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

4  
5 **NORTH COAST RIVERS ALLIANCE, et al.,**

6 **Plaintiffs,**

7 **v.**

8 **UNITED STATES DEPARTMENT OF THE**  
9 **INTERIOR, et al.,**

10 **Defendants,**

11 **WESTLANDS WATER DISTRICT, et al.,**

12 **Intervenor-Defendants.**

**1:16-cv-00307-LJO-MJS**

**ORDER GRANTING REQUEST FOR**  
**VOLUNTARY REMAND WITHOUT**  
**VACATUR (Doc. 28)**

13  
14 **I. INTRODUCTION**

15 This case concerns approval by the United States Department of the Interior and its member  
16 agency, the United States Bureau of Reclamation (collectively, “Federal Defendants,” “Reclamation,” or  
17 the “Bureau”), of six interim renewal contracts that authorize delivery of water from March 1, 2016,  
18 through February 28, 2018, from federal reclamation facilities to certain water districts served by the  
19 federal Central Valley Project (“CVP”) and provide for repayment of capital construction costs, as well  
20 as operational and maintenance expenses associated with CVP facilities (“2016-18 Interim Contracts”).  
21 Doc. 1 (Complaint); Doc 18-2 at ECF p. 12 & 22. The 2016-18 Interim Contracts at issue in this case  
22 provide water service to Westlands Water District, Santa Clara Valley Water District, and Pajaro Valley  
23 Water Management Agency (collectively, “Interim Contractors”). See Doc. 1 at ¶ 2. A coalition of  
24 environmental organizations led by the North Coast Rivers Alliance (collectively, “Plaintiffs”), allege,  
25

1 among other things, that Federal Defendants issued a deficient Environmental Assessment (“EA”) and  
2 associated Finding of No Significant Impact (“FONSI”)<sup>1</sup> prior to approval of the Interim Contracts, in  
3 violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and  
4 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. Doc. 1.

5 Before the Court for decision is Federal Defendants’ request for voluntary remand without  
6 vacatur of the EA/FONSI. Doc. 28. Plaintiffs oppose voluntary remand and, in the alternative, request  
7 vacatur of both the EA and the Interim Contracts. Doc. 44. On September 23, 2016, the Court issued an  
8 Order for Supplemental Briefing, requesting further input on specific issues related to the parties’  
9 requests. Doc. 41 (“Briefing Order”). Federal Defendants and Defendant Intervenors<sup>2</sup>, filed a joint  
10 statement in response to the request for supplemental briefing, Doc. 42, and Plaintiffs followed with a  
11 response. Doc. 44. On December 9, 2016, the Court requested that additional information be appended  
12 to the record. Doc. 50. Federal Defendants provided a responsive filing on December 12, 2016. Doc. 51.  
13 Having reviewed the parties’ filings in light of the entire record, the Court GRANTS Federal  
14 Defendants’ motion for voluntary remand without vacatur of the EA/FONSI, and DECLINES to vacate,  
15 set-aside or otherwise rescind the 2016-18 Interim Contracts.

## 16 **II. BACKGROUND**

17 This case is related to an earlier case, *Pacific Coast Federation of Fishermen’s Ass’ns v. U.S.*  
18 *Dep’t of Interior* (“PCFFA”), 1:12-cv-01303-LJO-MJS, which concerned a similar challenge to the  
19 NEPA review performed in connection with eight interim contracts that covered the period of time from  
20 March 1, 2012 through the end of February 2014 (“2012-2014 Interim Contracts”). *See PCFFA*, Doc.

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21 <sup>1</sup> NEPA requires agencies to prepare an EIS for all “major Federal actions significantly affecting the quality of the human  
22 environment.” 42 U.S.C. § 4332(2)(C). NEPA’s implementing regulations provide that an agency shall prepare an EA to  
23 determine whether a proposed federal action will have a significant impact and to determine whether preparation of an EIS  
24 will be necessary. 40 C.F.R. § 1508.9. An EA is a “concise public document” that “include[s] brief discussions of the need  
for the proposal, of alternatives as required by [42 U.S.C. § 4332(E)], [and] of the environmental impacts of the proposed  
action and alternatives.” 40 C.F.R. §§ 1508.9(a), (b). If the agency concludes in the EA that there is no significant effect from  
the proposed project, the federal agency may issue a FONSI in lieu of preparing an EIS. 40 C.F.R. § 1508.9(a)(1).

25 <sup>2</sup> On June 14, 2016, the Court granted the unopposed motion to intervene filed by Westlands Water District, San Luis Water  
District, and Panoche Water District. Doc. 21.

1 47. The parties in *PCFFA* filed cross-motions for summary judgment that became ripe at the end of  
2 January 2014. In February 2014, the Court denied the *PCFFA* plaintiffs’ motion for summary judgment  
3 and granted the *PCFFA* federal defendants’ and defendant-intervenors’ cross-motions for summary  
4 judgment on all remaining NEPA claims. *PCFFA*, Doc. 88.

