

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

4 The Consolidated Salmonid Cases	1:09-cv-1053 OWW DLB 1:09-cv-1090-OWW-DLB 1:09-cv-1378-OWW-DLB 1:09-cv-1520-OWW-DLB
5 6 SAN LUIS & DELTA-MENDOTA WATER 7 AUTHORITY, <i>et al.</i> v. GARY F. LOCKE, 8 <i>et al.</i>	1:09-cv-1580-OWW-DLB 1:09-cv-1625-OWW-SMS
9 STOCKTON EAST WATER DISTRICT v. 10 NOAA, <i>et al.</i>	SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION (SUPPLEMENTING DOC. 347)
11 STATE WATER CONTRACTORS v. GARY F. 12 LOCKE, <i>et al.</i>	
13 KERN COUNTY WATER AGENCY, <i>et al.</i> v. 14 U.S. DEPARTMENT OF COMMERCE, <i>et al.</i>	
15 OAKDALE IRRIGATION DISTRICT, <i>et al.</i> 16 v. U.S. DEPARTMENT OF COMMERCE, <i>et al.</i>	
17 METROPOLITAN WATER DISTRICT OF 18 SOUTHERN CALIFORNIA v. NMFS, <i>et al.</i>	

19
20 I. INTRODUCTION

21 On May 18, 2010, the Court issued findings of fact and
22 conclusions of law concerning motions for interim relief/
23 preliminary injunction. Findings of Fact and Conclusions of Law
24 re: Plaintiffs' Request for Preliminary Injunction (Docs. 161 &
25 230), Doc. 347 ("Findings & Conclusions"). The motions were
26 brought by Plaintiffs San Luis & Delta-Mendota Water Authority
27 and Westlands Water District (collectively "San Luis
28

1 Plaintiffs"). Docs. 164, 230, 233. Plaintiffs State Water
2 Contractors, Stockton East Water District, Oakdale Irrigation
3 District, and South San Joaquin Irrigation District; and
4 Plaintiff-Intervenor California Department of Water Resources
5 ("DWR") filed statements of non-opposition regarding San Luis
6 Plaintiffs' request to enjoin Action IV.2.1. Docs. 247, 248,
7 251. The motion regarding Action IV.2.3 was joined by plaintiffs
8 Kern County Water Agency and Coalition for a Sustainable Delta.
9 Doc. 181. DWR filed a partial joinder in and statement of non-
10 opposition to the Action IV.2.3 motion. Doc. 249.

11
12 The Findings and Conclusions explained that the requested
13 relief could not be ordered without further evidence to establish
14 that the requested relief would not violate section 7 of the
15 federal Endangered Species Act ("ESA"). Specifically,
16 "[i]njunctive relief cannot be imposed without up-to-date
17 evidence of the status of the species to assure that altered
18 operations will not deepen jeopardy to the affected species or
19 otherwise violate other laws." Findings & Conclusions 134:4-7.
20 A hearing to address the proposed injunction and any imminence of
21 harm to the species was scheduled for May 19, 2010. Findings &
22 Conclusions 134:21-23. After hearing argument from the parties
23 on May 19, further proceedings were scheduled for May 25, 2010.
24 5/19/10 Rough Tr. 39:16-19.

25
26 Plaintiffs filed the declarations of Terry Erlewine (Doc.
27
28

1 356) and Bradley Cavallo (Doc. 358), and exhibits thereto.
2 Federal Defendants filed the declarations of Jeffrey Stuart and
3 exhibits thereto (Doc. 364) and Ronald Milligan (Doc. 366), and a
4 partial joinder in Defendant-Intervenors' supplemental opposition
5 (Doc. 369). Defendant-Intervenors filed a supplemental
6 memorandum in opposition to Plaintiffs' motions for preliminary
7 Injunction (Doc. 365), and a related request for judicial notice
8 (Doc. 368) and supporting declaration (Doc. 368-2). At the May
9 25, 2010 hearing, the parties presented evidence concerning the
10 status of the species
11

12 The original Findings and Conclusions are incorporated by
13 this reference. After considering additional testimony, exhibits
14 received in evidence, the parties' additional submissions, and
15 oral arguments, the Court makes these supplemental findings of
16 fact and conclusions of law.
17

