face of the BiOp, and

24 (c) FWS improperly and without explanation
25 disregarded RPAs offered by DWR without
26 explanation;
27
28

1 (2) Federal Defendants fail to otherwise show
2 that the RPA satisfies the requirements of law;
3 and

4 (3) Federal Defendants have a duty, not
5 performed, to assess the feasibility of the RPA.

6 Doc. 273. DWR filed its own, complimentary opposition.

7 Doc. 282. Federal Defendants filed a reply. Doc. 296.

8 Plaintiffs also move to strike Federal Defendants' cross
9 motion. Doc. 284.

10
11
12 **II. STATUTORY/REGULATORY FRAMEWORK**

13 Section 7 of the ESA "prescribes the steps that
14 federal agencies must take to ensure that their actions
15 do not jeopardize endangered wildlife and flora."

16 *National Ass'n. of Homebuilders v. Defenders of Wildlife,*

17 551 U.S. 644, 651 (2007). Section 7(a)(2) provides that

18 "[e]ach Federal agency shall, in consultation with and
19 with the assistance of the Secretary [of Commerce or the
20 Interior], insure that any action authorized, funded, or
21 carried out by such agency (hereinafter in this section
22 referred to as an 'agency action') is not likely to
23 jeopardize the continued existence of any endangered
24 species or threatened species." 16 U.S.C. § 1536(a)(2).

25 "Each Federal agency shall review its actions at the
26 earliest possible time to determine whether any action
27
28

1 may affect listed species or critical habitat. If such a
2 determination is made, formal consultation is required."

3 50 C.F.R. § 402.14.

4 Formal consultation involves a process of sharing
5 information between the action agency and the wildlife
6 agency (in this case FWS). *Id.* Among other things,
7 during formal consultation, FWS is directed to:
8

9 (1) Review all relevant information provided by
10 the Federal agency or otherwise available. Such
11 review may include an on-site inspection of the
12 action area with representatives of the Federal
13 agency and the applicant.

14 (2) Evaluate the current status of the listed
15 species or critical habitat.

16 (3) Evaluate the effects of the action and
17 cumulative effects on the listed species or
18 critical habitat.

19 (4) Formulate its biological opinion as to
20 whether the action, taken together with
21 cumulative effects, is likely to jeopardize the
22 continued existence of listed species or result
23 in the destruction or adverse modification of
24 critical habitat.

25 (5) Discuss with the Federal agency and any
26 applicant the Service's review and evaluation
27 conducted under paragraphs (g)(1)-(3) of this
28 section, the basis for any finding in the
biological opinion, and the availability of
reasonable and prudent alternatives (if a
jeopardy opinion is to be issued) that the
agency and the applicant can take to avoid
violation of section 7(a)(2). The Service will
utilize the expertise of the Federal agency and
any applicant in identifying these alternatives.
If requested, the Service shall make available
to the Federal agency the draft biological
opinion for the purpose of analyzing the

1 reasonable and prudent alternatives....

2 ***

3 (8) In formulating its biological opinion, any
4 reasonable and prudent alternatives, and any
5 reasonable and prudent measures, the Service
6 will use the best scientific and commercial data
7 available and will give appropriate
8 consideration to any beneficial actions taken by
the Federal agency or applicant, including any
actions taken prior to the initiation of
consultation.

9 50 C.F.R. § 402.14(g).

10 At the conclusion of the consultation process, "the
11 Secretary shall provide to the Federal agency and the
12 applicant, if any, a written statement setting forth the
13 Secretary's opinion, and a summary of the information on
14 which the opinion is based, detailing how the agency
15 action affects the species or its critical habitat." 16
17 U.S.C. § 1536(b)(3)(A). This written statement is
18 commonly known as a "biological opinion."

19 Section 7(b)(3)(A) further provides that, "[i]f
20 jeopardy or adverse modification is found, the Secretary
21 shall suggest those reasonable and prudent alternatives
22 which he believes would not violate subsection (a)(2) of
23 [Section 7] and can be taken by the Federal agency ... in
24 implementing the agency action." *Id.* "Reasonable and
25 prudent alternatives refer to alternative actions
26 identified during formal consultation [1] that can be
27
28

1 implemented in a manner consistent with the intended
2 purpose of the action, [2] that can be implemented
3 consistent with the scope of the Federal agency's legal
4 authority and jurisdiction, [3] that is economically and
5 technologically feasible, and [4] that the Director
6 believes would avoid the likelihood of jeopardizing the
7 continued existence of listed species or resulting in the
8 destruction or adverse modification of critical habitat."
9 50 C.F.R. § 402.02 (the "four RPA requirements").

11 Where the Secretary concludes that an action, or the
12 implementation of an RPA, will result in incidental take
13 of listed species, but that take will not violate section
14 7(a)(2)'s prohibition against jeopardy and/or adverse
15 modification, the Secretary must provide the action
16 agency with a written statement that (1) "specifies the
17 impact of such incidental taking on the species" and (2)
18 "specifies those reasonable and prudent measures¹ that
19 the Secretary considers necessary or appropriate to
20 minimize such impact," and (3) "sets forth the terms and
21 conditions (including, but not limited to, reporting
22
23

24 ¹ Reasonable and prudent measures, as distinguished from reasonable
25 and prudent alternatives, "refer to those actions the Director
26 believes necessary or appropriate to minimize the impacts, i.e.,
27 amount or extent, of incidental take." 50 C.F.R. § 402.02. The
28 regulations further explain that "[r]easonable and prudent measures,
along with the terms and conditions that implement them, cannot
alter the basic design, location, scope, duration, or timing of the
action and may involve only minor changes." 50 C.F.R. §
402.14(i)(2).

1 requirements) that must be complied with by the [action
2 agency] to implement the measures specified..."

3 § 1563(b)(4)(C). This written statement is commonly
4 referred to as an "Incidental Take Statement" ("ITS").²

5 The implementing regulations echo these requirements,
6 mandating that a biological opinion include:
7

8 (1) A summary of the information on which the
9 opinion is based;

10 (2) A detailed discussion of the effects of the
11 action on listed species or critical habitat;
and

12 (3) The Service's opinion on whether the action
13 is likely to jeopardize the continued existence
14 of a listed species or result in the destruction
15 or adverse modification of critical habitat (a
16 "jeopardy biological opinion"); or, the action
17 is not likely to jeopardize the continued
18 existence of a listed species or result in the
19 destruction or adverse modification of critical
20 habitat (a "no jeopardy" biological opinion). A
"jeopardy" biological opinion shall include
reasonable and prudent alternatives, if any. If
the Service is unable to develop such
alternatives, it will indicate that to the best
of its knowledge there are no reasonable and
prudent alternatives.

21 50 C.F.R. 402.14(h) (emphasis added).

22 The regulations further specify that an ITS must:

23 (i) Specif[y] the impact, i.e., the amount or
24 extent, of such incidental taking on the
25 species;

26
27 ² Any taking that is in compliance with the terms of the ITS "shall
28 not be considered ... a prohibited taking of the species concerned."
§ 1536(o)(2).

1 (ii) Specif[y] those reasonable and prudent
2 measures that the Director considers necessary
3 or appropriate to minimize such impact;

4 ***

5 (iv) Set[] forth the terms and conditions
6 (including, but not limited to, reporting
7 requirements) that must be complied with by the
8 Federal agency or any applicant to implement the
9 measures specified under paragraph (i)(1)(ii)
10 and (i)(1)(iii) of this section; and

11 (v) Specif[y] the procedures to be used to
12 handle or dispose of any individuals of a
13 species actually taken.

14 50 C.F.R. § 402.14(i)(1)(i)-(v).

15 In addition, FWS and NMFS issued a "Consultation
16 Handbook" that "provides internal guidance and
17 establishes national policy for conducting consultation
18 and conferences pursuant to Section 7 of the Endangered
19 Species Act of 1973, as amended." Plaintiffs' Request
20 for Judicial Notice ("PRJN"), Exh. B (FWS/NMFS:
21 Procedures for Conducting Consultation and Conference
22 Activities Under Section 7 of the Endangered Species
23 Act," at Foreword, (March 1998)) ("Consultation
24 Handbook").³

25 The Consultation Handbook explains that during the
26 formal consultation period, FWS should "meet or
27 communicate with the action agency ... to gather any

28 ³ Plaintiffs' request for judicial notice of seven documents, all of
which are public records the content of which are not in dispute, is
GRANTED. Doc. 240. They are admissible to prove their existence
and content, but not the truth of the matters asserted therein.