5 The Ninth Circuit reversed in part, first finding that, despite the fact that the Central Valley  
6 Project Improvement Act (“CVPIA”), Pub. L. No. 102-575, 106 Stat. 4700 (1992), mandates renewal of  
7 long-term water service contracts, the CVPIA does not require Reclamation to enter into interim  
8 contracts and therefore the “no action” alternative articulated in the EA for the 2012-2014 Interim  
9 Contracts unlawfully assumed interim contract renewal. *Pac. Coast Fed’n of Fishermen’s Associations*  
10 *v. United States Dep’t of the Interior*, 655 Fed. Appx. 595, at \*1-2 (9th Cir. July 25, 2016) (“*PCFFA*  
11 *Appellate Ruling*”). The Ninth Circuit also held that “Reclamation’s decision not to give full and  
12 meaningful consideration to the alternative of a reduction in maximum interim contract water quantities  
13 was an abuse of discretion, and the agency did not adequately explain why it eliminated this alternative  
14 from detailed study.” *Id.* at \*2. While acknowledging that the Reclamation Project Act mandates  
15 renewal of existing contract quantities when water is beneficially used, *id.* (citing 43 U.S.C. § 485h-1(1)  
16 & (4)), the Ninth Circuit found that Reclamation “acted unreasonably by relying on stale water needs  
17 data.” *Id.* The Ninth Circuit affirmed this Court’s ruling regarding the geographic scope of the EA:

18 Plaintiffs contend that the EA’s geographic scope was improperly limited  
19 to the delivery areas and should also have considered the effects, including  
20 cumulative effects, of interim contract renewal on the California River  
21 Delta, the source of the water, and on the Delta’s fish and other wildlife.  
22 This contention lacks merit because the EA was tiered off of the  
23 [Programmatic Environmental Impact Statement], which addressed  
24 Central Valley Project-wide effects of long-term contract renewal. *See* 40  
25 C.F.R. § 1508.28 (describing tiering). In light of Reclamation’s obligation  
to conduct a more comprehensive analysis in the PEIS, it would be  
impractical to require the agency to trace the incremental effects of each  
two-year water service contract on the Delta and all Central Valley Project  
waters.

*Id.* at \*3. The matter was remanded to this Court with instructions to vacate the grant of summary

1 judgment in favor of defendants on plaintiffs’ claim that the EA for the 2012-14 Interim Contracts was  
2 inadequate because it did not give full and meaningful consideration to the alternative of a reduction in  
3 maximum water quantities. *Id.* Reclamation was directed to “consider such an alternative in any future  
4 EA for an interim contract renewal.” *Id.* In particular, the Ninth Circuit indicated that “[i]n satisfying  
5 this duty, Reclamation may rely upon any water needs assessment for which the data remain accurate.”  
6 *Id.*

### 7 **III. DISCUSSION**

#### 8 **A. Request for Voluntary Remand**

9 Federal Defendants move for voluntary remand without vacatur of the EA/FONSI for the 2016-  
10 18 Interim Contracts. As a threshold matter, the Court first must determine whether voluntary remand is  
11 appropriate under the circumstances. “A federal agency may request remand in order to reconsider its  
12 initial action.” *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012).  
13 The Ninth Circuit has recognized that “[g]enerally, courts only refuse voluntarily requested remand  
14 when the agency’s request is frivolous or made in bad faith.” *Id.* (citing *SKF USA Inc. v. United States*,  
15 254 F.3d 1022, 1029 (Fed. Cir. 2001)).

16 Courts in this Circuit generally look to the Federal Circuit’s decision in *SKF USA* for guidance  
17 when reviewing requests for voluntary remand. *See, e.g., Cal. Communities*, 688 F.3d at 992; *United*  
18 *States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. C-09-4029 EMC, 2011 WL 3607790, at  
19 \*3 (N.D. Cal. Aug. 16, 2011). *SKF USA* describes five positions an agency may take in response to  
20 judicial review of an agency action:

21 First, it may choose to defend the agency’s decision on the grounds  
22 previously articulated by the agency. Second, it may seek to defend the  
23 agency’s decision on grounds not previously articulated by the agency.  
24 Third, the agency may seek a remand to reconsider its decision because of  
25 intervening events outside of the agency’s control. Fourth, even in the  
absence of intervening events, the agency may request a remand, without  
confessing error, to reconsider its previous position. Finally, as in the  
present situation, the agency may request a remand because it believes that  
its original decision was incorrect on the merits and it wishes to change

1 the result.

2 254 F.3d at 1027-28.

3 According to *SKF USA*, under the third scenario, “the agency may seek a remand because of  
4 intervening events outside of the agency’s control, for example, a new legal decision or the passage of  
5 new legislation.” *Id.* at 1028. Under such circumstances, “[a] remand is generally required if the  
6 intervening event may affect the validity of the agency action.” *Id.*

7 In contrast, under the fourth scenario, “the agency may request a remand (without confessing  
8 error) in order to reconsider its previous position. It might argue, for example, that it wished to consider  
9 further the governing statute, or the procedures that were followed. It might simply state that it had  
10 doubts about the correctness of its decision or that decision’s relationship to the agency’s other policies.”  
11 *Id.* at 1029. In such a case, “the reviewing court has discretion over whether to remand.” *Id.* “A remand  
12 may be refused if the agency’s request is frivolous or in bad faith.” *Id.* One way an agency may  
13 demonstrate good faith is by admitting that the reasoning adopted in its original action was flawed. *See*  
14 *Cal. Communities*, 688 F.3d at 992 (approving voluntary remand where the agency “recognized” that its  
15 original reasoning was flawed and sought to explain its decision in an alternative manner). In contrast,  
16 bad faith may be demonstrated when an agency’s position does not demonstrate a commitment to a  
17 changed approach. *See Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 348-49 (D.C. Cir.  
18 1998) (finding bad faith where the agency sought remand based on a new “policy statement” that was  
19 nonbinding, where the agency could not promise any particular decision on remand, and where the court  
20 determined that the agency was merely employing “novel” tactics to avoid judicial review); *Corus Staal*  
21 *BV v. United States*, 387 F. Supp. 2d 1291, 1296 (Ct. Int’l Trade 2005) (denying a remand request  
22 because the requesting party expressed no doubts about the correctness of its decision).