18 To the extent any finding of fact may be interpreted as a
19 conclusion of law or any conclusion of law may be interpreted as
20 a finding of fact, it is so intended.
21

22 II. FINDINGS OF FACT

23 A. Limited Time Period.

24 1. Under the National Marine Fisheries Service's ("NMFS")
25 June 4, 2009 Biological Opinion ("BiOp" or "Salmonid BiOp"), the
26 pumping restrictions associated with Action IV.2.1 terminate May
27 31. BiOp at 641-42. The proposed injunction would enjoin the
28

1 implementation of Action IV.2.1 from May 26 to May 31, 2010 only.

2 2. Under the BiOp, the pumping restrictions associated
3 with Action IV.2.3 terminate on June 15 or when the average daily
4 water temperature at Mossdale is greater than 72° Fahrenheit for
5 seven consecutive days, whichever is sooner. BiOp at 650.

6
7 3. Given the time limit in the BiOp, the proposed
8 injunction against Action IV.2.3 will be in effect at most from
9 May 26 to June 15, 2010. The requested injunction includes a
10 three day "ramping-up" period, during which time exports will be
11 gradually increased. 5/25/10 Rough Tr. 207:25-208:8.

12
13 B. Current Status Of The Species.

14 4. The parties agreed at the May 25 hearing that only the
15 current status of the Central Valley spring-run Chinook salmon
16 ("spring-run") and Central Valley steelhead ("CV steelhead") are
17 relevant to the requested relief.¹ 5/25/10 Rough Tr. 20:1-21:9;
18 37:13-38:5; 5/25/10 Rough Tr. 139:22-25. These findings focus on
19 these two species.

20
21 (1) Central Valley Spring-Run Chinook Salmon (*O.*
22 *tshawytscha*).

23 5. NMFS listed the spring-run as a "threatened" species
24 under the ESA on January 5, 2006. 71 Fed. Reg. 834 (Jan. 5,
25 2006). NMFS designated critical habitat for the spring-run on
26 September 2, 2005. 70 Fed. Reg. 52,604 (Sept. 2, 2005).

27
28 ¹ Defendant-Intervenors advance an argument about fall-run Chinook
salmon, which are not a listed species.

1 6. The current population figure for spring-run returning
2 in 2009 is 3,802 fish. Gov't Salmon Exh. 102 at internal Exhibit
3 7. This is a decrease from 10,828 returning spring-run adults in
4 2006, the last time this cohort spawned in the Central Valley.
5 *Id.*; *id.*, ¶10.

6 7. Mr. Stuart testified that based on the historical
7 salvage data, the majority of spring-run emigrate through the
8 Delta in April, with emigration tailing off into May and early
9 June. 5/25/10 Rough Tr. 108:9-16.

10 8. Mr. Cavallo estimated that 90 percent of the mixed pool
11 of spring-run and fall-run Chinook young-of-the-year will exit
12 the Delta by May 25, 2010. 5/25/10 Rough Tr. 23:21-24:1; DWR Ex.
13 519 at ¶7. Mr. Stuart testified that typically 98 percent of the
14 spring-run have passed through the Delta by the end of May.
15 Gov't Salmon Ex. 102 at ¶12. This means between 90 to 98 percent
16 of spring-run are not within the influence or affect of the
17 remedy sought by Plaintiffs. 5/25/10 Rough Tr. 207:21-24.

18 9. The total direct seasonal loss of spring-run size
19 Chinook salmon at the export facilities as of May 17, 2010, was
20 4,419 fish. Gov't Salmon Ex. 102 at ¶12. Mr. Stuart testified
21 that the Salmonid BiOp does not use spring-run sized Chinook
22 salmon as a metric to determine the ESA take limit. 5/25/10
23 Rough Tr. 150:18-20. This is because spring-run Chinook are not
24 reliably distinguishable from fall-run Chinook using a length at
25 26 27 28

1 date criteria. 5/25/10 Rough Tr. 21:17-22. Instead, the one
2 percent incidental take limit for spring-run Chinook uses
3 hatchery late-fall Chinook salmon as surrogates for the yearling
4 spring-run. 5/25/10 Rough Tr. 150:6-10.