1 additional information necessary to conduct the
2 consultation." Consultation Handbook at 4-6. Among
3 other things, the formal consultation period should be
4 used to "develop reasonable and prudent alternatives to
5 an action likely to result in jeopardy or adverse
6 modification...." *Id.*
7

8 Consultation "should be undertaken cooperatively with
9 the action agency and any applicant, thus allowing the
10 Services to develop a better understanding of direct and
11 indirect effects of a proposed action and any cumulative
12 effects in the action area. Action agencies also have the
13 project expertise necessary to help identify reasonable
14 and prudent alternatives, and reasonable and prudent
15 measures. Other interested parties (including the
16 applicant, and affected State and tribal governments)
17 should also be involved in these discussions....These
18 cooperative efforts should be documented for the
19 administrative record." *Id.*
20

21 The Handbook contains a section on RPAs, which
22 provides as follows:
23

24 Reasonable and prudent alternatives

25 This section lays out reasonable and prudent
26 alternative actions, if any, that the Services
27 believe the agency or the applicant may take to
28 avoid the likelihood of jeopardy to the species
or destruction or adverse modification of
designated critical habitat (50 CFR §

1 402.14(h)(3)). When a reasonable and prudent
2 alternative consists of multiple activities, it
3 is imperative that the opinion contain a
4 thorough explanation of how each component of
5 the alternative is essential to avoid jeopardy
6 and/or adverse modification. The action agency
7 and the applicant (if any) should be given every
8 opportunity to assist in developing the
9 reasonable and prudent alternatives. Often they
10 are the only ones who can determine if an
11 alternative is within their legal authority and
12 jurisdiction, and if it is economically and
13 technologically feasible.

9 If adopted by the action agency, the reasonable
10 and prudent alternatives do not undergo
11 subsequent consultation to meet the requirements
12 of section 7(a)(2). The action agency's
13 acceptance in writing of the Services'
14 reasonable and prudent alternative concludes the
15 consultation process.

13 Section 7 regulations (50 CFR §402.02) limit
14 reasonable and prudent alternatives to:

- 15 • alternatives the Services believe will avoid
16 the likelihood of jeopardy or adverse
17 modification,
- 18 • alternatives that can be implemented in a
19 manner consistent with the intended purpose
20 of the action,
- 21 • alternatives that can be implemented
22 consistent with the scope of the action
23 agency's legal authority and jurisdiction,
24 and
- 25 • alternatives that are economically and
26 technologically feasible.

24 If the Services conclude that certain
25 alternatives are available that would avoid
26 jeopardy and adverse modification, but such
27 alternatives fail to meet one of the other three
28 elements in the definition of "reasonable and
prudent alternative," the Services should
document the alternative in the biological

1 opinion to show it was considered during the
2 formal consultation process. This information
3 could prove important during any subsequent
4 proceeding before the Endangered Species
5 Committee (established under section 7(e) of the
6 Act), which reviews requests for exemptions from
7 the requirements of section 7(a)(2).

8 Although a strong effort should always be made
9 to identify reasonable and prudent alternatives,
10 in some cases, no alternatives are available to
11 avoid jeopardy or adverse modification.

12 Examples include cases in which the corrective
13 action relies on:

- 14 • an alternative not under consideration
15 (e.g., locating a project in uplands instead
16 of requiring a Corps permit to fill a
17 wetland);
- 18 • actions of a third party not involved in the
19 proposed action (e.g., only the County,
20 which is not a party to the consultation,
21 has the authority to regulate speed limits);
- 22 • actions on lands over which the action
23 agency has no jurisdiction or no residual
24 authority to enforce compliance; and
- 25 • data not available on which to base an
26 alternative.

27 In these cases, a statement is included that no
28 reasonable and prudent alternatives are
available, along with an explanation. When data
are not available to support an alternative, the
explanation is that according to the best
available scientific and commercial data, there
are no reasonable and prudent alternatives to
the action undergoing consultation. The Services
are committed to working closely with action
agencies and applicants in developing reasonable
and prudent alternatives. The Services will, in
most cases, defer to the action agency's
expertise and judgment as to the feasibility of
an alternative. When the agency maintains that
the alternative is not reasonable or not

1 prudent, the reasoning for its position is to be
2 provided in writing for the administrative
3 record. The Services retain the final decision
4 on which reasonable and prudent alternatives are
5 included in the biological opinion. When
6 necessary, the Services may question the
7 agency's view of the scope of its authorities to
8 implement reasonable and prudent alternatives.

9 Consultation Handbook, 4-41 - 4-42.

10 III. FACTUAL BACKGROUND

11 The 2008 BiOp concluded that "the coordinated
12 operations of the CVP and SWP, as proposed, are likely to
13 jeopardize the continued existence of the delta smelt"
14 and "adversely modify delta smelt critical habitat."

15 BiOp 276-78.⁴ As required by law, the BiOp includes an
16 RPA designed to allow the projects to continue operating
17 without causing jeopardy or adverse modification. BiOp
18 279. The RPA includes various operational components
19 designed to reduce entrainment of smelt during critical
20 times of the year by controlling water flows in the
21 Delta. BiOp 279-85.

22 Component 1 (Protection of the Adult Delta Smelt Life
23 Stage) consists of two Actions related to OMR flows:
24 Action 1, requiring OMR flows to be no more negative than
25 -2,000 cubic feet per second ("cfs") on a 14-day average
26 and no more negative than -2,500 cfs for a 5-day running

27 ⁴ Although the BiOp is part of the administrative record for ease of
28 reference, its internal page references, rather than AR references,
will be used herein.

1 average, is triggered during low and high entrainment
2 risk periods based on physical and biological monitoring,
3 BiOp 281, 329; Action 2, setting maximum negative flows
4 for OMR, is triggered immediately after Action 1 ends or
5 if recommended by the SWG, BiOp 281-282, 352.

6
7 Under Component 2 (Protection of Larval and Juvenile
8 Delta Smelt), OMR flows must remain between -1,250 and
9 -5,000 cfs (specific flows to be determined by FWS)
10 beginning when Component 1 is completed, when Delta water
11 temperatures reach 12° Celsius, or when a spent female is
12 detected in trawls or at salvage facilities. BiOp 282,
13 357-358. Specific flows are maintained until June 30 or
14 when the Clifton Court Forebay water temperature reaches
15 25° Celsius. BiOp 282, 368.

16
17 Component 3 (Improve Habitat for Delta Smelt Growth
18 and Rearing), requires sufficient Delta outflow to
19 maintain average mixing point locations of Delta outflow
20 and estuarine water inflow ("X2") from September to
21 December, depending on water year type, in accordance
22 with a specifically described "adaptive management
23 process" overseen by FWS. BiOp 282-283, 369.

24
25 Under Component 4 (Habitat Restoration), DWR is to
26 create or restore 8,000 acres of intertidal and subtidal
27 habitat in the Delta and Suisun Marsh within 10 years.

1 BiOp 283-284, 379.

2 Under Component 5 (Monitoring and Reporting), the
3 Projects gather and report information to ensure proper
4 implementation of the RPA actions, achievement of
5 physical results, and evaluation of the effectiveness of
6 the actions on the targeted life stages of delta smelt so
7 that the actions can be refined, if needed. BiOp 284-
8 285, 328, 375, 37.

10 The BiOp describes the regulatory definition of
11 "reasonable and prudent alternatives" and the four RPA
12 factors:

13 The regulations (50 CFR 402.02) implementing
14 section 7 of the Act define reasonable and
15 prudent alternatives (RPA) as alternative
16 actions, identified during formal consultation,
17 that 1) can be implemented in a manner
18 consistent with the intended purpose of the
19 action; 2) can be implemented consistent with
20 the scope of the action agency's (i.e.
21 Reclamation's) legal authority and jurisdiction;
22 3) are economically and technologically
23 feasible; and, 4) would, the Service believes,
24 avoid the likelihood of jeopardizing the
25 continued existence of listed species or
26 resulting in the destruction or adverse
27 modification of critical habitat.