23 Citing the PCFFA Appellate Ruling as an “intervening event,” Federal Defendants maintain that  
24 their request for voluntary remand is governed by the third scenario, in which voluntary remand is  
25 effectively mandatory rather than the fourth scenario, in which the Court’s discretion is guided by a

1 good faith inquiry. Doc. 42 at 3. Federal Defendants cite *National Fuel Gas Supply Corp. v. FERC*, 899  
2 F.2d 1244 (D.C. Cir. 1990), in support of their position that the present situation falls within the third  
3 *SKF USA* category. In *National Fuel*, the D.C. Circuit granted the Federal Energy Regulatory  
4 Commission's ("FERC") request for voluntary remand of ratemaking order after an intervening judicial  
5 decision "dramatically—and, no doubt, unexpectedly—altered" the legal backdrop against which FERC  
6 issued its original order. *Id.* at 1249-50. Specifically, shortly before oral argument on the appeal, a  
7 different panel of the D.C. Circuit issued a ruling that appeared to deprive a prior FERC order of the  
8 "legal effect that [was] sought by [FERC] in *National Fuel*." *Id.* at 1249. This, the D.C. Circuit held,  
9 was an "intervening change in the law." *Id.*; see also *id.* at 1249-50 ("Remand under these circumstances  
10 also comports with the general principle that an agency should be afforded the first word on how an  
11 intervening change in law affects an agency decision pending review.").

12 Plaintiffs counter that the present case is distinguishable from *National Fuel*, pointing to  
13 *American Forest Resource Council v. Ashe*, 946 F. Supp. 2d 1 (D.D.C. 2013), in which the defendant  
14 agency argued that "an intervening change in the case law" mandated remand to the agency. *Id.* at 42 n.  
15 5. The agency decision at issue in *American Forest* was supported by reasoning generated largely in  
16 1996. See *id.* at 20. In requesting voluntary remand, the agency asserted that its 1996 explanation was  
17 "consistent with [then-]existing case law," but acknowledged that, since 1996, judicial decisions  
18 imposed a higher burden on the agency to justify the type of decision in question. *Id.* at 41. The agency  
19 admitted that it did not meet this heightened burden in 1996 and asked for an opportunity to do so as part  
20 of the voluntary remand. *Id.* at 41-2. The district court concluded that the "so-called 'change' in the law  
21 identified by [the agency] is not one that automatically requires remand," reasoning that, prior to the  
22 judicial decisions cited by the agency, the agency's own policies drew similar conclusion, i.e. the  
23 "cases' gloss" on those issues was not novel. *Id.* at 42 n. 5. Therefore, because the agency "could have  
24 taken the position it now takes before the so-called change in the law, the Court treat[ed] the remand  
25 request as one based on the agency's recognition of its own error, influenced as it were by several

1 judicial decisions.” *Id.*

2 Plaintiffs suggest that the present case is like *American Forest* because the Ninth Circuit’s ruling  
3 in *PCFFA* “relied upon existing NEPA jurisprudence and canons of statutory interpretation to set aside  
4 defendants’ unlawful actions.” Doc. 44 at 2. Plaintiffs argue that because *PCFFA* “obviously did not  
5 amend NEPA” it was “in no sense an ‘intervening change in the law.’” *Id.*

6 This takes the logic of *American Forest* too far. Federal Defendants issued the EA in dispute in  
7 this case on February 29, 2016, approximately two years after this Court upheld a similar EA against  
8 challenge in *PCFFA* by an order issued February 6, 2014. *PCFFA*, Doc. 88. Therefore, at the time the  
9 EA issued, at least one Court (this one) found the government’s actions to be consistent with NEPA. As  
10 previously discussed, that February 6, 2014 order was vacated in part by the Ninth Circuit, but not until  
11 March 28, 2016, after the EA in this case issued. *PCFFA*, Doc. 97. This procedural history makes this  
12 case distinguishable from *American Forests*. Therefore, the Court believes it would be appropriate to  
13 apply *SKF USA*’s “intervening change in the law” scenario to justify voluntary remand without a good  
14 faith inquiry.

15 But, even if *SKF USA*’s fourth scenario applies, requiring a showing of good faith, Federal  
16 Defendants have made such a showing in their supplemental briefing. In their original motions papers,  
17 Federal Defendants indicated:

18 In the present case, without any admission that an updated water needs  
19 assessment or new EA is required, Defendants have determined that  
20 performing an updated water needs assessment, and then making that  
21 assessment part of a new EA, will be a more efficient way to resolve this  
22 lawsuit without wasting judicial or agency resources on litigation. The  
23 remand would include an updated water needs assessment and a new EA  
24 based on the updated assessment and evaluation of a no-action alternative  
25 consistent with the Ninth Circuit’s amended decision [in *PCFFA*].  
Reclamation anticipates that this process may take approximately 12  
months, but potentially longer in light of the complexity of the issues and  
the other time-sensitive environmental reviews currently scheduled in the  
next 6-12 months.

Doc. 28 at 4.

1 The Court did not find this showing compelling, explaining that “Federal Defendants refuse to  
2 admit that a new EA is required, but nonetheless propose to prepare one that includes a no-action  
3 alternative consistent with the Ninth Circuit’s amended decision” to “resolve this litigation” and avoid  
4 the waste of judicial resources. Briefing Order at 5. The Court found this insufficient to demonstrate  
5 good faith. *Id.* In particular, the Court was “concerned with Federal Defendants’ refusal to acknowledge  
6 that there are parallels between the EA in this case and the EA in *PCFFA*,” *id.*, and the absence of  
7 authority suggesting that judicial or party efficiency alone is sufficient to demonstrate good faith, *see id.*  
8 at 4.

