

1
2 UNITED STATES DISTRICT COURT
3 FOR THE EASTERN DISTRICT OF CALIFORNIA
4

5 DELTA SMELT CONSOLIDATED
6 CASES

1:09-CV-407 OWW DLB

7 SAN LUIS & DELTA-MENDOTA
8 WATER AUTHORITY, *et al.* v.
9 SALAZAR, *et al.*

MEMORANDUM DECISION RE
CROSS-MOTIONS FOR SUMMARY
JUDGMENT ON NEPA ISSUES

10 STATE WATER CONTRACTORS v.
11 SALAZAR, *et al.*

12 COALITION FOR A SUSTAINABLE
13 DELTA, *et al.* v. UNITED
14 STATES FISH AND WILDLIFE
15 SERVICE, *et al.*

16 METROPOLITAN WATER DISTRICT
17 v. UNITED STATES FISH AND
18 WILDLIFE SERVICE, *et al.*

19 STEWART & JASPER ORCHARDS *et*
20 *al.* v. UNITED STATES FISH
21 AND WILDLIFE SERVICE.

22 I. INTRODUCTION

23 This case arises out of the United States Fish and
24 Wildlife Service's ("FWS") December 15, 2008 biological
25 opinion ("BiOp" or "2008 smelt BiOp") addressing the impact of
26 coordinated operations of the Central Valley Project ("CVP")
27 and State Water Project ("SWP") (the "Projects") on the
28 threatened delta smelt, prepared pursuant to Section 7(a)(2)
of the Endangered Species Act ("ESA"), 16 U.S.C. §§
1536(a)(2). Because the BiOp found that planned coordinated
Project operations would jeopardize the continued existence of

1 the delta smelt and/or adversely modify its critical habitat,
2 FWS proposed a Reasonable and Prudent Alternative ("RPA") that
3 imposes certain operating restrictions on the Projects. The
4 Bureau of Reclamation ("Reclamation") provisionally accepted
5 and then implemented the BiOp and its RPA.

6
7 Plaintiffs in three of the five consolidated cases,
8 namely San Luis & Delta Mendota Water Authority ("Authority")
9 and Westlands Water District ("Westlands"), State Water
10 Contractors ("SWC"), and Metropolitan Water District of
11 Southern California ("MWD") (collectively, "Plaintiffs") move
12 for summary judgment, arguing that issuance and/or
13 implementation of the BiOp/RPA is a "major federal action"
14 that will inflict harm on the human environment, and that FWS
15 and/or Reclamation should have, but did not conduct an
16 environmental assessment ("EA") or prepare an environmental
17 impact statement ("EIS") under the National Environmental
18 Policy Act ("NEPA"). Doc. 245. Federal Defendants and
19 Defendant-Intervenors oppose, Docs. 290 & 281, and have
20 submitted supporting declarations, Docs. 290-2 (Paul
21 Fujitani), 281-2 (Charles A. Simenstad). Plaintiffs replied
22 and submitted a supporting declaration. Docs. 297 & 197-2
23 (Thomas Boardman).

24
25
26 Defendant-Intervenors cross-move for summary judgment on
27 this claim, arguing that FWS was not required to prepare an
28

1 EIS in connection with issuance of the BiOp. Doc. 244.
2 Plaintiffs oppose. Doc. 287. Defendant-Intervenors filed a
3 reply. Doc. 298.

4 In response to the district court's request for further
5 argument on Reclamation's liability under NEPA, the parties
6 submitted supplemental briefs. Docs. 357-58, 360-61.
7

8 II. STATEMENT OF FACTS

9 The 2008 BiOp concluded that "the coordinated operations
10 of the CVP and SWP, as proposed, are likely to jeopardize the
11 continued existence of the delta smelt" and "adversely modify
12 delta smelt critical habitat." BiOp 276-78.¹ As required by
13 law, FWS's BiOp includes an RPA designed to allow the projects
14 to continue operating without causing jeopardy or adverse
15 modification. BiOp 279. The RPA includes various operational
16 components designed to reduce entrainment of smelt during
17 critical times of the year by controlling and reducing water
18 flows in the Delta. BiOp 279-85.
19
20

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

27 ¹ Although the BiOp is part of the administrative record ("AR"), for
28 ease of reference, its internal page references, rather than AR
references, are used.

1 running 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 for
4 OMR, is triggered immediately after Action 1 ends or if
5 recommended by the Smelt Working Group ("SWG"). BiOp 281-282,
6 352.
7

8 Under Component 2 (Protection of Larval and Juvenile
9 Delta Smelt), OMR flows must remain between -1,250 and -5,000
10 cfs beginning when Component 1 is completed, when Delta water
11 temperatures reach 12° Celsius, or when a spent female smelt
12 is detected in trawls or at salvage facilities. BiOp 282,
13 357-358. Component 2 remains in place until June 30 or when
14 the Clifton Court Forebay water temperature reaches 25°
15 Celsius. BiOp 282, 368.
16

17 Component 3 (Improve Habitat for Delta Smelt Growth and
18 Rearing) requires sufficient Delta outflow to maintain average
19 mixing point locations of Delta outflow and estuarine water
20 inflow ("X2") from September to December, depending on water
21 year type, in accordance with a specifically described
22 "adaptive management process" overseen by FWS. BiOp 282-283,
23 369.
24

25 Under Component 4 (Habitat Restoration), the California
26 Department of Water Resources ("DWR") is to create or restore
27 8,000 acres of intertidal and subtidal habitat in the Delta
28

1 and Suisun Marsh within 10 years. 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 physical
5 results, and evaluation of the effectiveness of the actions on
6 the targeted life stages of delta smelt, so that the actions
7 can be refined, if needed. BiOp 284-285, 328, 375, 37.

8 It is undisputed that no NEPA documentation was prepared
9 by either FWS or Reclamation in connection with the issuance,
10 provisional adoption, and/or implementation of the BiOp and
11 RPA.
12

13 14 III. ANALYSIS

15 A. Threshold Issues.

16 1. Requests for Judicial Notice.

17 a. Plaintiffs' Request for Judicial Notice.

18 Plaintiffs request judicial notice of the May 29, 2009
19 Findings of Fact and Conclusions of Law entered in this case.
20 Doc. 94. This document is judicially noticeable as part of
21 the court record. Plaintiffs also request judicial notice of
22 a document authored by DWR, entitled "Delta Water Exports
23 Could be Reduced by Up to 50 Percent Under New Federal
24 Biological Opinion: DWR Director Snow Responds to Delta Smelt
25 Biological Opinion" (Dec. 15, 2008). This is a judicially
26 noticeable record or report of an administrative body, see
27
28

1 *United States v. 14.02 Acres of Land More or Less in Fresno*
2 *County*, 547 F.3d 943, 955 (9th Cir. 2008), although only for
3 its publication and the existence of its content, not for the
4 truth of disputed matters asserted in the document.
5

6 b. Defendant Intervenors' Request for Judicial
7 Notice.

8 Defendant Intervenors request judicial notice of the
9 following three documents attached to the Declaration of
10 George Torgun, Esq., Doc. 285:

- 11 • Exhibit 1: Reclamation's Draft EIS/EIR for the El
12 Dorado County Water Agency Proposed Water Service
13 Contract.
- 14 • Exhibit 2: A Summary Document, published by CalFed,
15 concerning the Two Gates Project.
- 16 • Exhibit 3: A DWR Fact Sheet on the Two Gates
17 Project.
18

19 These are public documents published by administrative bodies
20 and readily available on the internet. They may be judicially
21 noticed for their publication and their contents, but not for
22 the truth of disputed matters asserted in the documents.
23

24 2. Effect of Preliminary Injunction Decision.

25 The May 29, 2009 Findings of Fact and Conclusions of Law
26 and Order Re Plaintiffs' Motion for Preliminary Injunction
27 ("May 29, 2009 PI Decision" or "PI Decision"), found that
28

1 Plaintiffs were likely to succeed on their NEPA claim against
2 the FWS. Doc. 94. Plaintiffs cite the PI Decision's
3 findings, suggesting that the district court "has already
4 determined" several key issues in this case. See, e.g., Doc.
5 245-2 at 7. But, "decisions on preliminary injunctions are
6 just that -- preliminary -- and must often be made hastily
7 and on less than a full record." *S. Or. Barter Fair v.*
8 *Jackson County, Or.*, 372 F.3d 1128, 1136 (9th Cir. 2004)
9 (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395
10 (1981)).
11

12 Thus, even [where] the facial challenge presented
13 to the district court here involved primarily
14 issues of law, we see no reason why [a] court
15 should [] deviate[] from the general rule that
16 decisions on preliminary injunctions 'are not
17 binding at trial on the merits, and do not
18 constitute the law of the case.

19 *Id.* (internal citations and quotations omitted).

20 Although the PI Decision may be considered, it is not law
21 of the case nor is it dispositive of any issue presently
22 before the court.

23 There is no requirement that Defendants supply new
24 law or facts to justify a different decision at the
25 summary judgment stage. Although a court has the
26 discretion to dissolve or modify a preliminary injunction
27 upon introduction of new facts or law, or a showing of
28 changed conditions, see *Mariscal-Sandoval v. Ashcroft*,
370 F.3d 851, 859 (9th Cir. 2004), summary judgment is an

1 entirely independent proceeding from the preliminary
2 injunction phase.

3
4 3. Burden of Proof.

5 Plaintiffs suggest that the "shift in procedural
6 posture," from preliminary injunction to summary adjudication,
7 "lessens Plaintiffs' burden." Doc. 245-2 at 3. Their
8 argument continues.

9 This Court's preliminary injunction was predicated,
10 in part, on the Court's determination that Plaintiffs
11 demonstrated they were likely to suffer irreparable
12 harm because of the 2008 BiOp's effects on the human
13 environment. On summary judgment, however,
14 Plaintiffs' required showing is relaxed: if the Court
15 determines the 2008 BiOp may affect the human
16 environment, NEPA's requirements are triggered.