5 10. Mr. Stuart testified that if the proposed preliminary
6 injunction were issued, he did not anticipate that the incidental
7 take limit for yearling spring-run Chinook would be exceeded.
8 5/25/10 Rough Tr. 161:10-14. However, the purpose of the
9 incidental take limit is to identify a point at which
10 reinitiation of consultation should occur. 3/31/10 Tr. 113:20-
11 22. It is not the default level at which the facilities should
12 be operated. If the RPA works as designed, the incidental take
13 limit should never be reached. *Id.* at 113:25-114:7, 133:15-24.
14 Mr. Stuart's testified that the low number of steelhead taken at
15 the pumps is evidence that the RPA is "functioning" as it was
16 "designed." *Id.*, 126: 12-20.

17 11. Because spring-run and fall-run Chinook are
18 "indistinguishable when captured in the Delta or its salvage
19 facilities," the breakdown between spring-run and fall-run within
20 the 4,419 fish figure is unknown. 5/25/10 Rough Tr. 24:2-11,
21 31:5-18; see 5/25/10 Rough Tr. 147:20-23. Mr. Cavallo opined
22 that it is "reasonable to assume ... that most of those fish
23 [4,419 salvage] are, in fact, fall-run." 5/25/10 Rough Tr. 31:5-
24 18.

1 12. In the BiOp, NMFS stated that "for Chinook salmon, the
2 losses are probably overestimated due to the inability to
3 identify individuals to race (e.g., most Chinook salmon reported
4 to be within the spring-run size category are actually fall-
5 run)." BiOp at 776; 5/25/10 Rough Tr. 143:21-12. Mr. Stuart
6 agreed with this statement. 5/25/10 Rough Tr. 144:4-12.
7

8 13. Mr. Stuart testified that he was not aware of the
9 existence of any studies that specifically determined late-
10 emigrating spring-run Chinook are genetically diverse from fish
11 that out-migrated at an earlier date. 5/25/10 Rough Tr. 157:18-
12 25. However, Mr. Stuart relied upon the McElhany study and his
13 general knowledge as a molecular biologist to support his opinion
14 that the tail of the spring-run possess specific genetic
15 diversity that make them sufficiently valuable genetically and
16 deserving of protection. 5/25/10 Rough Tr. 156:18-157:17. Mr.
17 Stuart's testimony has foundation, making this a dispute among
18 scientists about the value in terms of genetic diversity of the
19 tail end of the spring-run. 5/25/10 Rough Tr. 212:25-213:12.
20

21 14. Mr. Stuart testified that he could not provide a
22 quantified estimate of the proportion of the spring-run Chinook
23 that have not exited the Delta that would have to be adversely
24 affected before there is a negative impact on spatial or genetic
25 diversity of the species. 5/25/10 Rough Tr. 159:20-24.
26

27 15. There is no reasonable prospect that the proposed
28

1 remedy will salvage all of the remaining 2 to 10 percent of
2 spring-run in the Delta. 5/25/10 Rough Tr. 208:9-16.

3 16. Mr. Cavallo testified that the best available coded
4 wire tag studies do not demonstrate any export related mortality
5 effect for fish emigrating from the San Joaquin system. 5/25/10
6 Rough Tr. 39:1-24. Mr. Cavallo also opined that the proposed
7 remedy would not "significantly reduce the survival or recovery
8 probability" of the spring-run, nor would it "significantly
9 diminish the value of their critical habitat for survival or
10 recovery." *Id.*; DWR Ex. 519 at ¶12. "17. This opinion that
11 unlimited pumping will have no adverse effect on the species is
12 contrary to the evidence. There is ample record evidence that at
13 elevated pumping levels, the hydrologic influence of exports
14 directs the listed salmonids into areas of the Delta that are
15 hostile because of temperature, toxics, and other influences.

16 17. Mr. Stuart admitted he could not state unequivocally
17 that the proposed injunction would result in jeopardy to the
18 spring-run Chinook or would result in adverse modification to
19 their critical habitat, nor could Mr. Stuart state that such
20 jeopardy or adverse modification would be avoided. 5/25/10 Rough
21 Tr., 160:9-19; *id.*, 174: 15-21.