9 Federal Defendants returned with a clarified position:

10 Defendants’ motion for voluntary remand is based on the intervening  
11 *PCFFA* decision, which calls into question the validity of the EA in this  
12 case. . . .

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13 Defendants expressly “acknowledge that there are parallels between the  
14 EA in this case and the EA in *PCFFA*” that the Ninth Circuit later found  
15 to be inadequate, [Doc. 41 at 5]. Specifically, Defendants acknowledge  
16 that the EA in this case considered a no action alternative that “assumed  
17 [continued] interim contract renewal,” as the EA did in *PCFFA*, [655 Fed.  
18 Appx. 595], at \* 1. *See* [Doc. 41 at] 2. That analysis cannot stand under  
19 the intervening *PCFFA* decision. The EA in this case also “eliminated  
20 th[e] [reduced-quantity] alternative from detailed study” on the same  
21 grounds cited in the EA in *PCFFA*, and in doing so, the EA relied on the  
22 same 2006 water needs assessment that was “prepared with data from  
23 1999 that predated a land retirement project,” *see id.* at \*2. This reasoning  
24 is also insufficient according to *PCFFA*. Further, Defendants recognize  
25 that the treatment of the no-action and reduced-quantity alternatives in the  
*PCFFA* EA were the two bases for the Ninth Circuit’s partial reversal of  
the judgment for Defendants. *Id.* at \*3.

Although Defendants do not believe that they acted arbitrarily and  
capriciously in their preparation of the EA, given the state of the law at the  
time, Defendants acknowledge that these two aspects of the alternatives  
analysis in the EA would not pass muster under the reasoning of *PCFFA*,  
if that reasoning were applied in this case on the merits.

Doc. 42 at 4-5 (footnotes omitted). In addition, as set forth in the Declaration of Michael P. Jackson  
 (“Jackson Decl.”), the Area Manager for Reclamation’s South-Central California Area Office,



1 Reclamation has a defined plan of action for the remand, namely to (1) conduct a new water needs  
2 assessment; (2) prepare and evaluate a no-action alternative premised on non-renewal of the Interim  
3 Renewal Contracts for 2016-18; and (3) consider a reduced quantity alternative. Jackson Decl., Doc. 41-  
4 2, ¶ 8.

5 Plaintiffs continue to take issue with Reclamation's refusal to admit that it acted arbitrarily and  
6 capriciously. But, as discussed in the Briefing Order, there is no requirement that Reclamation admit  
7 wrongdoing. Briefing Order at 3-4 (citing *SKF USA* for the proposition that an "agency may request a  
8 remand (without confessing error) in order to reconsider its previous position," 254 F.3d at 1029  
9 (emphasis added)). Rather, like in *California Communities*, 688 F.3d at 992, where the agency was  
10 found to have demonstrated a good faith basis for voluntary remand where it recognized the need for  
11 additional analysis, Federal Defendants now have acknowledged that certain aspects of the EA cannot  
12 "pass muster" under *PCFFA*. This is sufficient to warrant voluntary remand.<sup>3</sup>

13 **B. Vacatur.**

14 Having concluded that voluntary remand is appropriate, the Court next turns to Federal  
15 Defendants' request for remand without vacatur, and Plaintiffs' parallel request to vacate both the EA  
16 and the Interim Contracts.

17 In deciding whether to vacate an agency action, courts faced with a motion for voluntary remand

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19 <sup>3</sup> As mentioned, in the *PCFFA Appellate Ruling*, the Ninth Circuit addressed the *PCFFA* plaintiffs' argument that the  
20 geographic scope of the *PCFFA* EA was "improperly limited to the delivery areas and should also have considered the  
21 effects, including cumulative effects of interim contract renewal on the California River Delta, the source of the water, and on  
22 the Delta's fish and other wildlife." 655 Fed. Appx. 595 at \*3. The Ninth Circuit held "this contention lack[ed] merit because  
23 the EA was tiered off of [a programmatic EIS ("PEIS")], which addressed [CVP]-wide effects of long-term contract renewal"  
24 and because "of Reclamation's obligation to conduct a more comprehensive analysis in the PEIS, it would be impractical to  
25 require the agency to trace the incremental effects of each two-year water service contract on the Delta and all [CVP]  
waters." *Id.* Here, Defendant Intervenors suggest that Plaintiffs have alleged only harms that are "beyond the scope of the  
NEPA review required by the [Interim Contracts]," and argue that "the Ninth Circuit expressly rejected the claim that the EA  
should have considered the [Interim Contracts'] effects on these alleged harms." Doc. 42 at 12. Pointing to allegations in the  
Complaint that at least arguably allege harms occurring within the Interim Contractors' service areas, Plaintiffs argue that  
Reclamation has "studiously avoid[ed] taking any position on that question, raising the possibility that Reclamation's future  
EA will be functionally identical to the EA that the Ninth Circuit held inadequate." Doc. 44 at 5. The Court does not believe  
Federal Defendants' silence on this issue demonstrates "recalcitrance" or otherwise undermines their good faith basis for  
voluntary remand. Federal Defendants have taken no position in this litigation that even remotely suggests they would be  
unwilling or unable to take into consideration evidence of environmental harm within the relevant service area(s).