28 BiOp 279.

It is undisputed that the BiOp does not explicitly
discuss the first three factors -- consistency with the
purpose of the action; consistency with the legal
authority and jurisdiction of the action agency; and

1 economic and technological feasibility -- at all. See
2 BiOp at 279-285 & Attachment B. None of the terms
3 "consistent with the intended purpose of the action,"
4 "jurisdiction," "legal authority," or "economically and
5 technologically feasible," are used in the RPA section of
6 the BiOp. These motions focus on the question: If no
7 analysis or discussion of these RPA issues is included in
8 the BiOp itself, is the BiOp facially arbitrary,
9 capricious, and/or contrary to law? Whether and to what
10 extent these factors are evaluated elsewhere in the
11 administrative record is for the next round of motions.
12
13

14 IV. STANDARD OF DECISION

15 Summary judgment is appropriate where there are no
16 genuine issues of material fact and the moving party is
17 entitled to judgment as a matter of law. Fed. R. Civ. P.
18 56(c). Plaintiffs' RPA claim against Federal Defendants
19 is brought under the ESA's citizen suit provision, and is
20 governed by APA section 706, because the ESA contains no
21 independent standard of review. *Village of False Pass v.*
22 *Clark*, 733 F.2d 605, 609 (9th Cir. 1984). The APA
23 requires that the agency action be upheld unless it is
24 found to be "arbitrary, capricious, an abuse of
25 discretion, or otherwise not in accordance with law," or
26 "without observance of procedure required by law." 5
27
28

1 U.S.C. § 706(2)(A), (D). The inquiry is designed to
2 "ensure that the agency considered all of the relevant
3 factors and that its decision contained no clear error of
4 judgment." *Pac. Coast Fed'n of Fishermen's Ass'ns v.*
5 *NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001). Agency action
6 should only be overturned if the agency has "relied on
7 factors which Congress has not intended it to consider,
8 entirely failed to consider an important aspect of the
9 problem, offered an explanation for its decision that
10 runs counter to the evidence before the agency, or is so
11 implausible that it could not be ascribed to a difference
12 in view or the product of agency expertise." *Id.* In
13 sum, a court must ask "whether the agency considered the
14 relevant factors and articulated a rational connection
15 between the facts found and the choice made." *Id.*

18 V. DISCUSSION

19 A. Motion to Strike DWR's Briefs.

20 Defendant-Intervenors, a coalition of environmental
21 organizations, move to strike DWR's brief on the ground
22 that Federal Rule of Civil Procedure 56 only permits a
23 "party claiming relief" or a "party against whom relief
24 is sought" may move for summary judgment. Doc. 299.
25 This motion is without merit. First, DWR is not moving
26 for summary judgment, it is merely supporting Plaintiffs'
27
28

1 motion. Second, Defendant-Intervenors signed a
2 stipulation regarding procedures for briefing the instant
3 motions, which specifically provides for DWR's
4 participation in briefing. See Doc. 148. Defendant-
5 Intervenors are estopped from taking a position
6 inconsistent with this stipulation. See *MWS Wire Indus.*
7 *Inc., v. Cal. Fine Wire Co.*, 797 F.2d 799, 803 (9th Cir.
8 1986). Defendant-Intervenors' motion to strike is
9 DENIED. Federal Defendants' similar complaint, asserted
10 within its opposition, is likewise without merit. Doc.
11 274 at 3.

12
13
14 B. Plaintiffs' Motion to Strike Federal Defendants'
15 Cross-Motion.

16 Plaintiffs move to strike Federal Defendants' entire
17 cross-motion for summary judgment on the RPA claims on
18 the ground that it exceeds the scope of non-record claims
19 set for early resolution in the amended Scheduling Order.
20 Doc. 284. The Second Amendment to the Scheduling order
21 provided that:

22 The moving parties may present their RPA claims
23 with the early disposition claims. RPA claims
24 that are to be heard with early dispositive
25 motions are to be limited to facial challenges
26 that address whether the requirements of the law
27 have been met, without the necessity of a
28 determination of disputed factual issues.

Doc. 144 at 3 (emphasis added). The purpose of this
limitation was to ensure that arguments and claims

1 requiring reference to the administrative record would
2 not be heard until after any issues regarding the scope
3 of the administrative record ("AR"), discovery, and
4 expert witnesses were resolved.

5 Federal Defendants' first major argument, that
6 Reclamation and FWS worked together, through the
7 consultation process, to identify an RPA that would avoid
8 jeopardy, makes frequent and extensive references to the
9 contents of the AR. Doc. 231 at 5-13. The same is true
10 for Federal Defendants' second major argument, that the
11 RPA satisfies all of the requirements of the ESA and its
12 implementing regulations, which refer to and rely on the
13 AR. See *id.* at 13-21. Neither of these arguments may be
14 considered at this time, as the completeness and content
15 of the AR remains in dispute.

16 Federal Defendants suggest that neither their own nor
17 Plaintiffs' RPA motions can "be heard without review of
18 the administrative record," and note "that is why the
19 Federal Defendants objected to the briefing of these
20 claims at this stage of the case." Doc. 309 at 1. But,
21 Plaintiffs' have framed their facial RPA claim very
22 narrowly, asserting that the ESA and its implementing
23 regulations require FWS to make certain findings on the
24 face of the BiOp. The claim that such findings are
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1 legally required can now be resolved.

2 Federal Defendants third major argument, that the ESA
3 does not allow Reclamation and FWS to balance the
4 survival of the delta smelt against the potential
5 economic effects of the RPA, is a merits response to
6 allegations in Plaintiffs' complaints that FWS was
7 required to evaluate the economic impact of the RPA and
8 determine on the merits whether the economic impact
9 renders the RPA "economically infeasible" or whether
10 "more economically feasible, less costly alternatives
11 exist that would prevent jeopardy with less economic
12 impact." See e.g., Doc. 292, San Luis Complaint, at
13 ¶95(c). Although this argument makes no reference to the
14 AR, the issue is intimately intertwined with merits
15 arguments based on the record and will be addressed in
16 the second round of summary judgment motions. It is
17 premature to rule on the economic effects argument at
18 this time, except to say, it cannot now be decided as a
19 matter of law

22 Plaintiffs' motion to strike is GRANTED WITHOUT
23 PREJUDICE to Federal Defendants' renewal of their motion
24 on these grounds in the next round of briefing.

25 //

26 //

1 C. Plaintiffs' and DWR's Motion for Summary Judgment.

2 1. Scope of Motion.

3 Plaintiffs and DWR argue that, to determine whether
4 an RPA meets the joint regulations' four requirements
5 must be discussed and analyzed on the face of a jeopardy
6 biological opinion. If such a requirement exists, it is
7 undisputed that the BiOp's language contains no such
8 discussion.
9

10 Federal Defendants respond that Plaintiffs' and DWR's
11 argument goes much further, asserting:

12 The premise of the motions for summary judgment
13 submitted by the Plaintiffs and [DWR] is that
14 the law requires the United States Fish and
15 Wildlife Service [FWS] to follow an elaborate
16 series of procedures when it develops an RPA,
17 and that it failed to follow those procedures
18 here. The Plaintiffs and DWR argue, for example,
19 that the Service is required by law to identify
20 a range of potential RPAs and then undertake a
21 detailed, independent analysis to determine
22 whether they satisfy the four criteria set out
23 in the regulatory definition (at 50 C.F.R. §
24 402.02). Plaintiffs' Memorandum of Points and
25 Authorities in Support of Motion for Summary
26 Adjudication of Reasonable and Prudent
27 Alternative Issue, Docket No. 237 (Aug. 3, 2009)
28 ("Pl. Mem."); "Real Party in Interest"
California Department of Water Resources' Points
and Authorities in Support of Plaintiffs' Motion
for Summary Adjudication on Reasonable and
Prudent Alternative Issue, Docket No. 246 (Aug.
3, 2009) ("DWR Mem."). This analysis, according
to the Plaintiffs, must be based on a "broad
suite of factors," including the potential
effects of the RPAs on political and business
interests and a full assessment of the potential
economic costs and benefits to affected
communities. Pl. Mem. at 19. They also claim
that the Service must present this analysis "on

1 the face" of the biological opinion itself and
2 not in the administrative record. Pl. Mem. at
3 20; DWR Mem. at 1. The Plaintiffs then take
4 their argument to its logical conclusion by
5 arguing that, once the Service has identified a
6 range of potential RPAs and evaluated their
7 economic effects, it must choose the least
8 costly RPA that "best suits" the interests of
9 business. Pl. Mem. at 19.