17 *Id.* This inaccurately states the governing standards. In the
18 preliminary injunction context, "a plaintiff seeking a
19 preliminary injunction must establish that he is likely to
20 succeed on the merits, that he is likely to suffer irreparable
21 harm in the absence of preliminary relief, that the balance of
22 equities tips in his favor, and that an injunction is in the
23 public interest." *Am. Trucking Assns., Inc. v. City of Los*
24 *Angeles*, 559 F.3d 1046, 1042 (9th Cir. 2009) (citing *Winter v.*
25 *NRDC*, --- U.S. ---, 129 S. Ct. 365 (2008)). Within the
26 likelihood of success on the merits prong, a court must
27 evaluate each claim according to applicable legal standards.
28 Here, that standard, in part, involves an inquiry into whether
"there are substantial questions about whether a project may

1 cause significant degradation of the human environment.
2 *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233,
3 1239 (9th Cir. 2005). For a preliminary injunction,
4 plaintiffs only had to establish that they are "likely" to
5 meet this burden under. On summary judgment, plaintiff must
6 actually prove success by a preponderance of the evidence.
7

8 **B. Applicable Legal Standards.**

9 Because NEPA contains no separate provision for judicial
10 review, compliance with NEPA is reviewed under the
11 Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); *NW*
12 *Resource Info. Ctr., Inc. v. NMFS*, 56 F.3d 1060, 1066 (9th
13 Cir. 1995), provided (1) there is final agency action and (2)
14 Plaintiffs can show that they have suffered a legal wrong or
15 will be adversely affected within the meaning of the statute,
16 *Northcoast Env't'l Ctr. v. Glickman*, 136 F.3d 660, 668 (9th
17 Cir. 1998). It is undisputed that the challenged agency
18 action, the issuance of the 2008 smelt BiOp and its RPA, is
19 "final agency action." See *Bennet v. Spear*, 520 U.S. 154,
20 161, 178 (1997) (issuance of biological opinion is "final
21 agency action"). It is also undisputed that Plaintiffs have
22 been adversely affected by the issuance of the 2008 smelt BiOp
23 and implementation of its RPA controlling the Projects' water
24 flows.
25
26

27 NEPA requires all federal agencies to prepare an EIS to
28

1 evaluate the potential environmental consequences of any
2 proposed "major Federal action[] significantly affecting the
3 quality of the human environment." 42 U.S.C. § 4332(C).² The
4 preparation of an EIS serves a number of purposes:

5
6 It ensures that the agency, in reaching its decision,
7 will have available, and will carefully consider,
8 detailed information concerning significant
9 environmental impacts; it also guarantees that the
10 relevant information will be made available to the
11 larger audience that may also play a role in both the
12 decisionmaking process and the implementation of that
13 decision.

14
15 Simply by focusing the agency's attention on the
16 environmental consequences of a proposed project,
17 NEPA ensures that important effects will not be
18 overlooked or underestimated only to be discovered
19 after resources have been committed or the die
20 otherwise cast. Moreover, the strong precatory
21 language of § 101 of the Act and the requirement that
22 agencies prepare detailed impact statements
23 inevitably bring pressure to bear on agencies to
24 respond to the needs of environmental quality. 115
25 Cong. Rec. 40425 (1969) (remarks of Sen. Muskie).

26
27 Publication of an EIS, both in draft and final form,
28 also serves a larger informational role. It gives the
public the assurance that the agency has indeed
considered environmental concerns in its
decisionmaking process, and, perhaps more
significantly, provides a springboard for public
comment.

29
30 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349
31 (1989) (internal citations and quotations omitted). "NEPA
32 does not contain substantive requirements that dictate a
33 particular result; instead, NEPA is aimed at ensuring agencies
34 make informed decisions and contemplate the environmental
35

36
37 ² That FWS declares itself a federal agency subject to NEPA, see FWS
38 NEPA reference handbook, available at: <http://www.fws.gov/r9esnepa>, is not
dispositive of the question of whether NEPA applies here. This means FWS
must undertake a major federal action with the required effect on the
human environment, to make FWS subject to NEPA.

1 impacts of their actions." *Ocean Mammal Inst. v. Gates*, 546
2 F. Supp. 2d 960, 971 (D. Hi. 2008) (quoting *Idaho Sporting*
3 *Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). "NEPA
4 emphasizes the importance of coherent and comprehensive up-
5 front environmental analysis to ensure informed decision
6 making to the end that the agency will not act on incomplete
7 information, only to regret its decision after it is too late
8 to correct." *Ctr. for Biological Diversity v. U.S. Forest*
9 *Service*, 349 F.3d 1157, 1166 (9th Cir. 2003) (internal
10 citation and quotations omitted).
11

12 Federal regulations implementing NEPA define major
13 federal action:

14
15 Major Federal action includes actions with effects
16 that may be major and which are potentially subject
17 to Federal control and responsibility. Major
18 reinforces but does not have a meaning independent of
19 significantly ([40 C.F.R.] § 1508.27). Actions
20 include the circumstance where the responsible
21 officials fail to act and that failure to act is
22 reviewable by courts or administrative tribunals
23 under the Administrative Procedure Act or other
24 applicable law as agency action.

25 (a) Actions include new and continuing activities,
26 including projects and programs entirely or partly
27 financed, assisted, conducted, regulated, or approved
28 by federal agencies; new or revised agency rules,
regulations, plans, policies, or procedures; and
legislative proposals (§§ 1506.8, 1508.17). Actions
do not include funding assistance solely in the form
of general revenue sharing funds, distributed under
the State and Local Fiscal Assistance Act of 1972, 31
U.S.C. 1221 et seq., with no Federal agency control
over the subsequent use of such funds. Actions do not
include bringing judicial or administrative civil or
criminal enforcement actions.

(b) Federal actions tend to fall within one of the
following categories:

1 (1) Adoption of official policy, such as rules,
2 regulations, and interpretations adopted pursuant
3 to the Administrative Procedure Act, 5 U.S.C. 551
4 et seq.; treaties and international conventions
or agreements; formal documents establishing an
agency's policies which will result in or
substantially alter agency programs.

5 (2) Adoption of formal plans, such as official
6 documents prepared or approved by federal
7 agencies which guide or prescribe alternative
uses of Federal resources, upon which future
agency actions will be based.

8 (3) Adoption of programs, such as a group of
9 concerted actions to implement a specific policy
10 or plan; systematic and connected agency
11 decisions allocating agency resources to
implement a specific statutory program or
executive directive.

12 (4) Approval of specific projects, such as
13 construction or management activities located in
14 a defined geographic area. Projects include
actions approved by permit or other regulatory
decision as well as federal and federally
assisted activities.

15 40 C.F.R. § 1508.18.

16 When an agency takes major federal, the agency must
17 prepare an EIS "where there are substantial questions about
18 whether a project may cause significant degradation of the
19 human environment." *Native Ecosystems*, 428 F.3d at 1239. An
20 agency may choose to prepare an environmental assessment
21 ("EA") to determine whether an EIS is needed. 40 C.F.R. §§
22 1501.4, 1508.9(b). The EA must identify all reasonably
23 foreseeable impacts, analyze their significance, and address
24 alternatives. 40 C.F.R. §§ 1508.8, 1508.9, 1508.27. If,
25 based on the EA, the agency concludes that the proposed
26 actions will not significantly affect the environment, it may
27
28

1 issue a Finding of No Significant Impact ("FONSI") and forego
2 completion of an EIS. See *Bob Marshall Alliance v. Hodel*, 852
3 F.2d 1223, 1225 (9th Cir. 1988); 40 C.F.R. § 1501.4(e).

4 Whether an action may significantly affect the
5 environment "requires consideration of context and intensity."
6 *Center for Biological Diversity v. Nat'l Highway Traffic*
7 *Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (citing 40
8 C.F.R. § 1508.27). "Context delimits the scope of the
9 agency's action, including the interests affected." *Id.*
10 (quoting *Nat'l. Parks & Conservation Ass'n v. Babbitt*, 241 F.3d
11 722, 731 (9th Cir. 2001)).

12
13 Intensity refers to the "severity of impact," which
14 includes both beneficial and adverse impacts, [t]he
15 degree to which the proposed action affects public
16 health or safety, [t]he degree to which the effects
17 on the quality of the human environment are likely to
18 be highly controversial, "[t]he degree to which the
19 possible effects on the human environment are highly
20 uncertain or involve unique or unknown risks," and
21 "[w]hether the action is related to other actions
22 with individually insignificant but cumulatively
23 significant impacts."

24 *Id.* at 1185-86 (citing 40 C.F.R. § 1508.27(b)(2), (4), (5),
25 (7)).

26 The parties debate at length the degree of deference owed
27 to an agency's decision under NEPA. However, in this case,
28 neither agency made any NEPA-related decision to which
29 deference is owed. The relevant standard is "reasonableness,"
30 as articulated in *High Sierra Hikers Ass'n v. Blackwell*:

31 Typically, an agency's decision not to prepare an EIS
32 is reviewed under the arbitrary and capricious

1 standard; however, where an agency has decided that a
2 project does not require an EIS without first
3 conducting an EA, we review under the reasonableness
4 standard.

5 390 F.3d 630, 640 (9th Cir. 2004). "Further, when an agency
6 has taken action without observance of the procedure required
7 by law, that action will be set aside." *Id.* (citations
8 omitted).

9 C. Major Federal Action.

10 1. Was FWS's Issuance of the Biological Opinion Major
11 Federal Action?

12 a. 40 C.F.R. § 1508.18.