1 have employed “the same equitable analysis” used to decide whether to vacate agency action after a  
2 “rul[ing] on the merits.” *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136,  
3 1143 (C.D. Cal. 2002); *ASSE Int’l, Inc. v. Kerry*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 1692806 (C.D. Cal.  
4 2016); *Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241-42 (D. Colo. 2011)  
5 (indicating that because “[v]acatur is an equitable remedy ... and the decision whether to grant vacatur is  
6 entrusted to the district court’s discretion. . . .vacation of an agency action without an express  
7 determination on the merits is well within the bounds of traditional equity jurisdiction.”). Courts  
8 routinely evaluate two factors originally articulated in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory*  
9 *Commission*, 988 F. 2d 146, 150-51 (D.C. Cir. 1993), often referenced as the “*Allied-Signal*” factors:  
10 (1) “the seriousness of an agency’s errors” and (2) “the disruptive consequences that would result from  
11 vacatur.” *Klamath-Siskiyou Wildlands Ctr. v. NOAA Nat’l Marine Fisheries Serv.*, 109 F. Supp. 3d  
12 1238, 1242 (N.D. Cal. 2015) (citing *California Communities*, 688 F.3d at 992 (quoting *Allied-Signal*,  
13 988 F.2d at 150-51)). “Put differently, courts may decline to vacate agency decisions when vacatur  
14 would cause serious and irreparable harms that significantly outweigh the magnitude of the agency’s  
15 error.” *Id.* (internal quotation marks removed).<sup>4 5</sup>

### 16 **1. Scope of the Complaint and Vacatur Request**

17 Before evaluating the prospects of vacatur, it is helpful to outline the scope of the Complaint in  
18 this case and the forms of vacatur requested. The Complaint alleges two causes of action. The First

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20 <sup>4</sup> Some cases suggest other factors may be considered. *See, e.g., Nat. Res. Def. Council v. Norton*, No. 1:05CV01207 OWW  
21 LJO, 2007 WL 14283, at \*13 (E.D. Cal. Jan. 3, 2007). But, more recently, the Ninth Circuit appears to have recognized the  
22 two *Allied-Signal* factors as controlling. *See Cal. Communities*, 688 F.3d at 992; *see also Sierra Forest Legacy v. Sherman*,  
951 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013) (interpreting *Cal. Communities* as holding the *Allied-Signal* factors are  
“controlling, for purposes of assessing vacatur”).

23 <sup>5</sup> As the Court noted in its Briefing Order, there is some authority to support application of a more onerous standard to a  
24 request for vacatur that would have the same operative effect as an injunction. *See* First Briefing Order at 6 n. 1 (citing  
25 *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. CV 12-9861-GW(SSX), 2016 WL 4445770, at \*5-6 (C.D. Cal.  
Aug. 12, 2016)). The Court declines to rule out the applicability of such a standard. However, because the Court finds that  
Plaintiffs’ request to vacate the Interim Contracts should be denied under the less onerous *Allied-Signal* test, there is no need  
to evaluate that same request under the arguably more onerous traditional injunctive relief standard.

1 Claim for Relief alleges that the EA and associated FONSI for the 2016-18 Interim Contracts are  
2 inadequate for a number of reasons, two of which are particularly relevant to the present analysis. First,  
3 Plaintiffs allege the EA and FONSI relied on the false premise that Reclamation had no discretion to  
4 reject the 2016-18 Interim Contracts and therefore defined the no action alternative as essentially the  
5 same as the Proposed Action (approval of the Interim Contracts), rendering any comparative analysis  
6 meaningless. Doc. 1 at ¶ 42 (a) & (c). In addition, Plaintiffs allege the EA failed to consider seriously  
7 any alternatives proposing reduced quantities of water deliveries, based in part on Reclamation's  
8 assertion that it lacked discretion to reduce contract quantities when water is beneficially used. *See id.* at  
9 ¶ 42(c). Plaintiffs relatedly allege that the water needs assessments Reclamation used to determine  
10 whether water was beneficially used were outdated. *Id.* at ¶ 41.

11 Plaintiffs' Second Claim for Relief alleges that approval of each of the 2016-18 Interim  
12 Contracts is a "major federal action that may significantly affect the quality of the human environment,"  
13 and therefore Reclamation acted unlawfully by preparing an EA instead of a more involved  
14 Environmental Impact Statement ("EIS"). *Id.* at ¶¶ 45-47.

15 Plaintiffs' prayer for relief requests the following:

- 16 1. A declaration that Defendants acted contrary to law by issuing a FONSI for the 2016-18  
17 Interim contract renewals based on an EA that is legally and factually inadequate;
- 18 2. An injunction ordering Defendants to withdraw the FONSI and to prepare an adequate  
19 EA as required by NEPA;
- 20 3. An injunction ordering Reclamation to prepare an EIS;
- 21 4. An award of costs and reasonable attorneys fees and expenses; and
- 22 5. "Any other relief that this Court deems just and proper."

23 Doc. 1 at 17-18.

24 It is plain from the face of the Complaint that Plaintiffs have requested vacatur of the EA and  
25 FONSI. It is therefore appropriate to consider Defendants' request for remand without vacatur of the

1 EA/FONSI together with Plaintiffs’ arguments in favor of vacating the EA/FONSI under the *Allied-*  
2 *Signal* test outlined above.