22 (2) Central Valley Steelhead (*O. mykiss*).

23 18. NMFS listed the CV steelhead as a "threatened" species
24 under the ESA on January 5, 2006. 71 Fed. Reg. 834 (Jan. 5,
25
26
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28

1 2006). NMFS designated critical habitat for the CV steelhead on
2 September 2, 2005. 70 Fed. Reg. 52,604.

3 19. There is limited information on the overall population
4 size of CV steelhead. Findings & Conclusions 14:21-23. However,
5 Mr. Stuart testified to an approximate population of 3,000 adult
6 steelhead spawners. 5/25/10 Rough Tr. 121:19-122:7.
7

8 20. It is unknown what percentage of the total CV steelhead
9 population is comprised of the Southern Sierra Nevada Diversity
10 Group of CV steelhead. 5/25/10 Rough Tr. 67:1-8.

11 21. Mr. Cavallo estimated that 87 percent of the CV non-
12 clipped steelhead will have exited the Delta past Chipps Island
13 by May 25, 2010. DWR Ex. 519 at ¶9. Mr. Stuart agreed with this
14 estimate. 5/25/10 Rough Tr. 154:14-155:2.
15

16 22. The incidental take limit for unmarked juvenile and
17 adult CV steelhead is 3,000. BiOp at 776. Eight hundred seventy
18 four (874) juvenile non-clipped CV steelhead have been salvaged
19 so far this year. 5/25/10 Rough Tr. 155:3-8. Daily salvage of
20 non-clipped CV steelhead peaked toward the end of January or
21 beginning of February, and then tapered off. 5/25/10 Rough Tr.
22 32:17-25.
23

24 23. Mr. Stuart testified that if the proposed preliminary
25 injunction were issued, he did not anticipate that the incidental
26 take limit for CV steelhead would be exceeded. 5/25/10 Rough Tr.
27 155:9-14. However, the incidental take limit is not the default
28

1 level at which the facilities should be operated. If the RPA
2 works as designed, the incidental take limit should never be
3 reached. *Id.* at 113:25-114:7, 133:15-24.

4 24. Approximately 13% of the population of Central Valley
5 steelhead are within the influence of export operations. Mr.
6 Stuart indicated that an important criteria in determining the
7 necessity of protection of the steelhead, particularly at this
8 time, is that the end of their run can extend into June. 5/25/10
9 Rough Tr. 211:17-24.

10 25. Mr. Stuart opined that increased salvage of CV
11 steelhead that exhibit late migratory behavior would diminish the
12 genetic diversity present in the population. Gov't Salmon Ex.
13 102 at ¶35. Although Mr. Stuart acknowledged that he was not
14 aware of the existence of any studies that specifically showed
15 that late emigrating CV steelhead were genetically diverse from
16 fish that out-migrated at an earlier date, 5/25/10 Rough Tr.
17 157:10-14, he relied upon the McElhany study to support his
18 opinion that the tail run of the steelhead possesses specific
19 genetic diversity that make them sufficiently valuable
20 genetically and deserving of protection. 5/25/10 Rough Tr.
21 212:16-25. Mr. Stuart's testimony has record support, making
22 this a dispute among scientists about the value in terms of
23 genetic diversity of the tail end of the steelhead run. 5/25/10
24 Rough Tr. 212:25-213:12.

1 26. Mr. Stuart testified that he could not provide a
2 quantified estimate of the proportion of the CV steelhead that
3 have not exited the Delta that would have to be adversely
4 affected before an adverse impact on spatial or genetic
5 diversity of the species, but recognized that any such proportion
6 would be lower for the Southern Sierra Nevada diversity group
7 because of their small population size. 5/25/10 Rough Tr.,
8 160:4-8.
9

10 27. Of the remaining 13 percent of the CV steelhead
11 population potentially within the influence of the pumps, Mr.
12 Stuart could not testify that there would be a total extirpation
13 of this remaining percentage. 5/25/10 Rough Tr. 213:21-214:1.
14