13 Plaintiffs suggest that the issuance of the 2008 BiOp
14 constitutes a "major federal action" under 40 C.F.R. §
15 1508.18, which provides that the word "major" in the phrase
16 major federal action "reinforces but does not have a meaning
17 independent of" the term "significantly" in "significantly
18 affecting the human environment." Does the issuance of a BiOp
19 constitute a "federal action" under the meaning of the
20 statute? Section 1508.18(b) provides that "[f]ederal actions
21 tend to fall within one of the following categories":

22 (1) Adoption of official policy, such as rules,
23 regulations, and interpretations adopted pursuant to
24 the Administrative Procedure Act, 5 U.S.C. 551 et
25 seq.; treaties and international conventions or
26 agreements; formal documents establishing an agency's
27 policies which will result in or substantially alter
28 agency programs.

(2) Adoption of formal plans, such as official
documents prepared or approved by federal agencies
which guide or prescribe alternative uses of Federal
resources, upon which future agency actions will be

1 based.

2 (3) Adoption of programs, such as a group of
3 concerted actions to implement a specific policy or
4 plan; systematic and connected agency decisions
5 allocating agency resources to implement a specific
6 statutory program or executive directive.

7 (4) Approval of specific projects, such as
8 construction or management activities located in a
9 defined geographic area. Projects include actions
10 approved by permit or other regulatory decision as
11 well as federal and federally assisted activities.

12 40 C.F.R. § 1508.18 (emphasis added). Plaintiffs principally
13 rely on § 1508.18(b)(4) as applicable to the coordinated
14 operations of the Projects.

15 The only court that has applied 40 C.F.R. § 1508.18(b)(4)
16 to require NEPA analysis for a biological opinion is *Ramsey v.*
17 *Kantor*, 96 F.3d 434 (9th Cir. 1996), which applied NEPA to the
18 National Marine Fisheries Service's ("NMFS") issuance of a
19 biological opinion and incidental take statement ("ITS") under
20 ESA § 7 permitting state regulators to issue salmon fishing
21 regulations consistent with that take statement. 96 F.3d at
22 441-445. *Ramsey* found the biological opinion and ITS
23 constituted "major federal action," triggering NEPA
24 compliance, because it was "clear ... both from our cases and
25 from the federal regulations, see 40 C.F.R. § 1508.18, that if
26 a federal permit is a prerequisite for a project with adverse
27 impact on the environment, issuance of that permit does
28 constitute major federal action and the federal agency
involved must conduct an EA and possibly an EIS before

1 granting it." *Id.* at 444.

2 **Ramsey determined:**

3 [T]he incidental take statement in this case is
4 functionally equivalent to a permit because the
5 activity in question would, for all practical
6 purposes, be prohibited but for the incidental take
7 statement. Accordingly, we hold that the issuance of
8 that statement constitutes major federal action for
9 purposes of NEPA.

10 *Id.*

11 The Ramsey federal defendants contended that there was
12 insufficient federal participation in a state run project to
13 require an EIS. The Appeals Court disagreed: "if a federal
14 permit is a prerequisite for a project with adverse impact on
15 the environment, issuance of that permit does constitute a
16 major federal action...." triggering NEPA. *Id.* at 444
17 (internal citations and quotations omitted). Ramsey held that
18 "the incidental take statement in [that] case is functionally
19 equivalent to a permit because the activity in question would,
20 for all practical purposes, be prohibited but for the
21 incidental take statement." *Id.* Because the ITS was the
22 functional equivalent of a permit, NEPA applied to the
23 issuance of the biological opinion, despite federal
24 defendants' contention that the mere issuance of an ITS was
25 insufficient federal participation in a state project.

26 Here, unlike Ramsey, the CVP is an entirely federal
27 project, operated by Reclamation, a federal agency, rendering
28 Ramsey's "functional equivalency" analysis largely irrelevant.

1 Ramsey stands for two important principles: First, under
2 certain circumstances, a biological opinion may qualify as a
3 major federal action for NEPA purposes; second, not every
4 biological opinion is a major federal action.³

5
6 Plaintiffs maintain that the 2008 smelt BiOp qualifies as
7 a major federal action under 40 C.F.R. § 1508.18(b)(4) as a
8 matter of course. See Doc. 245-2 at 10 (suggesting, without
9 any analysis that the 2008 smelt BiOp is subject to NEPA
10 because under 1508(b)(4) "actions approved by permit or other
11 regulatory decision are major federal actions"). Plaintiffs
12 do not explicate the basis for § 1508.18(b)(4)'s application
13

14
15 ³ Defendant Intervenors and Federal Defendants cite several cases
16 that support the general proposition that BiOps are not always subject to
17 NEPA. For example, in *Southwest Center for Biological Diversity v.*
18 *Klasse*, 1999 WL 34689321 (E.D. Cal. Apr. 1, 1999), the issue was whether
19 FWS failed to comply with NEPA when it issued a BiOp and ITS after
20 consultation with the Army Corps of Engineers ("Corps") regarding its
21 operation of a dam on the Kern River. The court rejected this argument,
22 finding that plaintiffs' claim was based on an "overbroad interpretation"
23 of Ramsey, which "did not intend to require the FWS to file NEPA documents
24 every time it issues an incidental take statement to a federal agency."
25 1999 WL 34689321 at *11. See also *P'ship for a Sustainable Future v. U.S.*
26 *Fish & Wildlife Serv.*, 2002 WL 33883548 at *7 (M.D. Fla. July 12, 2002)
27 ("As a cooperating agency, the FWS is not required to duplicate the work
28 of the Corps by preparing its own EA or EIS."); *City of Santa Clarita v.*
FWS, 2006 WL 4743970 at *19 (C.D. Cal. Jan. 20, 2006) (finding that ITSs
issued by FWS "were not 'major federal action' triggering separate and
additional NEPA obligations on the part of the Service"); *Miccosukee Tribe*
of Indians of Fla. v. U.S., 430 F. Supp. 2d 1328, 1335 (S.D. Fla. 2006)
("To expect or require FWS to submit its own EIS, in spite of the fact
that it was not the action agency and that the Corps had already issued
one is nonsensical and an utter waste of government resources.").

These cases are distinguishable. In three of the four cases cited,
City of Santa Clarita, *Partnership for a Sustainable Future*, and
Miccosukee Tribe, the action agency either had already or was in the
process of completing environmental analysis under NEPA. The fourth case,
Klasse, was a challenge to the Army Corps of Engineers' modification of
operations at Isabella Reservoir. *Klasse* found that the Corps'
modifications, like those at issue in *Upper Snake River*, discussed below,
did not "deviate[] from [the Corps'] standard management scheme regarding
water levels." 1999 WL 34689321 at *11.

1 to the 2008 Smelt BiOp. Plaintiffs' argument that the BiOp is
2 the "functional equivalent" of a permit, premised on Ramsey,
3 is unhelpful because Ramsey is distinguishable.

4 Plaintiffs rely on language from the PI Decision
5 suggesting the BiOp is an "approval of [a] specific project[],
6 such as [a] management activit[y] located in a defined
7 geographic area ... approved by ... [a] regulatory decision."
8 See 40 C.F.R. 1508.18(b)(4). No party provides any relevant
9 regulatory definitions, legislative history, or caselaw
10 interpreting the "management activity" language from
11 1508.18(b)(4). The BiOp and its RPA/ITS arguably constitute a
12 "management activity," as they prescribe concerted actions to
13 manage federal resources implementing a specific plan designed
14 to "manage" threats to the smelt. The BiOp is also, arguably,
15 a "formal plan[]... which guide[s] or prescribe[s] alternative
16 uses of Federal resources, upon which future agency actions
17 will be based." See 40 C.F.R. § 1508.18(b)(2).⁴

21 ⁴ Plaintiffs do not expressly invoke 40 C.F.R. § 1508.18(b)(3)
22 (federal actions tend to include "[a]doption of programs, such as a group
23 of concerted actions to implement a specific policy or plan; systematic
24 and connected agency decisions allocating agency resources to implement a
25 specific statutory program or executive directive"). *Westlands Water Dist.*
26 *v. U.S. Dept. of Interior, Bureau of Reclamation*, 850 F. Supp. 1388, 1422
27 (E.D. Cal. 1994), found that the BiOp in that case was part of a set of
28 "systematic and connected agency decisions allocating agency resources to
implement a specific statutory program," namely the Central Valley Project
Improvement Act ("CVPIA"). The 2008 smelt BiOp does not fit this
definition, because it resulted from the Bureau's Section 7 consultation
on the proposed coordinated operations of the CVP-SWP. No "specific
statutory program or executive directive" like the CVPIA caused federal
resources (water) to be reallocated to protect the smelt. Rather, it was
the BiOp, required by the ESA, which determined an RPA was necessary to
avoid jeopardy to the smelt and its habitat.

1 Federal Defendants counter that the BiOp cannot possibly
2 constitute major federal action because it is not binding upon
3 Reclamation. They suggest, if the BiOp is merely a suggested
4 course of action, it is not an "approval of [a] specific
5 project[], such as [a] management activit[y] located in a
6 defined geographic area ... approved by ... [a] regulatory
7 decision," or a "formal plan[]... which guide[s] or
8 prescribe[s] alternative uses of Federal resources, upon which
9 future agency actions will be based."

11
12 b. Is the BiOp Binding Upon Reclamation?

13 *Westlands Water Dist. v. U.S. Dept. of Interior, Bureau*
14 *of Reclamation*, 850 F. Supp. 1388, 1422 (E.D. Cal. 1994),
15 considered as a factor in deciding if a BiOp is major federal
16 action whether the BiOp is binding upon the action agency.
17 Plaintiffs maintain that "[t]he binding nature of the 2008
18 BiOp is not susceptible to reasonable debate." Doc. 287 at 8.
19 This is an overstatement.