3 Plaintiffs also make plain in their briefs that they seek to set aside the 2016-18 Interim Contracts  
4 as well. As a general matter, where an agency acts arbitrarily and/or capriciously or not in accordance  
5 with the law, the APA requires a reviewing court to set aside the agency action. 5 U.S.C. § 706(2)(A)-  
6 (D). In the present case, the challenged agency action is the issuance of the EA/FONSI. Nevertheless, if  
7 an agency has acted unlawfully in executing a contract, the court retains the discretion to apply the  
8 remedy of contract rescission to associated contracts, *Natural Resources Defense Council v. Houston*,  
9 146 F.3d 1118, 1129 (9th Cir. 1998), or preserve the associated contract, if the legal flaw can be  
10 rectified in some another way. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982));  
11 *Conner v. Burford*, 848 F.2d 1441, 1460-61 & n. 50 (9th Cir. 1988) (modifying district court order to  
12 clarify that oil leases executed without full NEPA and Endangered Species Act (“ESA”) compliance  
13 need not be set aside, while enjoining any “surface-disturbing” activities on the leased properties until  
14 full compliance is achieved, thereby “avoid[ing] the unnecessarily harsh result of completely divesting  
15 the lessees of their property rights”); *see also Tinoqui–Chalola Council of Kitanemuk & Yowlumne*  
16 *Tejon Indians v. U.S. Dep’t of Energy*, 232 F.3d 1300, 1305 (9th Cir. 2000) (court has authority under  
17 the APA to order rescission of a contract for sale if the federal agency “acted in excess of statutory  
18 authority or without observance of the procedures required by law”); *Port of Astoria v. Hodel*, 595 F.2d  
19 467, 479 (9th Cir. 1979) (court may declare contract unenforceable pending preparation of required  
20 environmental review).

21 As a threshold matter, Federal Defendants argue that Plaintiffs did not pray for the remedy of  
22 contract rescission<sup>6</sup> and should not be permitted to use Defendants’ motion for voluntary remand as a

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24 <sup>6</sup> The parties variously refer to this request as a request for “contract set-aside” and “contract vacatur.” *See, e.g.*, Doc. 42 at 8;  
25 Doc. 44 at 8. Regardless of label, for purposes of this case, it is a request for injunctive relief against contract  
implementation/performance.

1 basis for expanding the scope of this lawsuit. Doc. 42 at 8.<sup>7</sup> In their first supplemental brief, Plaintiffs  
2 argue the Complaint’s generic request for “[a]ny other relief this Court deems just and proper” is  
3 sufficient to permit contract set-aside as a remedy. Doc. 44 at 8. In support of this assertion, Plaintiffs  
4 cite *Rental Development Corporation of America v. Lavery*, 304 F.2d 839 (9th Cir. 1962), in which  
5 lessees sued lessors for breach of a lease, but did not request cancellation of the lease in their complaint.  
6 The Ninth Circuit nevertheless determined that ordering lease cancellation was appropriate because the  
7 complaint included “the usual prayer for ‘such other relief as to the Court may seem just and proper.’”  
8 *Id.* at 840-41. Other supporting authority exists, including *United States v. Martin*, 651 F.2d 24, 30-31  
9 (1st Cir. 1981), in which the First Circuit permitted an award of damages after trial despite the fact that  
10 the complaint did not contain an explicit prayer for damages, reasoning that the relief was justified under  
11 Fed. R. Civ. P. 54(c), which provides that “every final judgment shall grant the relief to which the party  
12 in whose favor it is entered is entitled, even if the party has not demanded such relief in his pleadings.”  
13 Defendant Intervenors cite a more recent Fifth Circuit case, *Dillard v. Merrill Lynch, Pierce, Fenner &*  
14 *Smith, Inc.*, 961 F.2d 1148, 1155 (5th Cir. 1992), which affirmed a district court’s refusal to consider a  
15 request for declaratory and injunctive relief because the plaintiff did not request such relief in his  
16 pleadings. Likewise, *Conkey v. Reno*, 885 F. Supp. 1389, 1392 (D. Nev. 1995), dismissed a claim for  
17 declaratory relief because the complaint failed to indicate “what in particular [the plaintiff] wish[ed] to  
18 have the Court declare,” reasoning that “[t]he failure to indicate what in particular plaintiffs seek by way  
19 of a declaratory judgment is in itself a failure to state a claim.” Both *Dillard* and *Conkey* cited Fed. R.  
20 Civ. P. 8(a)(3), which requires any pleading to contain “a demand for the relief sought, which may  
21 include relief in the alternative or different types of relief.” It is not necessary to and the Court does not  
22 resolve these conflicting authorities here because, as explained below, even if the Complaint’s generic  
23 prayer sufficiently pleads a prayer for contract rescission for notice purposes, the Court finds it is

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24 <sup>7</sup> The Court agrees with Plaintiffs that the representations made by the *PCFFA* plaintiffs in that case that they were “not  
25 ask[ing] the Court to enjoin or otherwise disturb . . . the Bureau’s entry into the interim contracts,” *see PCFFA* Doc. 26 at 2,  
does not bind the Plaintiffs in the present action.

1 inappropriate to rescind, vacate, or otherwise block performance of the 2016-18 Interim Contracts, at  
2 least not on the present record.<sup>8</sup>

3 Although the Court will assume, for purposes of the remaining discussion, that the Complaint  
4 sufficiently pleads a prayer for contract rescission, such a prayer does not fit neatly into an analytical  
5 framework in the context of the present motion. The Complaint challenges only the preparation and  
6 adoption of the EA/FONSI, not the execution of the Interim Contracts. At best, contract rescission may  
7 be an appropriate remedy upon a finding that the EA/FONSI were prepared in an unlawful manner.  
8 Therefore, in evaluating Federal Defendants' request for remand without vacatur of the EA/FONSI, the  
9 Court applies the *Allied-Signal* factors only to the question of whether the EA/FONSI should be vacated.  
10 Nevertheless, as a practical matter, for the reasons discussed below, the impact of Interim Contract  
11 vacatur is incorporated by reference into the discussion of the second *Allied-Signal* factor.

## 12 **2. Seriousness of the Agency's Errors**

13 The first *Allied-Signal* factor is the seriousness of the agency's errors. *California Communities*,  
14 688 F.3d at 992 (citing *Allied-Signal*, 988 F.2d at 150-51). One way to measure the seriousness of an  
15 agency's errors is to attempt to evaluate the likelihood that the agency will be able to justify future  
16 decisions that would follow the status quo. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027,  
17 1048-49 (D.C. Cir. 2002) (cited with approval in *Klamath-Siskiyou*, 109 F. Supp. 3d at 1243). In this  
18 case, a "status quo" decision by Federal Defendants would involve approval of an revised EA/FONSI  
19 (as opposed to preparation of an EIS) evaluating the 2016-18 Interim Contracts.