15 28. Mr. Cavallo opined that the proposed remedy would not
16 "significantly reduce the survival or recovery probability" of
17 the CV steelhead, nor would it "significantly diminish the value
18 of their critical habitat for survival or recovery." 5/25/10
19 Rough Tr. 39:1-24; DWR Ex. 519 at ¶12. This was based in part,
20 however, on his unsupported conclusion that exports do not affect
21 smolt survival.
22

23 29. Mr. Stuart admitted he could not state unequivocally
24 that the proposed injunction would result in jeopardy to the
25 spring-run Chinook or would result in adverse modification to
26 their critical habitat, nor could Mr. Stuart state that such
27 jeopardy or adverse modification would be avoided. 5/25/10 Rough
28

1 Tr., 160:9-19; *id.*, 174: 15-21.

2
3 C. Findings Of Fact Regarding Operation Of The Projects For The
4 Period Of May 26th Through June 15th (With RPA Actions
5 IV.2.1 And IV.2.3 Enjoined).

6 (1) Summary of RPA Actions IV.2.1 And IV.2.3.

7 30. RPA Action IV.2.1 limits combined water exports by the
8 CVP and SWP based on San Joaquin River flows as measured at
9 Vernalis. BiOp at 642. When flows at Vernalis range from 0 to
10 6,000 cfs, Action IV.2.1 limits combined CVP and SWP exports to
11 1,500 cfs. BiOp at 642. When flows at Vernalis range from 6,000
12 to 21,750, Action IV.2.1 imposes an inflow to combined CVP and
13 SWP exports ratio of 4:1. BiOp at 642.

14 31. RPA Action IV.2.3 limits Old and Middle River ("OMR")
15 flows to no more negative than -2,500 to -5,000 cubic feet per
16 second ("cfs") between January 1 and June 15, or until the
17 average daily water temperature at Mossdale is greater than 72
18 degrees Fahrenheit for one week, whichever occurs first. BiOp at
19 648-50.

20
21 (2) The Delta Smelt BiOp and/or State Water Resources
22 Control Board Decision D-1641 Will Likely Limit
23 Combined Project Exports During The Period That The
24 Injunction Applies.

25 32. If RPA Actions IV.2.1 and IV.2.3 are enjoined through
26 June 15, 2010, the 2008 Delta Smelt Biological Opinion ("Smelt
27 BiOp") would control Project operations between May 26th and June
28 15th, unless it is also enjoined. The Smelt BiOp requires OMR
flows to be no more negative than -1,250 to -5,000 cfs over a

1 fourteen-day running average through June 30 or until water
2 temperatures reach 25 degrees Celsius at Clifton Court. See
3 Fourth Milligan Declaration (Gov't Salmon Exh. 105), ¶5.

4 33. If the Delta Smelt BiOp is enjoined as well, State
5 Water Resources Control Board Water Rights Decision 1641 ("D-
6 1641") will control. Declaration of Terry Erlewine in Support of
7 Preliminary Injunction ("Erlewine Decl.") (Doc. No. 356; SWC Ex.
8 968) ¶2; D-1641 (SWC Ex. 965); 5/25/10 Rough Tr. 79:4-8.

10 34. D-1641 sets forth requirements that the Projects must
11 meet in order to implement applicable water quality and other
12 objectives for the Delta. See Erlewine Decl. (SWC Ex. 968) at A-
13 1; D-1641 (SWC Ex. 965) at 1.

14 35. Two specific restrictions in D-1641 are likely to
15 control combined Project pumping on various days in the period
16 from May 26 to June 15, 2010, the 35% Export/Inflow (E/I) ratio
17 and the "spring X2" standard. Specifically, D-1641 limits
18 Project exports to a combined total of not more than 35% of total
19 Delta inflow and further limits Project operations to ensure that
20 certain water quality standards are met as measured by the
21 location of X2 (2.64 mmhos/cm electrical conductivity). 5/25/10
22 Rough Tr. 80:21-81:1, 92:22-24; Erlewine Decl. (SWC Ex. 968) at
23 ¶¶ 5, 11; D-1641 (SWC Ex. 965).

1 a. Project Exports Are Currently Limited By D-1641 To
2 A Combined Total of Not More than 35% of Total
3 Delta Inflow.