10 Doc. 274 at 1. Federal Defendants assert that Plaintiffs
11 maintain FWS must "follow an elaborate series of
12 procedures when it develops an RPA." However, Plaintiffs
13 deny they so contend:

14 Plaintiffs' opening brief sets forth the limited
15 claim that Defendants violated the Joint
16 Consultation Regulations by failing to
17 articulate, on the face of the BiOp, any
18 rational connection between the facts considered
19 and conclusions reached in determining whether
20 and how the RPA adopted in the 2008 BiOp
21 satisfies the definitional requirements of the
22 Joint Consultation Regulations. See Pltfs. Memo
23 in Support of MSA at 1-2, 9-20. Hence,
24 Defendants' straw man argument, repeated ad
25 nauseum, that Plaintiffs "demand" a "burdensome
26 analysis" where the Service must identify a
27 "range" of potential RPAs and "weigh" the
28 "economic costs and benefits" of that range of
RPAs is misleading and factually incorrect. See,
e.g., Fed. Opp. at 1, 3-8, 12, 18-21, 23, 24.
Plaintiffs have already acknowledged that the
scope of what must be analyzed in adopting an
RPA in accordance with the ESA and Section
402.02 is an issue to be addressed in later
phases of this case based on the entire
administrative record. See Pltfs. Mot. to Strike
Fed. MSJ at 1:14-17; Pltfs. Opp. to Fed. MSJ at
2:16-20.

Nor have Plaintiffs asserted that the Service is
required to identify multiple RPAs and pick the
one that imposes the least cost on business
interests. Fed. Opp. at 4:10-11. While that

1 interpretation may be the logical conclusion of
2 the decisions in *Sw. Ctr. For Biological*
3 *Diversity v. U.S. Bureau of Reclamation*
4 *(Southwest Center)*, 143 F.3d 515 (9th Cir. 1998)
5 and *Westlands Water Dist. v. United States of*
6 *America*, 850 F. Supp. 1388 (E.D. Cal. 1994), it
7 is not the argument raised by Plaintiffs at this
8 stage of the proceedings. Instead, Plaintiffs
9 simply assert that Federal Defendants were
10 required to analyze the RPA requirements of
11 Section 402.02 and present their determinations
12 somewhere within the text of the BiOp. See
13 *Pltfs. Memo in Support of MSA* at 1-2, 9-20.
14 Inclusion of such a determination is even more
15 critical where, as here, the Service ultimately
16 imposed its RPA over the objections of the
17 Bureau and DWR. *Pltfs. Opp. to Fed. MSJ* at 11-
18 12.

19 See Doc. 295 at 3. Plaintiffs are entitled to define
20 their motion's scope. They advance only the narrow issue
21 of whether Federal Defendants were required to present
22 analysis of all four RPA requirements of 50 C.F.R. §
23 402.02 within the text of the BiOp; no other issue is
24 before the court for decision.

25 2. Consultation Handbook.

26 Both parties cite passages from the Consultation
27 Handbook to support and oppose the contention that FWS is
28 required to analyze the RPA requirements of 50 C.F.R. §
402.02 on the face of the BiOp. The Consultation
Handbook sets forth guidance and policy "made in
pursuance of official duty, based upon more specialized
experience and broader investigations and information
than is likely to come to a judge in a particular case,"

1 and "constitute a body of experience and informed
2 judgment to which courts and litigants may properly
3 resort for guidance." *Pac. Coast Fed'n of Fishermen's*
4 *Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1209 (E.D.
5 Cal. 2008) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134,
6 139-140 (1944)).
7

8 Plaintiffs note the general standard regarding
9 biological opinions:

10 Clarity and conciseness are extremely
11 important.... A biological opinion should
12 clearly explain the proposed project, its
13 impacts on the affected species, and the
14 Services' recommendations. It should be written
15 so the general public could trace the path of
16 logic to the biological conclusion and complete
17 enough to withstand the rigors of a legal
18 review.

19 Consultation Handbook at 1-2. These general goals of
20 clarity and conciseness serve the overarching requirement
21 that a BiOp should "clearly explain the proposed project,
22 its impacts on the affected species, and the Services'
23 recommendations." It does not specifically mandate a
24 discussion of the first three RPA requirements.

25 Other portions of the Handbook instruct FWS to work
26 closely with the action agency, because the action agency
27 possesses much of the expertise necessary to help develop
28 RPAs. The Handbook explains that during the formal
consultation period, FWS should "meet or communicate with

1 the action agency ... to gather any additional
2 information necessary to conduct the consultation." *Id.*
3 at 4-6. Among other things, the formal consultation
4 period should be used to "develop reasonable and prudent
5 alternatives to an action likely to result in jeopardy or
6 adverse modification....":
7

8 [Consultation] should be undertaken
9 cooperatively with the action agency and any
10 applicant, thus allowing the Services to develop
11 a better understanding of direct and indirect
12 effects of a proposed action and any cumulative
13 effects in the action area. Action agencies also
14 have the project expertise necessary to help
15 identify reasonable and prudent alternatives,
16 and reasonable and prudent measures. Other
17 interested parties (including the applicant, and
18 affected State and tribal governments) should
19 also be involved in these discussions....These
20 cooperative efforts should be documented for the
21 administrative record.

22 *Id.* This passage clearly indicates that the action
23 agency should play a central role in designing the RPA,
24 and that any cooperative efforts toward such ends should
25 be documented "for" the administrative record. It says
26 nothing about what RPA-related findings are required in
27 the BiOp itself.

28 The Handbook addresses at length the development and
documentation of RPA's. The parties cite passages from
this section. The entire RPA section states:

//

//

1 **Reasonable and prudent alternatives**

2 This section lays out reasonable and prudent
3 alternative actions, if any, that the Services
4 believe the agency or the applicant may take to
5 avoid the likelihood of jeopardy to the species
6 or destruction or adverse modification of
7 designated critical habitat (50 CFR
8 §402.14(h)(3)). When a reasonable and prudent
9 alternative consists of multiple activities, it
10 is imperative that the opinion contain a
11 thorough explanation of how each component of
12 the alternative is essential to avoid jeopardy
13 and/or adverse modification. The action agency
14 and the applicant (if any) should be given every
15 opportunity to assist in developing the
16 reasonable and prudent alternatives. Often they
17 are the only ones who can determine if an
18 alternative is within their legal authority and
19 jurisdiction, and if it is economically and
20 technologically feasible.

21 If adopted by the action agency, the reasonable
22 and prudent alternatives do not undergo
23 subsequent consultation to meet the requirements
24 of section 7(a)(2). The action agency's
25 acceptance in writing of the Services'
26 reasonable and prudent alternative concludes the
27 consultation process.

28 Section 7 regulations (50 CFR §402.02) limit
 reasonable and prudent alternatives to:

- alternatives the Services believe will avoid the likelihood of jeopardy or adverse modification,
- alternatives that can be implemented in a manner consistent with the intended purpose of the action,
- alternatives that can be implemented consistent with the scope of the action agency's legal authority and jurisdiction, and
- alternatives that are economically and technologically feasible.

1
2 If the Services conclude that certain
3 alternatives are available that would avoid
4 jeopardy and adverse modification, but such
5 alternatives fail to meet one of the other three
6 elements in the definition of "reasonable and
7 prudent alternative," the Services should
8 document the alternative in the biological
9 opinion to show it was considered during the
10 formal consultation process. This information
11 could prove important during any subsequent
12 proceeding before the Endangered Species
13 Committee (established under section 7(e) of the
14 Act), which reviews requests for exemptions from
15 the requirements of section 7(a)(2).

16 ***

17 *Id.* at 4-41 - 4-42 (emphasis added).⁵

18 The first sentence emphasizes the link between RPAs
19 and FWS's obligation to ensure that the proposed action
20 does not cause jeopardy or adverse modification to
21 critical habitat. Jeopardy has been found to be the
22 "guiding standard" for determination of RPAs. *Greenpeace*
23 *v. Nat'l Marine Fisheries Serv.*, 55 F. Supp. 2d 1248,
24 1268 (W.D. Wash. 1999) (rejecting third party's argument
25 that NMFS must balance the benefit to the species of an
26 RPA against the economic and technical burden on an
27 impacted industry, as "inconsistent with the purposes of
28 the ESA and with case law interpreting the Act"). The
second sentence translates the focus on jeopardy into a

⁵ This section concludes with a discussion of what should be done when no RPAs are available, a circumstance not applicable here.