20 Defendant Intervenors argue that any errors in the current EA are redeemable on remand because  
21 "Defendants have a plan for remand that will fully address the issues raised by the Ninth Circuit's ruling  
22 in *PCFFA*." Doc. 42 at 11. Federal Defendants indicate that they plan to conduct a new water needs  
23 assessment. Jackson Decl. at ¶ 8. If the water needs assessment shows that less than the full contract

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24  
25 <sup>8</sup> Moreover, even if the current Complaint does not properly request vacatur of the 2016-18 Interim Contracts, no party has addressed whether Plaintiffs would be entitled at this early stage of the case to amend their pleading to include such a prayer.

1 amount is beneficially used, Reclamation will define a reduced-quantity alternative based upon the water  
2 needs assessment and analyze that alternative in detail. *Id.* at ¶ 9. If the water needs assessment shows  
3 that the full contract amount is beneficially used, Reclamation will eliminate the reduced quantity  
4 alternative from detailed study based upon the water needs assessment. *Id.* It is difficult to imagine what  
5 else Federal Defendants could do to address the Ninth Circuit’s concern in *PCFFA* that any reduced  
6 quantity alternative evaluated in an EA covering the Interim Contracts should take into consideration up-  
7 to-date and accurate water needs information. As to this issue, the Court “cannot say it is unlikely [the  
8 agency] will be able to justify a future decision” to issue an EA/FONSI regarding and approve continued  
9 implementation of the 2016-18 Interim Contracts or a modified set of similar Interim Contracts based  
10 upon updated water needs assessments.

11 Potentially more problematic is Federal Defendants’ admission that any new EA will need to  
12 consider a no-action alternative based upon non-renewal of the Interim Contracts. Jackson Decl. at ¶ 8.  
13 In the *PCFFA Appellate Ruling*, the Ninth Circuit explained that the *PCFFA* EA’s “no action”  
14 alternative was unlawful because it assumed continued interim contract renewal. 655 Fed. Appx. 595 at  
15 \*1-2. The Ninth Circuit acknowledged that “[w]hen agency action is mandatory, the ‘no action’  
16 alternative is properly defined as the carrying out of that action,” but refused to find renewal of the  
17 interim contracts was mandatory or that the contracts themselves mandated renewal. *Id.* at \*2. As a  
18 general rule, a “no action” alternative is “meaningless” if it assumes the existence of the very plan being  
19 proposed. *Id.* (citing *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008)).  
20 The no-action alternative is used to create a baseline against which the impacts of a project are  
21 measured. *See Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010);  
22 40 C.F.R. § 1502.14 (describing alternatives analysis applicable to EISs); *Native Ecosystems Council v.*  
23 *U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005) (explaining that the alternatives provision of  
24 NEPA applies whether an agency is preparing an EIS or an EA). Because the purpose of an EA is at  
25 least in part to help the action agency determine whether an EIS is required, 40 C.F.R. § 1508.9, a

1 “meaningless” alternatives analysis in an EA calls into question the validity of the agency’s  
2 determination that issuance of an EA/FONSI, rather than an EIS, is appropriate.

3 As to this issue, it is difficult for the Court to determine whether the agency “will be able to  
4 justify a future decision” to issue an EA versus prepare an EIS. Because the scope of the impacts to be  
5 considered is limited to impacts within the delivery area, *PCFFA Appellate Ruling*, 655 Fed. Appx. 595  
6 at \*3, it is possible the impacts revealed by a comparison of the proposed Interim Contracts to a proper  
7 “baseline” no-action alternative would still warrant the re-issuance of an EA/FONSI. But, the present  
8 record reveals no information upon which Court can evaluate the likelihood that impacts will be found  
9 to be insignificant on remand. Given that this is Federal Defendants’ motion to remand without vacatur,  
10 this factor weighs slightly in favor of vacatur of the EA/FONSI.

### 11 **3. Consequences of Vacatur**

12 The Court next turns to the second *Allied-Signal* factor: the disruptive consequences that would  
13 result from vacatur. *California Communities*, 688 F.3d at 992 (citing *Allied-Signal*, 988 F.2d at 150-51).  
14 Federal Defendants do not assert that vacating the EA/FONSI would have any independent disruptive  
15 consequences. Rather, they asserted in the first round of supplemental briefing that “[i]t would be  
16 difficult to vacate the EA without causing at least some of the harms that would follow from vacating  
17 the contracts.” Doc. 42 at 7. In other words, Federal Defendants incorporate by reference arguments and  
18 evidence about the disruptive consequences of setting aside the Interim Contracts into their argument  
19 against vacatur of the EA/FONSI. For purposes of organizational clarity and efficiency, the Court first  
20 addresses these arguments regarding the disruptive consequences of Interim Contract rescission. The  
21 Court then addresses whether Federal Defendants adequately have connected EA/FONSI vacatur to  
22 Interim Contract rescission.