20
21 *Westlands* denied federal defendants' motion to dismiss
22 water districts' claims that NMFS and the Bureau failed to
23 comply with NEPA by, among other things, not completing an EA
24 or EIS before issuing a biological opinion concerning the
25 effects of coordinated Project operations on the winter-run
26 Chinook Salmon and implementing the RPA articulated in that
27 biological opinion. *Id.* at 1394-95. The federal defendants
28

1 in *Westlands* argued that the biological opinion was not a
2 "major federal action" because it was merely advisory. *Id.* at
3 1420 (citing 40 C.F.R. § 1508.18(b)(3)). The *Westlands*
4 plaintiffs, as the Plaintiffs do here, suggested that the
5 biological opinion and RPA at issue effectively bound
6 Reclamation because Reclamation "must either follow the
7 alternative suggested or risk violation of ESA § 7(a)(2)...."
8 *Id.* at 1420.

10 *Westlands* found that, as a general rule, "[b]iological
11 opinions are not binding on the Secretary, nor do they
12 invariably require an EIS." 850 F. Supp. at 1422 (emphasis
13 added). Rather, a case-by-case analysis is required:

15 A biological opinion is part of the ESA process
16 originated by 16 U.S.C. § 1536(a)(2), which requires
17 federal agencies, with the assistance of the
18 Secretary, to "insure that any action authorized,
19 funded, or carried out by such agency ... is not
20 likely to jeopardize the continued existence of any
21 endangered species or threatened species." The
22 federal agency undertaking such activity must consult
23 the service having jurisdiction over the relevant
24 endangered species. 16 U.S.C. § 1536(a)(3). The
25 U.S. Fish and Wildlife Service (FWS) and the National
26 Marine Fisheries Service (NMFS), are jointly
27 responsible for administering the ESA. 50 C.F.R. §
28 402.01(b) (1992). The consulting service then issues
a biological opinion that details how the proposed
action "affects the species or its critical habitat,"
including the impact of incidental takings of the
species. 16 U.S.C. § 1536(b)(3)(A).

24 "The agency is not required to adopt the alternatives
25 suggested in the biological opinion; however, if the
26 Secretary deviates from them, he does so subject to
27 the risk that he has not satisfied the standard of
28 Section 7(a)(2)." *Tribal Village of Akutan v. Hodel*,
869 F.2d 1185, 1193 (9th Cir. 1988) (citation
omitted), cert. denied, 493 U.S. 873 (1989). A
Secretary can depart from the suggestions in a
biological opinion, and so long as he or she takes

1 "alternative, reasonably adequate steps to insure the
2 continued existence of any endangered or threatened
3 species," no ESA violation occurs. Id. at 1193 95;
4 Pyramid Lake Paiute Tribe of Indians v. Department of
5 Navy, 898 F.2d 1410, 1418 (9th Cir.1990) ("a non
6 Interior agency is given discretion to decide whether
7 to implement conservation recommendations put forth
8 by the FWS"). The Joint Regulations state:

9 The Service may provide with the biological
10 opinion a statement containing discretionary
11 conservation recommendations. Conservation
12 recommendations are advisory and are not intended
13 to carry any binding legal force.

14 50 C.F.R. § 402.14(j) (1992). 50 C.F.R. § 402.15(a)
15 states:

16 []Following the issuance of a biological opinion,
17 the Federal agency shall determine whether and in
18 what manner to proceed with the action in light
19 of its section 7 obligations and the Service's
20 biological opinion.

21 Courts have attempted to define the "point of
22 commitment," at which the filing of an EIS is
23 required, during the planning process of a federal
24 project. See *Sierra Club v. Peterson*, 717 F.2d 1409,
25 1414 (D.C.Cir. 1983). "An EIS must be prepared
26 before any irreversible and irretrievable commitment
27 of resources." *Conner v. Burford*, 848 F.2d 1441,
28 1446 (9th Cir. 1988), cert. denied 489 U.S. 1012
(1989). 40 C.F.R. § 1502.5(a) similarly provides,
"[f]or projects directly undertaken by Federal
agencies, the environmental impact statement shall be
prepared at the feasibility analysis (go/no go) stage
and may be supplemented at a later stage if
necessary."

[One of the water agency plaintiffs] points out that
the Environmental Review Procedures, under the
National Oceanic and Atmospheric Administration
("NOAA") Order No. 216 6, § 6.02.c.2(d), require an
EIS for:

Federal plans, studies, or reports prepared by
NOAA that could determine the nature of future
major actions to be undertaken by NOAA or other
federal agencies that would significantly affect
the quality of the human environment.

It is undisputed that the NMFS's actions are subject
to an EIS requirement, if those actions are a "major
federal action significantly affecting the human
environment." Under 40 C.F.R. § 1508.18(b)(2), an

1 activity is a federal action if it "guides," rather
2 than binds, the use of federal resources. CVP water
3 is a federal resource. The Bureau's options were
4 narrow had it declined to follow the NMFS's
5 reasonable and prudent alternatives. See *Tribal*
6 *Village of Akutan*, 869 F.2d at 1193 (agency need not
7 adopt reasonable and prudent alternatives in
8 biological opinion, so long as it complied with ESA
9 Section 7(a)(2) by taking "alternative, reasonably
10 adequate steps to insure the continued existence of
11 any endangered or threatened species"); *Portland*
12 *Audubon Society v. Endangered Species*, 984 F.2d 1534,
13 1537 (9th Cir.1993) (discusses exemptions from ESA,
14 by application to the Committee under 16 U.S.C. §§
15 1536(a)(2), (g)(1)(2)).

9 The government submits *Bennett v. Plenert*, CV 93
10 6076, 1993 WL 669429 (D.Or.1993), as authority that
11 biological opinions are not binding on federal
12 agencies, and consequently are not major federal
13 actions. But in *Bennett*, the court left open the
14 issue that a biological opinion could constitute a
15 major federal action under NEPA. *Id.* at p. 11, n. 4.
16 Biological opinions are not binding on the Secretary,
17 nor do they invariably require an EIS. The inquiry
18 requires a case by case analysis.

15 Taking the facts alleged in the plaintiffs'
16 complaints as true, the biological opinion is part of
17 a systematic and connected set of agency decisions
18 which result in the commitment of substantial federal
19 resources for a statutory program, which resulted in
20 reallocation of over 225,000 acre feet of CVP water
21 under the ESA for salmon protection with the
22 environmental impacts alleged. This is NEPA major
23 federal action.

24 *Id.* at 1420-22 (emphasis added) (parallel citations omitted).⁵

21
22 ⁵ Federal Defendants and Defendant-Intervenors place great weight on
23 a line of authority that suggests where the specific "dimensions" of a
24 proposal are still evolving and have not yet reached the point
25 "immediately preced[ing] where there will be 'irreversible and
26 irretrievable commitments of resources' to [an] action affecting the
27 environment," it is premature to require NEPA compliance. *Sierra Club v.*
28 *Hathaway*, 579 F.2d 1162, 1158 (1978); see also *Metcalf v. Daley*, 214 F.3d
1135, 1143 (9th Cir. 2000) (NEPA analysis not required until decision
results in an "irreversible and irretrievable commitment of resources").
Plaintiffs rejoin that the "irreversible and irretrievable commitment of
resources" standard concerns the timing of NEPA, not its applicability,
and is therefore inapplicable. Plaintiffs are correct that the
"irreversible and irretrievable commitment of resources" is most often
used to determine when, rather than whether, NEPA analysis is required,
and is designed to ensure that agencies engage in the NEPA process early

1 The biological opinion was found not binding on Reclamation,
2 and the court instead applied 1508.18(b)(3) to find that NEPA
3 applied to the BiOp because it was part of a "systematic and
4 connected set of agency decisions which result in the
5 commitment of substantial federal resources for a statutory
6 program," a provision that is inapplicable here. *Id.* at
7 1422.⁶
8

9 Here, to satisfy its obligations under NEPA, Reclamation
10 initiated formal consultation and prepared a BA to describe
11 the proposed action. FWS, as the consulting agency, reviewed
12 the BA, disagreed with its conclusion, and issued the 2008
13 BiOp with an RPA. See BiOp i-vi. Reclamation was free to
14 accept or reject, in whole or in part, FWS's recommendations
15 and advice prescribed in that RPA. The consultation
16 regulations state that "the Federal [action] agency shall
17 determine whether and in what manner to proceed with the
18 action in light of its section 7 obligations and the Service's
19 biological opinion." 50 C.F.R. § 402.15(a).⁷ However, FWS
20
21

22 enough to "insure that planning and decisions reflect environmental
23 values, to avoid delays later in the process, and to head off potential
24 conflicts." *Metcalfe*, 214 F.3d at 1143 (citing 40 C.F.R. § 1501.2). But,
25 this does not render the inquiry irrelevant here. Rather, the point at
26 which an "irreversible and irretrievable commitment of resources" takes
27 place is relevant to determining which agency is responsible for
28 undertaking NEPA analysis in this case. See *Westlands*, 850 F. Supp. at
1422.

⁶ *Westlands* was vacated on other grounds, *Westlands Water Dist. v. NRDC*, 43 F.3d 457 (9th Cir. 1994), and the NEPA claim was voluntarily withdrawn by plaintiffs before a merits ruling issued, see *Stockton East Water Dist. v. U.S.*, 75 Fed. Cl. 321, 326 (2007).