3 36. D-1641 requires that the Projects export a total of not
4 more than 35% of Delta inflows during the period of February
5 through June. Erlewine Decl. (SWC Exs. 968) Exhibit A at A-5; D-
6 1641 (SWC Ex. 965) at 5; 5/25/10 Rough Tr. 80:21-24. Delta
7 inflow is the combined total of the Sacramento River inflow at
8 Freeport, the Yolo Bypass inflow, inflow from streams including
9 the Mokelumne River and the San Joaquin River, and all other
10 flows entering the Delta. 5/25/10 Rough Tr. 81:10-14.

12 37. Total Delta inflows and outflows are reported daily,
13 including on the Bureau of Reclamation's ("Reclamation") website.
14 5/25/10 Rough Tr. 81:16-18; see also Erlewine Decl. (SWC Ex. 968)
15 at ¶5; Erlewine Decl. Exhibit B (SWC Ex. 968).

17 38. For the calculation of maximum percent Delta inflow
18 diverted, the export rate is a 3-day running average and the
19 Delta inflow is a 14-day running average, except when the CVP or
20 the SWP is making storage withdrawals for export, in which case
21 both the export rate and the Delta inflow are 3-day running
22 averages. Erlewine Decl. Exhibit A (SWC Exs. 968) at A-7; D-1641
23 (SWC Ex. 965) at 7; 5/25/10 Rough Tr. 86:4-9.

24 //

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1 b. Combined Project Exports Are Also Limited by D-
2 1641's Requirement That X2 Be Maintained At
3 Specified Locations.

3 39. During February through June, D-1641 requires that
4 exports be limited to ensure that X2 is positioned at one of
5 three locations in the western Delta, most notably near Chipps
6 Island, based on unimpaired runoff as indicated by the Central
7 Valley 8-Stream/River Index. Erlewine Decl. (SWC Ex. 968) ¶11;
8 Erlewine Decl. Exhibit A (SWC Exs. 968) at A-9, fn (b); D-1641
9 (SWC Ex. 965) at 9, fn(b); *see also* 5/25/10 Rough Tr. 93:5-10
10 (the purpose of maintaining X2 near Chipps Island is "to keep
11 salinity low").
12

13 40. More specifically, this spring X2 standard operates in
14 addition to the 35% E/I ratio limitation described above and
15 requires that Project exports be limited to hold X2 at or
16 westerly of Chipps Island on a daily or 14-day average basis and,
17 in any event, to provide Delta outflows of at least 11,400 cubic
18 feet per second ("cfs"). Erlewine Decl. (SWC Exs. 965, 968) ¶11;
19 Erlewine Decl. Exhibit A (SWC Ex. 968) at A-9; D-1641 (SWC Ex.
20 965) at 9.
21
22

23 c. The Anticipated Effect Of D-1641.

24 41. Although it cannot be estimated with certainty what
25 total Delta inflows will be in the upcoming weeks, Mr. Erlewine
26 prepared two sets of hydrology projections to determine what
27 Project operations would likely be between May 26th and June
28

1 15th, given D-1641's requirement that Projects export be no
2 greater than 35% of Delta inflows. Erlewine Decl. (SWC Ex. 968)
3 at ¶6.

4 42. The first projection assumed that total Delta inflows
5 from all sources would continue to decline through June 15th.
6 Erlewine Decl. (SWC Ex. 968) at ¶7 and Table 1; Erlewine Decl.
7 Exhibit C (SWC Ex. 967). Under that scenario, total Project
8 exports are likely to progressively decline from 7,300 cfs to
9 5,100 cfs between May 26th and June 15th. Erlewine Decl. (SWC
10 Ex. 968) at ¶7 and Table 1; Erlewine Decl. Exhibit C (SWC Ex.
11 967). This decline in Project exports does not directly
12 correlate to OMR flows, but the OMR flows under this projection
13 would likely range from approximately -4,691 cfs to -5,432 cfs
14 during the same May to June period. Erlewine Decl. (SWC Ex. 968)
15 at ¶¶ 8-9 and Table 1; Erlewine Exhibit D (SWC Ex. 968).