1 specific requirement that "that the opinion contain a
2 thorough explanation of how each component of the
3 alternative is essential to avoid jeopardy and/or adverse
4 modification" (emphasis added), when an RPA consists of
5 multiple parts. Federal Defendants argue the BiOp does
6 so. In contrast, there is no explicit requirement that
7 the BiOp discuss any of the other three RPA requirements.
8

9 The latter part of the first paragraph reemphasizes
10 the central role of the action agency in developing RPAs,
11 noting that "[o]ften they are the only ones who can
12 determine if an alternative is within their legal
13 authority and jurisdiction, and if it is economically and
14 technologically feasible." This language omits any
15 requirement that FWS, as consulting agency, must make
16 findings as to the legal authority and jurisdiction of
17 the action agency, and/or the economic and technological
18 feasibility of the RPA. The second paragraph explicates
19 that the consultation process is not complete until the
20 action agency accepts the RPA in writing.
21

22 The Handbook quotes 50 C.F.R. § 402.02's definition
23 of the term "reasonable and prudent alternative" and
24 states:
25

26 If the Services conclude that certain
27 alternatives are available that would avoid
28 jeopardy and adverse modification, but such
alternatives fail to meet one of the other three

1 elements in the definition of "reasonable and
2 prudent alternative," the Services should
3 document the alternative in the biological
4 opinion to show it was considered during the
5 formal consultation process. This information
6 could prove important during any subsequent
7 proceeding before the Endangered Species
8 Committee (established under section 7(e) of the
9 Act), which reviews requests for exemptions from
10 the requirements of section 7(a)(2).

11 *Id.* at 4-41. This language concerns situations in which
12 FWS concludes that an RPA will avoid jeopardy and/or
13 adverse modification, but will not meet the other three
14 RPA requirements. In such a case, that RPA must be
15 documented in the BiOp to facilitate subsequent
16 proceedings before the Endangered Species Committee
17 ("ESC").

18 Plaintiffs argue that this language supports imposing
19 a requirement that the BiOp contain explicit findings
20 with respect to all four RPA requirements whenever an RPA
21 is proposed, because failing to include such findings
22 would fail to "facilitate" proceedings before the ESC.
23 See Doc. 237 at 10. The efficacy of this assertion can
24 be evaluated by considering the purpose of the ESC and
25 the 1978 amendments to the ESA that created the ESC.

26 //

27 //

28 //

1 3. The ESC and Related Legislative History.⁶

2 The ESC was added with the 1978 amendments to the
3 ESA. After construction of the Tellico Dam was halted by
4 the Supreme Court's ruling in *TVA v. Hill*, 437 U.S. 153
5 (1978), Congress sought to "introduce some flexibility
6 into the Act."⁷ After competing Senate (S. 2899) and
7 House (H.R. 14104) bills were reconciled, the final bill
8 adopted two significant changes to the ESA. First, upon
9 reaching a jeopardy conclusion, the Secretary of the
10 Interior or Commerce is required to "suggest" RPAs "which
11 [s]/he believes" would avoid jeopardy and/or adverse
12 modification. 16 U.S.C. § 1536(b)(3)(A).

13
14 The statute did not define term "reasonable and
15 prudent alternative." The House report emphasized that
16

17
18 ⁶ Where the meaning of a statute or regulation is unclear, resort to
19 legislative history is appropriate. *Oregon Advocacy Ctr. v. Mink*,
20 322 F.3d 1101, 1114 (9th Cir. 2003). Here, Congress has not
21 directly defined the term "reasonable and prudent alternative" in
22 the ESA, nor does the statute directly address the question
23 presented by these cross motions, that the BiOp itself, rather than
24 the AR, must include a detailed analysis of the three additional
25 elements of the definition of an RPA.

26 ⁷ Congressman Bowen, the manager of the 1978 Amendments in the House,
27 stated the following in debate regarding H.R. 14104:

28 [W]e have a statute which we have lived with since 1973. It
 was an attempt to balance environmental and developmental
 interest. I, frankly, am of the opinion that it has not been
 successful in that regard, and I think most of the Members of
 this House agree. For that reason, we have rewritten that
 legislation this year, and we have made a diligent effort to
 take into consideration more accurately the development needs
 of this Nation.

 PRJN, Ex. D (Cong. Rec. (Oct. 14, 1978), reprinted in Leg. History
 at 801).

1 "search for alternatives in the consultation process
2 should be limited to those that are 'reasonable and
3 prudent.' The committee does not intend that the
4 Secretary and the Federal agency should, at the
5 consultation stage, be required to review all possible
6 alternatives to the agency action including those
7 inconsistent with the project's objectives and outside of
8 the Federal agency's jurisdiction." PRJN, Ex. C (H.R.
9 Rep. No. 95-1625, reprinted in A Legislative History of
10 the Endangered Species Act of 1973, As Amended in 1976,
11 1977, 1978, 1979, and 1980 ("Legis. History") at 746).

12
13 Second, the 1978 Amendments created the ESC
14 (otherwise known as the "God Squad"), a group of mostly
15 Cabinet-level officials, including the Secretaries of the
16 Interior, the Army, and Agriculture, as well as the
17 Administrator of the Environmental Protection Agency and
18 others. See 16 U.S.C. § 1536(e). The ESC was given the
19 authority to exempt a project from the ESA's prohibitions
20 against take, jeopardy, and adverse modification of
21 critical habitat, if the Committee determines, among
22 other things, that the benefits of the agency's action
23 "clearly outweigh" the benefits of alternative courses of
24 action and the action is "of regional or national
25 significance." 16 U.S.C. § 1536(h)(1)(A)(ii), (iii).
26
27
28

1 The procedure to invoke the ESC is as follows. If
2 FWS concludes during an ESA consultation that an agency
3 action would violate Section 7(a)(2) of the ESA, the
4 action agency, the Governor of the State where the action
5 would occur, or a permit or license applicant may apply
6 for an exemption from Section 7(a)(2). 16 U.S.C. §
7 1536(g)(1). Once an application is received, the
8 Secretary of the Interior (or the Secretary of Commerce
9 for species falling under that agency's jurisdiction)
10 must make a "threshold" determination of whether that
11 application meets the necessary requirements including
12 whether the action agency and the exemption applicant
13 carried out their "consultation responsibilities ... in
14 good faith and made a reasonable and responsible effort
15 to develop and fairly consider modifications or
16 reasonable and prudent alternatives to the proposed
17 agency action which would not violate" Section 7(a)(2).
18 16 U.S.C. § 1536(g)(3)(A)(i). If these requirements have
19 not been satisfied, the Secretary may deny the
20 application. 16 U.S.C. § 1536(g)(3)(B). If, however,
21 the application passes this threshold test, the
22 Secretary, in consultation with the ESC, holds public
23 hearings on the issue. 16 U.S.C. § 1536(g)(4).

24 ESC hearings are formal adjudicatory proceedings, 16
25
26
27
28

1 U.S.C. § 1536(g)(4), presided over by an Administrative
2 law Judge ("ALJ"), 50 C.F.R. § 452.05(a)(2). The ESC and
3 the ALJ have the authority to take evidence at these
4 hearings and may subpoena the attendance and testimony of
5 witnesses and the production of documents. 16 U.S.C. §
6 1536(e)(9); 5 U.S.C. §§ 554-56.
7

8 The Secretary uses the record developed at these
9 hearings to develop a report to present to the ESC. 16
10 U.S.C. §§ 1536(g)(4), (5). The report must analyze the
11 "availability of reasonable and prudent alternatives to
12 the agency action, and the nature and extent of the
13 benefits of the agency action and of alternative courses
14 of action consistent with conserving the species or the
15 critical habitat." *Id.* § 1536(g)(5)(A).⁸ It must also
16 include a "summary of the evidence concerning whether or
17 not the agency action is in the public interest and is of
18 national or regional significance." *Id.* § 1536(g)(5)(B).
19

20 The Secretary's report is to be based on the record
21

22 ⁸ DWR correctly points out that both the consultation procedure set
23 forth in Section 7(a) and (b), as well as the ESC procedure set
24 forth in Section 7(g) use the term "reasonable and prudent
25 alternative." In debate over the use of the term "reasonable and
26 prudent," Senator Baker explained that "[t]he value of the term
27 'reasonable' is that it permits members of the [ESC] to consider a
28 wide range of factors. It is the intent of the [Committee] that the
[ESC] in evaluating alternatives examine not only engineering
'feasibility,' but also environmental and community impacts,
economic feasibility and, other relevant factors." 124 Cong. Rec.
21,590 (1978). DWR cites this legislative history in support of the
proposition that "economic feasibility" should be considered when
designing an RPA. Doc. 246. It is premature to address this issue,
as it only incidentally bears upon what RPA-related findings must be
included on the face of the BiOp.