⁷ Courts have consistently held that the action agency retains the ultimate responsibility for deciding whether, and how, to proceed with the

1 could not issue the BiOp without also including an RPA to
2 mitigate jeopardy. FWS proposed an RPA that called for
3 actions that commit federal water to smelt protection.
4 Reclamation was not "bound" to accept the proposed RPA, but it
5 did so. Resulting operations reduced 2008-09 water deliveries
6 by several hundred thousand acre-feet. In this case, actions
7 speak louder than words.
8

9 Plaintiffs argue that the FWS's issuance of the 2008 BiOp
10 requires that FWS prepare an EIS, because a BiOp has a
11 "powerful coercive effect" on the action agency. Doc. 245-2
12 at 12. On the one hand, if Reclamation had disregarded the
13 RPA, the 2008 BiOp would not have provided an exemption from
14 the ESA's take prohibitions, potentially subjecting the
15 operators to civil and criminal liability. 16 U.S.C. §§
16 1538(a) (prohibiting the "take" of listed species); 1536(o)(2)
17 (a taking in compliance with a biological opinion's ITS "shall
18 not be considered to be a prohibited taking of the species
19 concerned").⁸ However, Federal Defendants argue Reclamation's
20
21

22 proposed action after Section 7 consultation. See, e.g., *Pyramid Lake*
23 *Paiute Tribe of Indians v. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th
24 Cir. 1990); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th
25 Cir. 1988) ("[the action] agency is not required to adopt the alternatives
26 suggested in the biological opinion"); *Sierra Club v. Marsh*, 816 F.2d
27 1376, 1386 (9th Cir. 1987) ("The ESA does not give the FWS the power to
28 order other agencies to comply with its requests or to veto their
29 decisions."); *Westlands*, 850 F. Supp. at 1422 ("Biological opinions are
30 not binding on the Secretary"); *Nat'l Wildlife Fed'n v. Coleman* 529 F.2d
31 359, 371 (5th Cir. 1976) ("Section 7 does not give [the Service] a veto
32 over the actions of other federal agencies").

⁸ Plaintiffs emphasize *Bennett v. Spear*, 520 U.S. 154, 161, 178
(1997), which held that biological opinions have a "virtually
determinative," and "powerful coercive effect" on an action agency. But

1 departure from the RPA would not necessarily violate Section 7
2 of the ESA, if Reclamation took "alternative, reasonably
3 adequate steps to insure the continued existence" of listed
4 species. *Tribal Village of Akutan*, 869 F.2d at 1193. This is
5 sophistry. Reclamation operated the joint Projects and
6 managed federal resources (CVP water) in accordance with the
7 RPA, resulting in a major revision of 2008-09 coordinated CVP
8 operations and substantial reallocation of federal resources.
9 The only reason Reclamation did so was to meet the mandate of
10 the ESA and the BiOp.⁹ Both agencies participated to some
11 degree in the agency action at issue here.

12
13 Assuming, *arguendo*, NEPA applies, is it required that one
14 of the agencies should have acted as "lead agency" in any
15 effort to comply with NEPA's requirements? Plaintiffs
16 acknowledge that "to avoid duplication, applicable regulations
17

18
19 Bennett concerned "final agency action" requirement under APA, not NEPA's
"major federal action" trigger.

20 ⁹ Reclamation has considered alternative approaches to mitigating
jeopardy. In recent NEPA reviews performed by Reclamation on CVP-SWP
21 projects, Reclamation has indicated that it is "still reviewing" the BiOp
to determine if it "can be implemented in a manner that is consistent with
22 the intended purpose of the [2004 Operations Criteria and Plan], is within
Reclamation's legal authority and jurisdiction, and is economically and
23 technologically feasible." See, e.g., Defendant Intervenor's Request for
Judicial Notice ("DIRJN"), Ex. 1, El Dorado County Water Agency Proposed
24 Water Service Contract Draft EIS/EIR (July 2009) at 1-5. The Bureau has
also evaluated alternatives to the RPA in its NEPA review for the "Two-
25 Gates Project," which proposes an "alternative management strategy" to
achieve protection of the delta smelt "with higher than the minimum
26 allowed water exports described in the [2008 Smelt BiOp's RPA] while
operating within the other water management requirement (D-1641)." DIRJN,
27 Ex. 2, Two-Gates Fish Protection Demonstration Project, Summary Document
(July 16, 2009) at 1; DIRJN, Ex. 3, DWR Fact Sheet, Two-Gates Project: A
28 project led by the U.S. Bureau of Reclamation (August 2009). But,
Reclamation chose to implement the RPA, rather than any of these
alternatives, during the 2008-09 water year.

1 allow agencies to share NEPA responsibility if more than one
2 agency is involved in the same action or a group of related
3 actions," Doc. 245-2 at 25 (citing *Sierra Club v. U.S. Army*
4 *Corps of Engineers*, 295 F.3d 1209, 1215 (11th Cir. 2002); 40
5 C.F.R. § 1501.5), and that "when more than one federal agency
6 has authority over an action, NEPA does not explicitly specify
7 which agency is responsible for preparing an EIS," *id.* (citing
8 *Sierra Club v. U.S. Army Corps of Eng.*, 701 F.2d 1011, 1041
9 (2d Cir. 1983)). NEPA permits the relevant federal agencies
10 to decide between themselves which will act as lead agency,
11 subject to reasonable constraints. 40 C.F.R. § 1501.5(c);
12 *Westlands*, 850 F. Supp. at 1422; see also *NRDC v. Callaway*,
13 524 F.2d 79, 86 (2d Cir. 1975). This is reasonable agency
14 interpretation of law; it makes little sense to have two
15 agencies prepare separate NEPA documents for the same agency
16 action.

17
18
19 If there is a disagreement among several agencies
20 involved in a project as to which is the lead agency, the
21 following factors "shall determine lead agency designation":
22

- 23 (1) Magnitude of agency's involvement.
- 24 (2) Project approval/disapproval authority.
- 25 (3) Expertise concerning the action's environmental effects.
- 26 (4) Duration of agency's involvement. (5) Sequence of
27 agency's involvement.

28 40 C.F.R. § 1501.5(c).

1 Plaintiffs maintain that application of these factors
2 demonstrates that FWS is the appropriate lead agency, arguing:

3
4 FWS is the agency that researched, drafted, and
5 approved the 2008 BiOp and, thus, has the most
6 involvement in the action. See AR 4-7; see also
7 Bennett, 520 U.S. at 161, 178 (a biological opinion
8 is FWS's decision document). FWS has the sole
9 approval authority over the 2008 BiOp, and its ITS
10 and RPA, while other entities will be liable for
11 incidental take of a listed species if they do not
12 comply with it. AR 300-01. FWS has expertise in
13 assessing the environmental effects of actions such
14 as the instant action. FWS was involved throughout
15 the development process of the BiOp and RPA, so FWS
16 is the agency with authority to shape the 2008 BiOp
17 and its recommendations. See AR 4-7. And finally,
18 FWS was involved from the beginning of the 2008 BiOp
19 development process and is the final decision-maker
20 and sole issuing agency, making it the logical agency
21 to develop useful environmental analysis before
22 approval, rather than mere post hoc "review" of
23 actions that are too late to be altered. See AR 4-7;
24 Doc. 94, Findings of Fact, at p. 40, ¶ 30.

25 Doc. 245-2 at 26-27

26 This argument assumes that the BiOp itself, rather than
27 the operation of the Projects under the BiOp is the relevant
28 action in need of NEPA evaluation. Federal Defendants and
Defendant Intervenors maintain that this is not the
appropriate focus for the "lead agency" inquiry. Rather, it
is Reclamation's planned coordinated operation of the Projects
that creates the jeopardy found by the BiOp. This coincides
with FWS's Consultation Handbook, which indicates that FWS
should "assist the action agency or applicant in integrating
the formal consultation process into their overall

1 environmental compliance" for a particular project.
2 Consultation Handbook at 4-11 (emphasis added).
3

4 The appropriate focus is "Project operations," and
5 Reclamation is the appropriate lead agency. Reclamation
6 proposed the action (in the form of the Operations and
7 Criteria Plan ("OCAP")) to FWS, which triggered the
8 preparation of the BiOp. Reclamation has the ongoing
9 statutory authority to implement project operations as
10 prescribed by the OCAP. See, e.g., AR at 10262 (BA at 1-1)
11 ("The Bureau of Reclamation (Reclamation) and the California
12 Department of Water Resources (DWR) propose to operate the
13 Central Valley Project (CVP) and State Water Project (SWP) to
14 divert, store, and convey CVP and SWP (Project) water
15 consistent with applicable law and contractual obligations.");
16 AR at 10263-64 (BA at 1-2 - 1-3) (identifying certain laws
17 authorizing Bureau operation of CVP); AR at 10270-71 (BA at 1-
18 9 - 1-10) (Coordinated Operation Agreement ("COA") and P.L.
19 99-546 impose a "Congressional mandate to Reclamation to
20 operate the CVP in conjunction with the SWP FWS's involvement
21 with regard to future Project operations is limited,
22 consisting primarily of its obligation to ensure that those
23 operations do not impair protection and recovery of threatened
24 and endangered species, an obligation that it shares with
25 Reclamation. 16 U.S.C. § 1536(a)(2).").
26
27
28

1 Reclamation has greater expertise concerning the alleged
2 adverse environmental effects. The impacts identified by
3 Plaintiffs allegedly occur as a result of reduced water
4 deliveries under Reclamation's water supply contracts. See,
5 e.g., Doc. 292, San Luis First Amended Complaint ("SLFAC") at
6 ¶44 ("Water supply shortages resulting from [sic] the 2008
7 Biological Opinion ... threaten numerous adverse environmental
8 effects including ... worsening of groundwater basin
9 overdraft, land subsidence, decreased groundwater recharge,
10 threatened violation of state-adopted basin plan water quality
11 objectives, reductions in crop yields, reduced agricultural
12 employment, endangerment of permanent crops, and decreased air
13 quality."). Reclamation routinely examines these and related
14 impacts as the lead or co-lead agency on NEPA reviews of
15 proposed CVP-SWP operations¹⁰ and frequently has the ability
16 and authority to propose ways to mitigate these impacts.¹¹ FWS

19
20 ¹⁰ See, e.g., 66 Fed. Reg. 50,213 (Oct. 2, 2001) (San Luis Unit
21 Feature Reevaluation); 70 Fed. Reg. 68,475 (Nov. 10, 2005) (South Delta
22 Improvements Program); 69 Fed. Reg. 71,424 (Dec. 9, 2004) (San Luis Unit
23 Long-Term Contract Renewals); 58 Fed. Reg. 7,242 (Feb. 5, 1993) (Central
24 Valley Project Improvement Act implementation).