16 43. The second projection assumed that total Delta inflows
17 would remain constant through June 15th. Erlewine Decl. (SWC Ex.
18 968) at ¶10 and Table 1. As of May 25, 2010, it appears that San
19 Joaquin River flows will likely remain about 4,000 cfs through
20 the first week of June due to releases caused by snow melt and
21 for flood control purposes on the Tuolumne River. 5/25/10 Rough
22 Tr. 87:15-22, 99:8-11. Under this scenario, total Project
23 exports are likely to remain steady at approximately 7,500 cfs,
24 and OMR flows would range between -5,350 cfs and
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1 -6,000 cfs. Erlewine Decl. (Doc. No. 356) at ¶10 and Table 1.

2 44. Regarding D-1641's further restrictions vis-à-vis the
3 location of X2 through June 15, and based on current water
4 quality, Delta inflow patterns, and other conditions, it is
5 "nearly certain" that the spring X2 limitation will be triggered
6 in June, likely for a period of at least 20 days. Erlewine Decl.
7 (SWC Ex. 968), ¶11; Milligan Decl., Gov't Salmon Ex. 105), ¶9;
8 5/25/10 Rough Tr. 94:1. Although the Project operators have
9 discretion about which 20 days in June will be utilized to meet
10 the D-1641 spring X2 requirement, it is likely the 20 day period
11 will occur earlier in the month. 5/25/10 Rough Tr. 98:9-14. To
12 meet these further restrictions, "Project exports would have to
13 be reduced to levels more restrictive than those summarized
14 above" related to the 35% limitation. Erlewine Decl. (SWC Ex.
15 968) ¶11. These additional restrictions will further reduce the
16 magnitude of reverse flows in Old and Middle Rivers to a likely
17 range of -5,700 cfs to less negative than -3,000 cfs and,
18 ultimately, will lower the rate of combined Project exports to a
19 range well below 7,000 cfs, to as low as 3,000 cfs. Erlewine
20 Decl. (SWC Ex. 968) ¶11; 5/25/10 Rough Tr. 95:5-7.

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24 (3) Ramping Period And Daily Monitoring.

25 45. Plaintiffs proposed that Project operations not be
26 instantaneously operated at the highest allowable levels of
27 exports under D-1641, but instead that exports be ramped up from
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1 their current levels to higher levels over a three day period
2 beginning May 26, 2010 if Actions IV.2.1 and IV.2.3 are enjoined.
3 5/25/10 Rough Tr. 200:10-15.

4 46. In conjunction with ramping up and throughout the
5 period of injunctive relief, NMFS, Reclamation and DWR will be
6 ordered to monitor take at the CVP and SWP export pumps on a day-
7 by-day basis. If NMFS or Reclamation believe that any increased
8 salvage is sufficient to jeopardize either the spring-run Chinook
9 or CV steelhead species, or there is adverse modification to the
10 species' critical habitat, they may immediately file notice
11 seeking to dissolve the injunctive relief. 5/25/10 Rough Tr.,
12 215:23-216:3. Any such application will be heard on shortened
13 time.
14

15
16 (4) Salvage-Triggered OMR Flow Restrictions Remain In
17 Effect.

18 47. Plaintiffs propose that Action IV.2.3's calendar-based
19 -5,000 cfstrigger be enjoined, but that its salvage triggers
20 remain in effect. Therefore, if during the period May 26 through
21 June 15, the density of juvenile salmonid losses at the export
22 pumps increases sufficiently to pose an increased risk to the
23 species as contemplated by these salvage-based triggers, export
24 pumping will be reduced to meet Action IV.2.3's OMR flow
25 restrictions. BiOp at 648-52.
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1 III. CONCLUSIONS OF LAW

2 A. Legal Standards For Injunctive Relief.

3 1. Plaintiffs must establish four factors by a
4 preponderance of the evidence to receive temporary injunctive
5 relief:

6 (1) Likelihood of success on the merits;

7 (2) Likelihood the moving party will suffer
8 irreparable harm absent injunctive relief;

9 (3) The balance of equities tips in the moving
10 parties' favor; and

11 (4) An injunction is in the public interest.