1 developed at the public hearings, which includes "[t]he
2 transcript of testimony and exhibits, together with all
3 papers and requests filed in the proceeding." 50 C.F.R.
4 § 452.08(a); 5 U.S.C. § 556(e).

5
6 To grant an exemption, the ESC must determine, among
7 other things, that (1) "there are no reasonable and
8 prudent alternatives"; (2) "the benefits of such action
9 clearly outweigh the benefits of alternative courses of
10 action"; and (3) the action is in the "public interest,"
11 and it is "of regional or national significance." 16
12 U.S.C. §§ 1536(h)(1)(A). The ESC's final determination
13 must be based "on the record, based on the report of the
14 Secretary, the record of the hearing held ... and on such
15 other testimony or evidence as it may receive...." 16
16 U.S.C. § 1536(h)(1)(A).

17
18 The House Report compared the Services' obligation
19 during consultation to that of the ESC as follows:

20 Section 7 consultation is intended to focus
21 attention on the agency action, its objectives,
22 and the aspects of the agency action which gave
23 rise to the problem initially. The focus of
24 section 7 consultation should be on solving the
25 problem in a way which is clearly within the
26 jurisdiction and expertise of the consulting
27 parties. In contrast, the review board and the
28 Endangered Species Committee should focus on a
wider variety of alternatives. Their search
should not be limited to original project
objectives or the acting agency's jurisdiction.

Id. The requirement of considered analysis of RPAs at

1 the BiOp stage is more easily understood as facilitating
2 the ESC process.

3
4 4. Application to the Consultation Handbook
5 Language.

6 The Consultation Handbook requires that if FWS
7 "conclude[s] that certain alternatives are available that
8 would avoid jeopardy and adverse modification, but such
9 alternatives fail to meet one of the other three elements
10 in the definition of 'reasonable and prudent
11 alternative,' [FWS] should document the alternative in
12 the biological opinion to show it was considered during
13 the formal consultation process." Handbook at 4-41. Any
14 such rejected alternatives may be relevant the
15 Secretary's "threshold" determination of whether the
16 action agency and the exemption applicant carried out
17 their "consultation responsibilities ... in good faith
18 and made a reasonable and responsible effort to develop
19 and fairly consider modifications or reasonable and
20 prudent alternatives to the proposed agency action which
21 would not violate" Section 7(a)(2).⁹

22
23 Although it may be critical to make the Secretary
24 aware of rejected alternatives by documenting them in the
25

26
27 ⁹ No other decision during the ESC process relies directly on the
28 content of the BiOp, as the Secretary's report to the ESC and the
ESC's final determination are to be based on the record made at the
ESC hearing.

1 BiOp to permit determination of whether the exemption
2 applicant made a good faith effort to consider RPAs, such
3 a determination does not logically turn on whether or not
4 FWS determines that any particular RPA (1) can be
5 implemented in a manner consistent with the intended
6 purposes of the action; (2) can be implemented consistent
7 with the scope of the action agency's legal authority and
8 jurisdiction; and/or (3) is economically and
9 technologically feasible.
10

11 The relevant legislative history reveals the purpose
12 of the Secretary's threshold evaluation:
13

14 The basic premise of S. 2899 is that the
15 integrity of the interagency consultation
16 process designated under section 7 of the act be
17 preserved. Many, if not most, conflicts between
18 the Endangered Species Act and Federal actions
19 can be resolved by full and good faith
20 consultation between the project agency and
21 [FWS] or [NMFS], as appropriate. The committee
22 intends that only in those instances where the
23 consultation process has been exhausted and a
24 conflict still exists should the Endangered
25 Species Committee consider granting an exemption
26 for a Federal action.... [I]n the process of
27 deciding whether to review fully an action for
28 an exemption the Endangered Species Committee
would be required to determine that an
irresolvable conflict does indeed exist.... An
irresolvable conflict cannot be found to exist
unless the project agency had thoroughly
reviewed all modifications and alternatives to
the action that are within its jurisdiction and
consistent with the objectives of the project,
but has determined that even with the adoption
of such modification or alternatives the
activity cannot be completed without adversely
affecting a listed species or critical habitat.

1 RJN, Exh. "E" (S. Rep. No. 95-874 (1978), reprinted in
2 Congress' Leg. History, at 943-944) (emphasis added).
3
4 The Secretary is concerned with the conduct of the action
5 agency, referred to in the report as the "project
6 agency." If the action agency "thoroughly reviewed all
7 modifications and alternatives to the action that are
8 within its jurisdiction and consistent with the
9 objectives of the project, but [] determined that even
10 with the adoption of such modification or alternatives
11 the activity cannot be completed without adversely
12 affecting a listed species or critical habitat," the
13 Secretary may conclude that an irreconcilable conflict
14 exists, warranting further consideration by the ESC.
15 Whether or not the FWS analyzes all four RPA factors on
16 the face of the BiOp has absolutely no bearing on the
17 Secretary's ESC threshold inquiry.
18
19

20 The Consultation Handbook contains no express
21 requirement that FWS make findings in the BiOp regarding
22 the final three RPA requirements, in contrast with the
23 express instructions that the BiOp must contain "a
24 thorough explanation of how each [RPA] component of the
25 alternative is essential to avoid jeopardy and/or adverse
26 modification." Nor does the ESC process demand that FWS
27 makes such findings. No such findings are necessary to
28

1 enable the Secretary to make its threshold determination
2 regarding whether the exemption applicant made a good
3 faith effort to engage in consultation, and the latter
4 stages of the ESC process rely on a record wholly
5 independent of the BiOp, built during a formal
6 administrative hearing. An examination of the ESA
7 statutory language, the consultation regulations, and the
8 Consultation Handbook, coupled with the legislative
9 history, establish that no express language mandates that
10 the additional three definitional elements of an RPA be
11 discussed on the face of the BiOp, as opposed to the
12 administrative record supporting the BiOp.
13
14

15 5. Caselaw.

16 Plaintiffs and DWR rely on caselaw to support their
17 contention that, despite the lack of an explicit
18 requirement, the BiOp must include findings treating the
19 first three RPA requirements. It is undisputed that an
20 agency acts arbitrarily and/or capriciously when it fails
21 to consider an important aspect of a problem before it.
22 *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d
23 1028, 1034 (9th Cir. 2001) ("*PCFFA I*"). But, whether an
24 agency must expressly consider any particular issue on
25 the face of its decisional document, as opposed to
26 elsewhere in the administrative record, is a different
27
28

1 question. On the one hand, an agency action may be
2 upheld even if it is of "less than ideal clarity" as long
3 as "the agency's path may reasonably be discerned."
4 *Bowman Transp., Inc. v. Arkansas-Best Freight System,*
5 *Inc.*, 419 U.S. 281, 285-86 (1974). However, a court
6 "cannot infer an agency's reasoning from mere silence..."
7 but must "rely only on what the agency actually said...."
8 Compare *Gifford Pinchot Task Force v. U.S. Fish and*
9 *Wildlife Serv.*, 378 F.3d 1059, 1072 n.9 (9th Cir. 2004)
10 (holding that the court "may only rely on what the agency
11 said in the record to determine what the agency decided
12 and why"); *Pac. Coast Fed'n of Fishermen's Ass'ns v.*
13 *NMFS*, 426 F.3d 1082, 1092 (9th Cir. 2005) ("*PCFFA II*")
14 (citing *Gifford Pinchot* for the proposition that a court
15 must "rely only on what the agency actually said in the
16 biological opinion"). Does the caselaw require that the
17 RPA requirements be discussed on the face of the BiOp?