25 ¹¹ See, e.g., 74 Fed. Reg. 37,051 (July, 27, 2009) (Madera Irrigation
26 District Water Supply Enhancement Project proposed "[t]o increase water
27 storage, enhance water supply reliability and flexibility for current and
28 future water demand and reduce local overdraft"); 74 Fed. Reg. 34,031
(July 14, 2009) (Delta-Mendota Canal-California Aqueduct Intertie proposed
"to improve the DMC conveyance conditions that restrict the CVP Jones
Pumping Plant to less than its authorized pumping capacity of 4,600 cubic
feet per second."); 73 Fed. Reg. 29,534 (May 21, 2008) (Red Bluff
Diversion Dam); 72 Fed. Reg. 42,428 (Aug. 2, 2007) (San Joaquin River
Restoration Program); 69 Fed. Reg. 71,424 (Dec. 9, 2004) (Mendota Pool
Ten-Year Exchange Agreements proposed "to provide water to irrigable lands
on Mendota Pool Group properties in Westlands Water District and San Luis
Water District to offset substantial reductions in contract water supplies
attributable to the Central Valley Project Improvement Act (CVPIA), the

1 has little to no expertise in or authority over many of these
2 matters.¹²

3 In the final analysis, FWS was asked for its "opinion"
4 whether Reclamation's operations plans would jeopardize the
5 smelt. FWS provided that opinion, as required by law.
6 Reclamation was not "bound" by the BiOp until it chose to
7 proceed with the OCAP and implement the RPA. Once Reclamation
8 did so, operation of the Projects became the relevant agency
9 "action," and Reclamation, as action agency, is the more
10 appropriate lead agency under NEPA. The adaptive management
11 protocol prescribed in the RPA leaves FWS with the final word
12 on exactly what flow requirements will be imposed.
13 Reclamation accepted this arrangement as a constraint upon its
14 operations when it provisionally accepted the RPA. FWS played

17 Endangered Species Act listings and regulations, and new Bay-Delta water
18 quality rules.").

19 ¹² Federal Defendants and Defendant Intervenors' position that
20 Reclamation is the appropriate lead agency is supported by *Pac. Coast*
21 *Fed'n of Fishermen's Ass'ns v. Gutierrez*, Case No. 1:06-CV-245 OWW LJO
22 ("PCFFA"), in which plaintiffs alleged that Reclamation's approval of the
23 2004 OCAP was a major federal action that required compliance with NEPA.
24 2007 WL 1752289 (E.D. Cal. June 15, 2007). The Court determined that the
25 OCAP was not reviewable as a "final agency action" under the APA but noted
26 that, after ESA consultation on the OCAP was completed, Reclamation "may
27 decide to take certain actions and, if those actions []rise to the level
28 of a 'final agency action' under the APA, steps could be reviewable." *Id.*
at *13 (emphasis in original). PCFFA recognized that Reclamation stated
in the OCAP that "NEPA compliance is being accomplished on all new
projects or actions that may change CVP/State Water Project operations
such that there is a significant effect on the environment." *Id.* at *18.
The district court concluded:

It is explicit that if and when Reclamation ultimately decides to
take a new action that is not within the scope of historical
operations that could have a significant impact on the environment,
Reclamation will undertake NEPA analysis.

Id. (emphasis added).

1 a key role in formulation, planning, and implementation of the
2 RPA, with full knowledge that no NEPA compliance had been
3 undertaken. This is not a shell game in which the agencies
4 may leave the public to guess which agency has taken major
5 federal action. It is a close call whether FWS's issuance of
6 the BiOp and its RPA under these circumstances is major
7 federal action under NEPA. This call need not be made,
8 because Reclamation, the agency with the ultimate authority to
9 implement the RPA, is now joined as a party, whose actions
10 must be evaluated under NEPA.
11

12
13 2. A NEPA Claim Against Reclamation Has Been Pled and Is
14 Ripe for Adjudication.

15 On September 4, 2009, shortly after the opening briefs in
16 this round of motions for summary judgment were due, the
17 Authority and Westlands ("San Luis Parties") amended its
18 complaint to include NEPA claims against the Bureau. Doc.
19 292, *San Luis First Amended Complaint* ("SLFAC").
20 Specifically, the SLFAC alleges that Reclamation's decision to
21 provisionally accept and implement the 2008 BiOp is arbitrary,
22 capricious, and contrary to law, because, among other things,
23 "Reclamation did not ... perform[] NEPA analysis of the
24 impacts to the human environment from, or alternative actions
25 to, the 2008 Biological Opinion...." SLFAC ¶114. The parties
26 were offered an opportunity and did supplement their briefing
27 to fully consider the amended complaint. See Docs. 336 (Order
28

1 Re further NEPA briefing); 357 & 358 (Defendant Intervenors'
2 supplemental NEPA filings); 360 (Federal Defendants'
3 supplemental NEPA filing); 361 (Plaintiffs' supplemental NEPA
4 filing).

5
6 Federal Defendants object to summary adjudication of any
7 NEPA claim against Reclamation that has "neither been pled nor
8 argued." Doc. 360 at 5. The objection is overruled, because
9 such a claim has been pled in the SLFAC. In addition, Federal
10 Defendants addressed Reclamation's liability under NEPA in
11 their original briefs, see Docs. 290 at 21-23 (Federal
12 Defendants' Opposition) & 290-2 (Fujitani Declaration), at
13 oral argument, and have been given further opportunity to
14 supplement those briefs to fully address Reclamation's role
15 and actions.

16
17 Federal Defendants also suggest that Reclamation should
18 be permitted the opportunity to "assemble an administrative
19 record" on the NEPA issue before it is adjudicated. Doc. 360
20 at 5. However, the parties previously agreed that NEPA claims
21 against FWS related to the issuance of the BiOp could be
22 adjudicated without reference to the administrative record.
23 See Doc. 120 at 6-7. Federal Defendants fail to explain why
24 NEPA claims against the Bureau related to implementation of
25 the BiOp should be treated any differently.
26
27
28

1 3. Reclamation's Provisional Acceptance and
2 Implementation of the BiOp and its RPA Constitute
3 Major Federal Action Because they Represent a
4 Significant Change to the Operational Status Quo.

5 Projects such as the CVP and SWP, constructed prior to
6 the date on which NEPA became effective, January 1, 1970, are
7 not retroactively subject to NEPA. See *Upper Snake River*
8 *Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234 (9th
9 Cir. 1990). "However, if an ongoing project undergoes changes
10 which themselves amount to major Federal actions, the
11 operating agency must prepare an EIS." *Id.* at 234-35 (citing
12 *Andrus v. Sierra Club*, 442 U.S. 347, 363 n. 21
13 (1979) (explaining that major federal actions include the
14 "expansion or revision of ongoing programs")). The critical
15 inquiry is whether the BiOp causes a change to the operational
16 status quo of an existing project. *Upper Snake River*, 921
17 F.2d at 235.

18 *Upper Snake River* concerned Reclamation's decision to
19 reduce flows below Palisades Dam and Reservoir to below 1,000
20 cfs "[d]ue to lack of precipitation ... to increase water
21 stored for irrigation...." 921 F.2d at 234. Although it had
22 been standard operating procedure since 1956 to maintain flows
23 below that dam above 1,000 cfs, during previous dry periods,
24 the average flow had "been lower than 1,000 cfs for 555 days
25 (or 4.75% of the total days in operation)." *Id.* at 233.
26 Because the challenged flow fluctuations were within historic
27 28

1 operational patterns, no NEPA compliance was required:

2 The Federal defendants in this case had been
3 operating the dam for upwards of ten years before the
4 effective date of the Act. During that period, they
5 have from time to time and depending on the river's
6 flow level, adjusted up or down the volume of water
7 released from the Dam. What they did in prior years
8 and what they were doing during the period under
9 consideration were no more than the routine
10 managerial actions regularly carried on from the
11 outset without change. They are simply operating the
12 facility in the manner intended. In short, they are
13 doing nothing new, nor more extensive, nor other than
14 that contemplated when the project was first
15 operational. Its operation is and has been carried on
16 and the consequences have been no different than
17 those in years past.

18 The plaintiffs point out that flow rates have been
19 significantly below 1,000 cfs for periods of seven
20 days or more only in water years 1977, 1982, and
21 1988, all years of major drought. They also note that
22 prior to construction of the dam, the lowest recorded
23 flow rate did not fall below 1400 cfs. From these
24 facts, they argue that the Bureau's reduction of the
25 flow below 1,000 cfs is not a routine managerial
26 action. However, a particular flow rate will vary
27 over time as changing weather conditions dictate. In
28 particular, low flows are the routine during drought
years. What does not change is the Bureau's
monitoring and control of the flow rate to ensure
that the most practicable conservation of water is
achieved in the Minidoka Irrigation Project. Such
activity by the Bureau is routine.

19 *Id.* at 235-36 (emphasis added).

20 *Westlands* specifically distinguished *Upper Snake River*,
21 and reasoned that whether or not an EIS was required "will, of
22 necessity, depend heavily upon the unique factual
23 circumstances of each case." 850 F. Supp. at 1415 (citing
24 *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1224
25 (9th Cir. 1979)).

26 To some extent, the finding is based on whether the
27 proposed agency action and its environmental effects
28 were within the contemplation of the original project

1 when adopted or approved. See [*Port of Astoria, Or.*
2 *v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)];
3 *Robinswood Community Club [v. Volpe]*, 506 F.2d 1366
4 [(9th Cir. 1974)]. The inquiry requires a
5 determination of whether plaintiffs have complained
6 of actions which may cause significant degradation of
7 the human environment. [*City and County of San*
8 *Francisco v. United States*, 615 F.2d 498, 500 (9th
9 Cir. 1980)].

10 *Westlands*, 850 F. Supp. at 1415. In *Westlands* "the taking of
11 water for non-agricultural purposes [was] alleged to have
12 changed the operational requirements of the CVP, imposed new
13 standards for reverse flows in the Western Delta, carryover
14 storage in the Shasta reservoir, and caused closure of the
15 Delta cross-channel. Such actions and the environmental
16 effects alleged are not routine managerial changes." *Id.* at
17 1421.