12 *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374
13 (2008); *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046,
14 1052 (9th Cir. 2009).

15 2. As explained in the Findings and Conclusions,
16 Plaintiffs have already succeeded on their NEPA claim and have
17 shown a likelihood of success on the merits of the ESA claims
18 raised in their preliminary injunction motion. Findings &
19 Conclusions 129:2-3; 130:11-12. Additionally, Plaintiffs have
20 shown a likelihood of irreparable harm from loss of water supply.
21 Findings & Conclusions 69:6 - 85:17; 5/25/10 Rough Tr. 204:8 -
22 205:7. Plaintiffs have further shown that the balance of harms
23 and the public interest favor injunctive relief, provided such
24 relief will increase the water supply available to the CVP and
25 SWP without jeopardizing the continued existence of the species
26 and/or adversely modifying their critical habitats. Findings &
27
28

1 Conclusions 134:4-20.

2
3 B. Central Valley Spring-Run Chinook Salmon.

4 3. Plaintiffs' expert Mr. Cavallo testified that if
5 Plaintiffs' injunction were granted, operations would not
6 jeopardize the spring-run Chinook salmon or adversely modify its
7 critical habitat. 5/25/10 Rough Tr. 39:1-24; DWR Ex. 519 at ¶12.

8 4. On cross examination, NMFS's expert Mr. Stuart could
9 not say whether or not these injunctions will jeopardize the
10 continued existence of the species or adversely impact their
11 habitats. 5/25/10 Rough Tr. 210:18-25; 160:9-19.

12
13 5. The small percentage of the population in the area of
14 concern that might be potentially affected by the injunction and
15 the fact that there is no reasonable prospect that all of the
16 remaining spring-run Chinook will be subject to salvage justifies
17 the conclusion that the short period of injunctive relief
18 requested will not deepen the jeopardy or adversely modify the
19 critical habitat of the spring-run. 5/25/10 Rough Tr. 208:4-16.

20
21 C. Central Valley Steelhead.

22 6. Mr. Stuart testified that the tail end of the CV
23 steelhead migration was important to the species as a whole due
24 to a genetic characteristic for late migration. Gov't Salmon Ex.
25 102 at ¶35. Mr. Cavallo disagreed and stated there was no
26 evidence of a genetic difference between CV steelhead that
27 migrate during the other portions of the migration period and the
28

1 late migratory steelhead. 5/25/10 Rough Tr. 33:20-34:24. This
2 is a scientific dispute that must be resolved in favor of the
3 government.

4 7. Mr. Stuart testified that he could not opine whether or
5 not the proposed injunction would jeopardize the CV steelhead or
6 adversely modify their critical habitat. 5/25/10 Rough Tr.
7 160:9-19.
8

9 8. Only a small percentage of the population remains in
10 the area of concern that might be potentially affected by the
11 injunction. In addition, there is no reasonable prospect that
12 all of the remaining individuals in the tail end of the CV
13 steelheads' migration would be subject to salvage or extirpation,
14 and therefore any important genetic contribution from these late-
15 migrating individuals to the overall species will remain even if
16 the injunction is granted. 5/25/10 Rough Tr. 214:16-20.
17

18 9. Accordingly, granting the requested injunction is not
19 likely to deepen the jeopardy of the the CV steelhead or destroy
20 adversely modify its critical habitat during the limited period
21 May 26 through June 15.
22

23 D. Green Sturgeon, Orca, And Winter-Run Chinook Salmon.

24 10. The parties agreed that the proposed injunction will
25 not cause harm that would rise to the level of jeopardizing or
26 adversely modifying the critical habitat of the green sturgeon,
27 orcas, and winter-run Chinook.
28

1 E. Stay Pending Appeal.

2 11. At the May 25, 2010 hearing, Federal Defendants and
3 Defendant-Intervenors requested a stay pending appeal of the
4 preliminary injunction ordered by this Court. This request was
5 denied because any stay would effectively deprive Plaintiffs of
6 any benefit of the preliminary injunction.
7

8 F. Bond.

9 12. Plaintiffs are required to post a \$5,000.00 bond.
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11 SO ORDERED
12 Dated: June 1, 2010

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge

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