20 Plaintiffs place great weight on the Ninth Circuit's
21 decision in *Southwest Center for Biological Diversity v.*
22 *U.S. Bureau of Reclamation*, 143 F.3d 515, 518 (9th Cir.
23 1998), upholding a FWS biological opinion concluding that
24 Reclamation's operations on Lake Mead and the Lower
25 Colorado River would jeopardize an endangered bird
26 species, the Southwestern Willow Flycatcher. Before the
27
28

1 BiOp was finalized, FWS sent Reclamation a draft RPA
2 comprised of a number of short and long-term components.
3 *Id.* Some of the short-term measures would have required
4 Reclamation to lower the level of Lake Mead. Reclamation
5 advised FWS that it lacked discretion to do so. *Id.*
6 FWS's final BiOp confirmed that project operations would
7 jeopardize the species, but proposed a new RPA which no
8 longer required Reclamation to take the originally-
9 proposed short term actions, replacing them with other
10 short term measures. *Id.*

12 Environmental plaintiffs argued that FWS improperly
13 rejected the draft RPA in favor of the final RPA, which
14 does less to preserve habitat near Lake Mead, "based on
15 Reclamation's alleged lack of discretion to lower the
16 level of Lake Mead." *Id.* at 523. Specifically,
17 Plaintiffs complained "that the secretary never
18 independently reviewed Reclamation's representation that
19 it lacked such discretion." *Id.*

21 The Ninth Circuit rejected this argument on several
22 grounds. First, "under the ESA, the Secretary was not
23 required to pick the first reasonable alternative the FWS
24 came up with in formulating the RPA. The Secretary was
25 not even required to pick the best alternative or the one
26 that would most effectively protect the Flycatcher from
27
28

1 jeopardy.... The Secretary need only have adopted a final
2 RPA which complied with the jeopardy standard and which
3 could be implemented by the agency." *Id.* at 523
4 (emphasis added).

5 Second, "under the ESA, the Secretary was not
6 required to explain why he chose one RPA over another, or
7 to justify his decision based solely on apolitical
8 factors.[FN5]" *Id.* Footnote 5 further explains:

9
10 The Secretary must rely on "the best scientific
11 and commercial data available" in formulating an
12 RPA, 16 U.S.C. § 1536(a)(2). However, the ESA
13 does not explicitly limit the Secretary's
14 analysis to apolitical considerations. If two
15 proposed RPAs would avoid jeopardy to the
16 Flycatcher, the Secretary must be permitted to
17 choose the one that best suits all of its
18 interests, including political or business
19 interests.

20 *Id.*

21 The Ninth Circuit then articulated the governing
22 standard: "The only relevant question before [the court]
23 for review was whether the Secretary acted arbitrarily
24 and capriciously or abused his discretion in adopting the
25 final RPA." *Id.* "In answering this question, the court
26 had only to determine if the final RPA met the standards
27 and requirements of the ESA. The court was not in a
28 position to determine if the draft RPA should have been
adopted or if it would have afforded the Flycatcher
better protection." *Id.*

1 The Ninth Circuit reviewed the evidence and found no
2 APA violation:

3 Upon careful review of the evidence, we cannot
4 say the district court erred in finding that the
5 final RPA met the standards and requirements of
6 the ESA. The district court determined that the
7 FWS considered the relevant factors and
8 reasonably found that the Flycatcher could
9 survive the loss of habitat at Lake Mead for
10 eighteen months until 500 acres could be
11 protected, then survive an additional two years
12 until an additional 500 acres could be
13 protected, and finally survive through the MSCP
14 process until compensation could be made for the
15 historical habitat lost on the Lower Colorado
16 River and until an extensive ecological
17 restoration could be undertaken. Southwest
18 failed to present any convincing evidence to
19 contradict the FWS' findings. Southwest merely
20 relied upon the discarded draft RPA which had
21 indicated that preservation of the Lake Mead
22 habitat was necessary to the survival of the
23 Flycatcher. However, upon further consideration
24 of the matter, the FWS was entitled to, and did,
25 in fact, change its mind. The FWS concluded in
26 the final BO that the proposed short-term and
27 long-term provisions of the final RPA would
28 avoid jeopardy to the Flycatcher,
notwithstanding the failure to modify
Reclamation's operation of Hoover Dam at Lake
Mead. Because there was a rational connection
between the facts found in the BO and the choice
made to adopt the final RPA, and because we must
defer to the special expertise of the FWS in
drafting RPAs that will sufficiently protect
endangered species, we cannot conclude that the
Secretary violated the APA.

24 *Id.* (emphasis added).

25 Plaintiffs argue the emphasized text, approving FWS's
26 RPA because there was a rational connection between the
27 facts "found in the BiOp" and that decision, establishes
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1 that the FWS must make findings on all four RPA
2 requirements on the face of the BiOp. This overstates
3 the Ninth Circuit's holding. First, *Southwest Center*
4 says nothing about requiring findings on the face of the
5 BiOp. The requisite findings were, unsurprisingly, in
6 the BiOp in that case, because those findings concerning
7 how each component of the final RPA would avoid jeopardy,
8 were explicitly required by the Consultation Handbook.
9 Consultation Handbook 4-41 ("When a reasonable and
10 prudent alternative consists of multiple activities, it
11 is imperative that the opinion contain a thorough
12 explanation of how each component of the alternative is
13 essential to avoid jeopardy and/or adverse
14 modification.") (emphasis added). Neither the Handbook,
15 the ESA, nor any of its implementing regulations
16 explicitly require that the BiOp contain an analysis of
17 any of the other three RPA requirements.

18 Plaintiffs suggest the second sentence from the
19 *Southwest Center* language delineates that findings are
20 required for all four RPA requirements. Plaintiffs quote
21 that sentence as authority to claim the "'FWS considered
22 the relevant factors and reasonably found'" the Joint
23 Consultation Regulations requirements were satisfied with
24 respect to an RPA issued in a biological opinion for the
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1 Southwest Willow Flycatcher...." Doc. 237 at 10. This
2 is misleading, because the entire sentence makes clear
3 that the only "findings" discussed in Southwest Center
4 were findings concerning the capacity of the Flycatcher
5 to survive in the short term while the RPA was being
6 implemented. 143 F.3d at 523. Southwest Center only
7 stands for the proposition that FWS must justify its
8 conclusion that the RPA would prevent jeopardy and/or
9 adverse modification in the BiOp. See *Greenpeace*, 55 F.
10 Supp. 2d at 1268 (finding the jeopardy determination to
11 be the "guiding standard" for determination of RPAs).
12 Southwest Center does not create the discussion
13 requirement Plaintiffs suggest.

14
15
16 *PCFFA II*, on which Plaintiffs also rely, is not
17 contrary. 426 F.3d 1082. There, the Ninth Circuit
18 overturned an RPA adopted for coho salmon because NMFS
19 failed to articulate the bases for its assumptions
20 underlying the RPA. *Id.* at 1090-95. The district court
21 concluded that the agency had "implicitly considered"
22 whether all three phases of the RPA would ensure against
23 jeopardy. *Id.* at 1091. The Ninth Circuit emphasized
24 that "it is a basic principle of administrative law that
25 the agency must articulate the reason or reasons for its
26 decision." *Id.*

1 The Ninth Circuit found "little substance to the
2 discussions of Phases I and II" in the BiOp. *Id.* at
3 1093. Although some language suggested that "the agency
4 believed that the RPA would avoid jeopardy to the coho,
5 this assertion alone is insufficient to sustain the BiOp
6 and the RPA." *Id.* The Ninth Circuit refused to "take
7 [the agency's] word that the species will be protected if
8 its plans are followed." *Id.* As in *Southwest Center,*
9 *PCFFA II* only discussed whether the RPA would avoid
10 jeopardy, the analysis of which is explicitly required in
11 the BiOp. Here, Plaintiffs seek to extend this logic to
12 mandate that FWS include specific findings concerning the
13 three other RPA requirements in the BiOp. *PCFFA II* does
14 not require this.

15
16
17 Plaintiffs also cite *NRDC v. Kempthorne*, 506 F. Supp.
18 2d 322 (E.D. Cal. 2007), which held that, although
19 certain, potentially critical data was part of the
20 administrative record, its significance, or lack thereof,
21 was not discussed in the BiOp. *Id.* at 362-363. The
22 government's post hoc reasoning was rejected, that, even
23 if the data had been addressed in the BiOp, the ultimate
24 opinion reached by the Service would not have been
25 different. "Although a decision of less than ideal
26 clarity may be upheld if the agency's path may reasonably
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1 be discerned, [a court] cannot infer an agency's
2 reasoning from mere silence. Rather, an agency's action
3 must be upheld, if at all, on the basis articulated by
4 the agency itself." *Id.* at 366 (citing *PCFFA*, 426 F.3d
5 at 1091). The district court further reasoned "[h]ad FWS
6 examined the FMWT 2004 data in the BiOp, the weight it
7 gave to that data would have been entitled to deference.
8 The agency's silence cannot be afforded deference."
9 *Kempthorne*, 506 F. Supp. 2d at 366.