18 Plaintiffs contend that the present circumstances are
19 more like those in *Westlands* than in *Upper Snake River*.
20 First, quoting page 280 of the BiOp, Plaintiffs argue that
21 "the 2008 BiOp greatly 'decreas[es] the amount of ... the
22 projects' export pumping plants operations prior to, and
23 during, the critical [delta smelt] spawning period.'" Doc.
24 245-2 at 20 (quoting BiOp 280). Plaintiffs' partial quotation
25 is not fully accurate, as the entire quoted sentence concerns
26 effects to critical habitat, not pumping rates: "Overall, RPA
27 Component 1 will increase the suitability of spawning habitat
28 for delta smelt by decreasing the amount of Delta habitat
 affected by the projects' export pumping plants' operations

1 prior to, and during, the critical spawning period."

2 Nevertheless, the RPA will be implemented by altering flow
3 patterns, which will substantially reduce water availability
4 for water service contractors.¹³

5
6 Plaintiffs argue that the various components of the RPA
7 call for more restrictive OMR flows than under the status quo:

8 RPA Component 1, Action 2 for January and February
9 calls for much more restrictive OMR flows of -1,250
10 cfs to -5,000 cfs rather than the -5,000 cfs
11 permitted under D-1641. AR 22, 1867. As recognized
12 by a DWR comment letter on the BiOp, this is a
13 considerable change from the previous regimen because
14 "to meet a -1,250 cfs OMR flow during June, the
15 Project could cut pumping to zero and still not meet
16 the OMR target." AR 6995-96. In addition, the
17 proposed take limits for adult delta smelt have been
18 significantly lowered such that they would have been
19 exceeded 19 out of 28 years of historic operations
20 from 1981 to 2007. AR 1867.

21 ¹³ In addition, Plaintiffs quote BiOp page 281 to posit that the RPA
22 "mandates even greater reductions in Delta water exports whenever 'the
23 Service [makes a] final determination as to OMR flows required to protect
24 delta smelt.'" Doc 245-2 at 20 (quoting BiOp 281). Although the BiOp
25 does contain a sentence that reads, "[t]hroughout the implementation of
26 RPA Component 1, the Service will make the final determination as to OMR
27 flows required to protect delta smelt." The surrounding text does not
28 state that the RPA "mandates even greater reductions" in export pumping
whenever FWS makes a final determination as to OMR flows. This partial
quotation is inaccurate.

29 Plaintiffs also argue that a DWR comment letter included in the
30 administrative record "demonstrates" that "the RPA mandates export
31 restrictions well beyond routine Project managerial changes by imposing
32 pumping restrictions in the fall months, viz., the 'X2' requirements
33 purported to benefit delta smelt habitat, which have never previously
34 served as the basis for export restrictions during that time period. AR
35 6993." Doc. 245-2 at 20. As noted by DWR in that letter, "relative to
36 2008, the actions represent a substantial increase in the level of
37 protection. The addition of a fall action is something new, though.
38 Obviously, water supply would take a larger 'hit.'" *Id.* Although the
letter includes hearsay opinions, implementing such management actions
constitutes a new and unprecedented change in project operations, which
will have restrictive impacts that have the potential to be major and
adverse.

1 Doc. 245-2 at 20. This argument is predominantly based on
2 information in the administrative record, despite the fact
3 that administrative record has not yet been finalized and the
4 scheduling conference order in this case specifically limits
5 the "early resolution" claims to those that do not depend on
6 the administrative record.
7

8 Federal Defendants maintain that whether the RPA causes a
9 change to the status quo is an issue of fact, requiring
10 evaluation of all of the evidence in the record. The parties
11 previously agreed that issues requiring review of the
12 administrative record were not to be decided at this stage in
13 the case. See Doc. 120 at 6-7.¹⁴ Federal Defendants present
14 the Declaration of Paul Fujitani, Doc. 290-2, which includes a
15 review of historic OMR flows and compares those flows to
16 projected flows under the RPA. Based on Fujitani's
17 declaration, Federal Defendants argue:
18

19
20 As the available historical data show ... average OMR
21 flows in January have fluctuated from as high as -
22 3,269 cfs (January 1998) to as low as -8,268 cfs
23 (January 2003). Daily flows vary even more widely --
24 for example, in January 1998, daily OMR flows ranged
25 between 2,810 cfs and -9,530 cfs. See Ex. 1. The
26 flows set forth in RPA Component 1, Action 2 are
27 within these historic parameters. Similarly, the
28 historical record shows average OMR flows in February
have fluctuated from as high as 20,631 cfs (February

¹⁴ Plaintiffs misconstrue Defendant-Intervenors' argument that these factual issues should not be decided at this time as an argument that they are not amendable to summary judgment at all. Plaintiffs' extensive discussion of why NEPA issues are amenable to summary judgment is misplaced. Issues that require a review of the administrative record are, by the parties' own stipulation, not to be decided at this stage of the case. Doc. 120 at 6-7.

1 1997) to as low as -9,086 cfs (February 2003). The
2 February flows set forth in RPA Component 1, Action 2
are also within these historic parameters.

3 RPA Component 2 provides that under certain
4 conditions, OMR flows should be maintained between -
5 1,250 and -5,000 cfs from the date Component 1 is
6 completed until June 30 (or until water temperatures
7 at Clifton Court Forebay reach 25 degrees Celsius).
The available historic data shows a wide range of OMR
flows between January and July, and the flow ranges
set forth in RPA Component 2 are within these
historic parameters. See Ex. 1.

8 Therefore, even after adopting the OMR flow
9 restrictions, Reclamation continues to operate the
10 CVP within existing law and the same overall flow
parameters, as it has done for decades.

11 *Id.* at 22-23.

12 Plaintiffs respond with the declaration of Thomas
13 Boardman, Doc. 297-2, who opines that, under certain
14 scenarios, the RPA constrains export pumping in a manner that
15 departs from the status quo ante:

16 I reviewed historic data and considered how the 2008
17 BiOp might affect operations as compared to the pre-
18 existing criteria in D-1641. Based upon my review of
19 those data, I found, in some circumstances, operating
20 the CVP and SWP to meet pre-existing D-1641 criteria
21 resulted in OMR flows more positive than -1,250 cfs.
22 If those circumstances occur, the new OMR criteria in
23 the 2008 BiOp would not control. I also found, in
24 some circumstances, operating the CVP and SWP to meet
25 the pre-existing D-1641 criteria resulted in OMR
26 flows within the range specified by FWS pursuant to
27 the 2008 BiOp. If those circumstances are presented
28 again, the 2008 BiOp may control CVP and SWP
operations, depending upon where in the range FWS
sets the OMR limit. In still other circumstances,
however, I found the pre-existing D-1641 criteria
allowed OMR flows more negative than -5,000 cfs, the
most negative flow rate allowed under the 2008 BiOp.
If those circumstances occur, the new operating
criteria in the 2008 BiOp will definitely control CVP
and SWP operations. The changes in CVP and SWP

1 operations necessary to meet the new operating
2 criteria in the 2008 BiOp will reduce availability of
the CVP and SWP to supply water.

3 *Id.* at ¶9.

4 Boardman also concluded that "[i]n 2009, limits on OMR
5 flows imposed by FWS under the 2008 BiOp resulted in lower
6 rates of CVP and SWP pumping than otherwise would have been
7 allowed if only the preexisting criteria in D-1641
8 controlled." *Id.* at ¶10. Boardman estimates "that as a
9 result of the 2008 BiOp limits on OMR flows from mid February
10 to the end of March and from mid May to the end of June, the
11 Jones Pumping Plant was unable to pump approximately 390,000
12 acre-feet of water that it otherwise could have pumped and
13 provided to water users south of the Delta, if only the pre-
14 existing criteria in D-1641 controlled." *Id.*

15
16
17 Fujitani's and Boardman's conclusions are not
18 inconsistent. Fujitani concludes that average and daily OMR
19 flows under the RPA fall within historic average and daily
20 flow ranges. Boardman opines that, even though any given
21 post-RPA average or daily OMR flow figure may fall within
22 historic ranges, under certain circumstances, pre-RPA
23 constraints would permit even more negative flows, resulting
24 in even more export capability. Although Fujitani's
25 conclusion, that post-RPA operations fall within the range of
26 historic operating conditions, may comply with the letter of
27
28

1 *Upper Snake River*, the RPA's operational changes violate the
2 spirit and reasoning of *Upper Snake River*:

3 This circuit has held that where a proposed federal
4 action would not change the status quo, an EIS is not
5 necessary. "An EIS need not discuss the environmental
6 effects of mere continued operation of a facility."
7 *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d
8 115, 116 (9th Cir. 1980) (holding EIS unnecessary for
9 federal financial assistance in purchasing an
10 existing airport since federal action would not
11 change status quo), cert. denied, 450 U.S. 965
(1981); see also *Committee for Auto Responsibility v.*
12 *Solomon*, 603 F.2d 992 (D.C. Cir. 1979) (holding
13 government lease of parking area to new parking
14 management firm does not trigger EIS requirement
15 since area already used for parking so no change in
16 status quo).

17 We find the reasoning of the district court in *County*
18 *of Trinity v. Andrus* particularly instructive. In
19 *Trinity* the plaintiffs sought to enjoin the Bureau
20 from lowering the level of a reservoir during the
21 drought year of 1977 because of the potential damage
22 to the fish population in the reservoir. The court
23 explained that the issue was "not whether the actions
24 are of sufficient magnitude to require the
25 preparation of an EIS, but rather whether NEPA was
26 intended to apply at all to the continuing operations
27 of completed facilities." *Id.* at 1388. The court
28 distinguished the case from cases "when a project
takes place in incremental stages of major
proportions," and from cases where "a revision or
expansion of the original facilities is
contemplated," *id.* Neither of these situations
applied here, the court observed. Instead,

[t]he Bureau has neither enlarged its capacity to
divert water from the Trinity River nor revised
its procedures or standards for releases into the
Trinity River and the drawdown of reservoirs. It
is simply operating the Division within the range
originally available pursuant to the authorizing
statute, in response to changing environmental
conditions.