11 Plaintiffs argue that this language reflects a
12 requirement that analysis of the data must be included in
13 the BiOp, suggesting that if such analysis was instead
14 found elsewhere in the administrative record it would be
15 insufficient. This reads too much into *Kempthorne*, where
16 the necessary reasoning was found in neither the BiOp nor
17 the administrative record. *Id.* at 380 (district court
18 searched for, but did not find, certain analyses in the
19 BiOp or "elsewhere in the administrative record").
20 *Kempthorne* found the content of the BiOp lacking in light
21 of the entire AR, both of which entirely failed to
22 competently perform the required ESA jeopardy and habitat
23 modification analyses. The practical fact is that a BiOp
24 is much more accessible than the administrative record,
25 which can be tens of thousands of pages long. *Kempthorne*

1 did not address or decide the issue presented here.¹⁰

2 In APA review cases, it is well established that, in
3 determining whether agency action was "arbitrary,
4 capricious, an abuse of discretion, or otherwise not in
5 accordance with law... the court shall review the whole
6 record or those parts of it cited by a party, and due
7 account shall be taken of the rule of prejudicial error."
8 5 U.S.C. § 706. The "whole record," includes "everything
9 that was before the agency pertaining to the merits of
10 its decision." *Portland Audubon Soc'y v. Endangered*
11 *Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993).
12 See also *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp.
13 1291, 1308 (W.D. Wash. 1994) (finding declarations
14 properly considered to "explain the agency's actions or
15 to determine whether its course of inquiry was
16 inadequate.")¹¹

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20 ¹⁰ *Westlands Water Dist. v. U.S. Dept. of Interior, Bureau of*
21 *Reclamation*, 850 F. Supp. 1388, 1425-26 (E.D. Cal. 1992), does not
22 demand a contrary conclusion. In that case, decided on a motion to
23 dismiss, plaintiffs alleged that NMFS was required to consider, and
24 balance, the economic and/or environmental effects of an RPA on
25 south-of-Delta water users, because the ESA's regulations require
26 RPAs to be "economically and technologically feasible." The
27 complaint sufficiently raised the issue of economic feasibility
28 under 40 C.F.R. § 402.02. *Id.* at 1426. However, neither the
parties nor the court suggested in *Westlands* that a discussion of
economic feasibility was required on the face of the BiOp.

¹¹ Similarly, in *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059,
1072 (9th Cir. 2004), the Ninth Circuit rejected the agency's
argument that the BiOp's analysis implicitly considered "recovery,"
holding that a court "cannot infer an agency's reasoning from mere
silence or where the agency failed to address significant objections
and alternative proposals." *Gifford* carefully examined the text of

1 DWR's cases do not undermine this reasoning. *Motor*
2 *Vehicle Manufacturers Association of the United States,*
3 *Inc., v. State Farm Mutual Auto Insurance Company*, 463
4 U.S. 29 (1983), concerned the National Highway Traffic
5 Safety Administration's ("NHTSA") decision to rescind
6 passive restraint crash safety requirements for new motor
7 vehicles. When NHTSA learned that automakers opted to
8 install automatic seatbelts which users could easily
9 detach, the agency rescinded the order in light of the
10 expense required to implement a program that would have
11 only minimal safety benefits because it could be
12 disengaged by users. *Id.* at 38-39. The Court concluded
13 that this decision was arbitrary and capricious because
14 NHTSA failed to consider modifying the standard to
15 require the installation of airbags. *Id.* at 46. In
16 reaching this conclusion, the Court indicated it must
17 "consider whether the decision was based on a
18 consideration of the relevant factors and whether there
19 has been a clear error of judgment." *Id.* (emphasis
20 added).

24 several BiOps, finding that in two of the BiOps, the critical
25 habitat analyses mentioned the word "recovery" only in an
26 introductory paragraph while in four other BiOps, the word
27 "recovery" was not mentioned at all, and there was no discussion of
28 how critical habitat plays a role in recovery of the species. *Id.*
at 1073. The Ninth Circuit held it could not infer any overarching
concern for recovery from the silence of this text." *Id.* at 1074.
Although the *Gifford* court focused on the text of the BiOps, the
Ninth Circuit explicitly "consider[ed] [] the entire record," before
finding the BiOp to be inadequate. *Id.* at 1066.

1 Focusing on *State Farm's* use of the word "decision,"
2 DWR asserts that all relevant factors must be considered
3 in the text of the agency's decision document, rather
4 than elsewhere in the administrative record. But, *State*
5 *Farm* also emphasized that the relevant statute required a
6 "record of the rulemaking proceedings to be compiled,"
7 *id.* at 43-44, and indicated that "Congress established a
8 presumption against... changes in current policy that
9 are not justified by the rulemaking record," *id.* at 43.
10 *State Farm* does not support DWR's position that the
11 "whole record" rule should be ignored in favor of a
12 requirement that any and all analytical reasoning must be
13 included in the decision document (the BiOp).

14
15 DWR also relies on *Burlington Truck Lines, Inc. v.*
16 *United States*, 371 U.S. 156, 168-69 (1962), which
17 criticized the Interstate Commerce Commission's ("ICC")
18 failure to make any findings or include any analysis to
19 justify a particular decision. The Court noted that
20 "expert discretion is the lifeblood of the administrative
21 process, but unless we make the requirements for
22 administrative action strict and demanding, expertise,
23 the strength of modern government, can become a monster
24 which rules with no practical limits on its discretion."
25 *Id.* at 167 (internal citations and quotations omitted).
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1 See also *Ry. Labor Executives' Ass'n v. ICC*, 784 F.2d
2 959, 974 (refusing to "rummage around in the record below
3 to find a plausible rationale to fill the void in the
4 agency order under review"). *Burlington and Railway*
5 *Labor Executives'* insistence upon formal findings is
6 unsurprising given that, under the procedures applicable
7 in that case, where the ICC was required to "make
8 findings that support its decision, and those findings
9 must be supported by substantial evidence." *Id.* No such
10 general findings requirement exists here. Rather, the
11 only findings explicitly required by the Consultation
12 Handbook are those concerning the capacity of any RPA to
13 prevent jeopardy and/or adverse modification.¹²
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15
16 A statute or regulation may specifically require
17 certain reasoning or findings to be included in the
18 ultimate decision document. The above-mentioned
19 requirement that the BiOp explain why each part of a
20 multi-part RPA ensures against jeopardy or adverse
21 modification is one such example. However, there is no
22 parallel requirement that FWS certify or make findings
23 with respect to the other three RPA requirements on the
24 fact of the record. It is not appropriate for a court to
25

26 ¹² *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402
27 (1971), is also unhelpful. In that case, although there was an
28 administrative record, it was not before the court, necessitating
remand to the district court for review of the agency's decision
based on the entire administrative record. *Id.* at 419-20.

1 "create[] a requirement not found in any relevant statute
2 or regulation." *The Lands Council v. McNair*, 537 F.3d
3 981, 991 (9th Cir. 2008).¹³ Rather, the issue of whether
4 FWS properly promulgated the RPA must be decided on the
5 basis of the entire record.
6

7 **VI. CONCLUSION**

8 For the reasons set forth above, Plaintiffs' motion
9 for summary judgment on the narrow issue of whether FWS
10 is required to discuss the first three RPA requirements
11 on the face of the BiOp is DENIED, as is Federal
12 Defendants' cross-motion, WITHOUT PREJUDICE to the next
13 round of dispositive motions which will address on the
14 merits all issues of the BiOp's sufficiency. Federal
15 Defendants shall submit a form of order consistent with
16 this memorandum decision within ten (10) days of
17 electronic service.
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21 SO ORDERED

22 Dated: October 15, 2009

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

26 _____
27 ¹³ Nor is it dispositive that NMFS included findings concerning all
28 four RPA factors in its related BiOp concerning the impacts of
Project operations on salmonids and other species. See PRJN, Ex. A
(NMFS, Biological Opinion and Conference Opinion on the Long-Term
Operations of the Central Valley Project and State Water Project
(June 4, 2009)). Although NMFS shows an analysis treating all RPA
elements can be presented in a BiOp, this action is not an admission
binding on a different agency.