Id. at 1388-89. The court then concluded that actions

1 taken in operating the system of dams and reservoirs
2 (in particular, operational responses in a drought
3 year) were not "major Federal actions" within the
4 meaning of NEPA.

5 The Federal defendants in this case had been
6 operating the dam for upwards of ten years before the
7 effective date of the Act. During that period, they
8 have from time to time and depending on the river's
9 flow level, adjusted up or down the volume of water
10 released from the Dam. What they did in prior years
11 and what they were doing during the period under
12 consideration were no more than the routine
13 managerial actions regularly carried on from the
14 outset without change. They are simply operating the
15 facility in the manner intended. In short, they are
16 doing nothing new, nor more extensive, nor other than
17 that contemplated when the project was first
18 operational. Its operation is and has been carried on
19 and the consequences have been no different than
20 those in years past.

21 The plaintiffs point out that flow rates have been
22 significantly below 1,000 cfs for periods of seven
23 days or more only in water years 1977, 1982, and
24 1988, all years of major drought. They also note that
25 prior to construction of the dam, the lowest recorded
26 flow rate did not fall below 1400 cfs. From these
27 facts, they argue that the Bureau's reduction of the
28 flow below 1,000 cfs is not a routine managerial
action. However, a particular flow rate will vary
over time as changing weather conditions dictate. In
particular, low flows are the routine during drought
years. What does not change is the Bureau's
monitoring and control of the flow rate to ensure
that the most practicable conservation of water is
achieved in the Minidoka Irrigation Project. Such
activity by the Bureau is routine.

921 F.2d at 235-36 (emphasis added).

Here, in contrast to the "routine" activities described
in *Upper Snake River* and *Trinity* (cited in *Upper Snake River*),
Reclamation's decision to implement the RPA is a "revis[ion]
[of] its procedures or standards" for operating the Jones

1 pumping plant and other facilities significantly affecting OMR
2 flows. This can be determined from the face of the BiOp and
3 uncontroverted analyses of public data. Reclamation's and
4 FWS's joint interest is pellucid: the Projects' water
5 delivery operations must be materially changed to restrict
6 project water flows to protect the smelt. Reclamation's
7 implementation of the BiOp is major federal action because it
8 substantially alters the status quo in the Projects'
9 operations.
10

11
12 D. Significantly Affect the Human Environment

13 If the "major federal action" component is satisfied, an
14 agency must prepare an EIS "where there are substantial
15 questions about whether a project may cause significant
16 degradation of the human environment." *Native Ecosystems*
17 *Council*, 428 F.3d at 1239. Plaintiffs maintain that the 2008
18 BiOp satisfies this standard because it "reallocates hundreds
19 of thousands of acre-feet of water annually -- enough water to
20 serve the needs of millions of people -- from the current
21 reasonable and beneficial municipal, industrial, agricultural,
22 and other uses." Doc. 245-2 at 22. In support of this and
23 related assertions, Plaintiffs cite extensively to the AR. It
24 has been agreed that this stage of the case will not rely on
25 the AR, which was not finalized at the time the NEPA claims
26 were presented.
27
28

1 However, certain, dispositive conclusions can be made
2 without looking to the AR. First, it is undisputed that
3 implementation of the RPA reduced pumping by more than 300,000
4 AF in the 2008-09 water year. See Boardman Decl., Doc. 297-2
5 at ¶10. FWS admitted in its Answer to the State Water
6 Contractors' Complaint that such "reductions in exports from
7 the Delta" may "place greater demands upon alternative sources
8 of water, including groundwater." Doc. 141 at ¶¶ 4, 16. The
9 potential environmental impact of groundwater overdraft is
10 beyond reasonable dispute. See, e.g., *NRDC v. Kempthorne*,
11 2008 WL 5054115, *27 (E.D. Cal. Nov. 19, 2008) (noting that the
12 final EIS covering renewal of the Sacramento River Settlement
13 Contracts "predicts that reversion to the pre-settlement
14 regime would have potential effects on the environment,
15 because the Settlement Contractors would rely more heavily on
16 local groundwater, leading to air quality and soil erosion
17 problems, as well as impacts to local streams and wildlife.");
18 *NRDC v. Kempthorne*, 2007 WL 4462395 (E.D. Cal. 2007)
19 (acknowledging "[r]isks that will be created by implementation
20 of [] interim remedial actions" designed to protect smelt
21 "include, but are not limited to ... Adverse effects on
22 agriculture including, but not limited to, loss of jobs,
23 increased groundwater pumping, fallowed land, and land
24 subsidence[;] [and] Air pollution resulting from heavier
25
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1 reliance on groundwater pumping and decrease in surface
2 irrigation...."). This, in and of itself, raises the kind of
3 "serious questions" about whether a project may cause
4 significant degradation of the human environment, requiring
5 NEPA compliance. That the Bureau must comply with NEPA is
6 established as a matter of law.
7

8 **E. Miscellaneous Issues.**

9 1. **Will Application of NEPA to the Issuance of the BiOp**
10 **Frustrate the Purposes of the ESA?**

11 Federal Defendants and Defendant Intervenors argue that
12 application of NEPA to FWS's issuance of the BiOp will
13 frustrate the purposes of the ESA. Doc. 290 at 15-20; Doc
14 244-2 at 11-12. It is not necessary to address this argument
15 because it is not necessary to decide whether NEPA applies to
16 FWS's issuance of the BiOp. NEPA applies to Reclamation's
17 acceptance and implementation of the BiOp and its RPA. This
18 dispute over statutory priority is premature.
19

20 2. **Did the Timing of the Preparation of the BiOp**
21 **Preclude Compliance with NEPA?**

22 Defendant Intervenors argue that the "expedited timeframe
23 for FWS's completion of the [BiOp] in this case preclude[d]
24 compliance with NEPA." Doc. 244-2 at 12.¹⁵ This argument is
25 directed at FWS's duty under NEPA for issuing the BiOp.
26

27 ¹⁵ Federal Defendants discuss the timing issue, without directly
28 asserting that they did not have enough time to comply with NEPA. Doc.
290 at 17.

1 Because it is not necessary to determine whether FWS had to
2 comply with NEPA before issuing the BiOp, it is not necessary
3 to address this argument here.

4 Assuming, *arguendo*, resolution of this issue is necessary
5 to resolution of these cross motions, Defendant Intervenors'
6 argument is meritless. The ESA and its regulations allow the
7 Service 135 days to complete a biological opinion (from the
8 submission and review of the BA). See 16 U.S.C. § 1536(b)(1),
9 50 C.F.R. § 402.14(e). In this case, FWS was ordered to issue
10 the new BiOp by December 15, 2008. See *NRDC v. Kempthorne*,
11 1:05-cv-1207, Docs. 560 (requiring BO by September 15, 2008),
12 753 (extending, at FWS's request, deadline to December 15,
13 2008). The initial BA submitted by the Bureau was
14 insufficient, and FWS received a revised version August 20,
15 2008. *Id.*, Doc. 712-2 at 3; AR at 2 (BiOp at i).

16 Defendant Intervenors insist that "FWS could not have
17 prepared a NEPA document and still complied with its statutory
18 and Court-ordered duty to issue the BO." Doc. 244-2. On the
19 one hand, a 30-day or less statutorily mandated time-frame for
20 completion of a process has been deemed insufficient to
21 prepare an EIS. See *Flint Ridge Dev. Co. v. Scenic River*
22 *Ass'n*, 426 U.S. 776 (1976) (30 day statutory mandate left
23 insufficient time to comply with NEPA); *Westlands Water Dist.*
24 *v. U.S.*, 43 F.3d 457, 460-61 (9th Cir. 1994) (where water
25
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1 delivery had to be completed "immediately upon enactment" of
2 statute, there was no time for NEPA analysis); *Merrell v.*
3 *Thomas*, 807 F.2d 776, 778 (9th Cir. 1986) (thirty days
4 insufficient). However, absent such a short time frame, NEPA
5 compliance is not excused unless the agency has demonstrated
6 that compliance with NEPA was impossible. *Western Land Exch.*
7 *Project v. U.S. Bureau of Land Management*, 315 F. Supp. 2d
8 1068, 1082-83 (D. Nev. 2004). That has not occurred here.
9 Federal Defendants expressly declined, when asked by the
10 Court, to invoke the timing exception during the preliminary
11 injunction hearing. Although they do mention timing in their
12 opposition brief, they do not explain why any form of NEPA
13 compliance was impossible during the more than three months
14 that passed between receipt of Reclamations' final BA and the
15 December 15, 2008 BiOp deadline. Nor do Federal Defendants or
16 Defendant Intervenors suggest that compliance with NEPA was
17 impossible before Reclamation's implementation of the BiOp and
18 its RPA.
19
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21

22 IV. CONCLUSION

23 For all the reasons set forth above:

24 Plaintiffs' are entitled to summary judgment on their
25 claim against Reclamation and the Secretary of the Interior
26 that Reclamation violated NEPA by failing to perform any NEPA
27 analysis prior to provisionally adopting and implementing the
28

1 2008 BiOp and its RPA.

2 Plaintiffs shall submit a form of order consistent with
3 this memorandum decision within ten (10) days of electronic
4 service.

5 A telephonic scheduling conference will be held on
6 November 24, 2009 at 10:00 a.m. in Courtroom 3 (OWW) to
7 discuss remedies issues. The parties may appear
8 telephonically.
9

10
11 SO ORDERED

12 DATED: November 13, 2009

13 /s/ Oliver W. Wanger
14 Oliver W. Wanger
15 United States District Judge
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