#### 23 **a. Disruptive Consequences of Interim Contract Vacatur**

24 Defendants point to several potential consequences of vacating the 2016-18 Interim Contracts.  
25 Michael Shires, an economist and public policy analyst retained by Defendant Intervenors, researched



1 how the operations of Westlands Water District (“Westlands”) impact the economy of its immediate  
2 region, the state, and the nation. Declaration of Michael A. Shires (“Shires Decl.”), Doc. 42-3 at ¶ 2-3.  
3 Shires states that reductions in Westland’s CVP water supply have resulted in: (1) more expensive  
4 groundwater being used to attempt to cover some of the shortfall in available water; (2) farmers within  
5 Westlands taking land out of production and/or curtailing harvesting of some planted crops; and  
6 (3) farmers within Westlands changing the mix of crops grown. *Id.* at ¶ 5. With regard to reduced  
7 acreage in production, Shires concludes that reduced water availability has caused an 18 percent decline  
8 in available jobs and overall output, for an estimated loss of 5,200 jobs and nearly \$650 million dollars  
9 of overall economic output. *Id.* at ¶ 6. Shires concludes that if CVP water deliveries cease altogether,  
10 these negative consequences would be “all the more damaging and even potentially devastating given  
11 that the already prolonged unavailability of sufficient water deliveries would be extended even further.  
12 Such further extension of the unavailability of sufficient water [deliveries] would be expected to result  
13 in an accumulation and multiplication of negative consequences, for example, processing plant and  
14 supply chain closures and other business failures.” *Id.* at ¶ 8.

15 According to Jose Gutierrez, Westlands’ Deputy General Manager of Resources, failure to  
16 receive water allocations has had a “significant negative impact on the local and regional economies.”  
17 Declaration of Jose Gutierrez (“Gutierrez Decl.”), Doc. 42-2, at ¶ 28. Overall, the “weather-related and  
18 regulatory-drought” has resulted in the fallowing of hundreds of thousands of acres of land in the  
19 Central Valley, the loss of more than 15,000 jobs, and more than \$2 billion in lost revenue to the state’s  
20 farming industry. *Id.* at ¶ 30. Gutierrez also explains that the area within Westlands’ service area has  
21 suffered from land subsidence, a consequence of long-term groundwater overdraft. *Id.* at ¶¶ 33-34.  
22 Groundwater pumping generally decreases in years when CVP Contract water deliveries decrease. *Id.* at  
23 ¶ 37. Water supply constraints are also expected to lead to significant land fallowing, which can  
24 negatively impact air quality. *Id.* at ¶ 38.

25 Plaintiffs point out, correctly, that all of the harms listed above are harms that have occurred or

1 are occurring as the result of the drought with the Interim Contracts in place. Plaintiffs argue that “the  
2 very fact that these harms occur now, with the contracts in place, shows that vacatur is not the cause of  
3 the harm.” Doc. 44 at 12-13. It is true that Defendants have not provided any quantitative (or even rough  
4 qualitative) estimate of the relative impact of Interim Contract vacatur vis-à-vis the background  
5 conditions. However, Defendants have presented evidence that tends to suggest existing economic and  
6 environmental harms would be exacerbated if the Interim Contracts are vacated. For example, Shires  
7 extrapolates from existing harms caused by the ongoing drought and regulatory restrictions to conclude  
8 that vacatur of the Interim Contracts would cause additional harm. Shires Decl., Doc. 42-3, at ¶ 8 The  
9 fact that the harms would be present to some degree without vacatur simply goes to the weight this harm  
10 is to be given in the equitable balance.

11 This case is unlike *Public Employees for Environmental Responsibility v. United States Fish &*  
12 *Wildlife Serv.*, No. CV 14-1807 (JDB), 2016 WL 3030228, at \*1-2 (D.D.C. May 25, 2016) (“*PEER*”), in  
13 which the district court disregarded the agency’s showing that vacatur of agency orders for  
14 noncompliance with NEPA would cause economic disruption. The *PEER* court found the agency had  
15 not made a compelling case because the forecasted harms were “imprecise or speculative.” *Id.* at \*2.  
16 Specifically, the agency claimed that “[f]isheries impacts can be in the millions of dollars” and that “the  
17 impacts to the aquaculture could be in the millions of dollars.” *Id.* The Court found these to be “entirely  
18 conjectural” and, critically, disputed by contrary evidence presented by the environmental plaintiffs.  
19 Here, while Defendants’ showing is imprecise, it is not completely conjectural. It is not fantasy, for  
20 example, to extrapolate from documented harms that have resulted from low water deliveries in order to  
21 advance the proposition that greater harm would result from no water deliveries.

22 Moreover, unlike in *PEER*, in response to Federal Defendants’ and Defendant Intervenors’  
23 imperfect, but nonetheless pertinent, factual showing, Plaintiffs present no evidence in the context of  
24 these motions regarding the consequences of not vacating the Interim Contracts. Plaintiffs argue that  
25 “the environmental harm from remanding without vacatur is profound,” Doc. 44 at 13, but cite only to

1 general holdings from prior cases as well as the allegations in their own complaint. For example,  
2 Plaintiffs quote a footnote from the Introduction to this Court’s summary judgment ruling in *PCFFA*, in  
3 which the Court notes it “is indisputable that delivery of CVP water to contractors impacts the  
4 environment in significant ways.” *PCFFA*, Doc. 88 at 6 n. 3 (emphasis in original). In that sentence, the  
5 Court was explaining why “operational decisions . . . rather than the Interim Contracts themselves,  
6 actually control deliveries” to water contractors. *Id.* at 5. That generic statement cannot be used as  
7 evidence of harm for purposes of the present equitable analysis, particularly given the extremely generic  
8 nature of the statement, as compared to the very specific scope of environmental harms relevant to the  
9 NEPA analysis under review in the present case, which, according to the Ninth Circuit, is properly  
10 “limited to the delivery areas.” *PCFFA Appellate Ruling*, 655 Fed. Appx. 595 at \*3. The Complaint  
11 certainly alleges “the worsening contamination of ground and surface water resources in the Central  
12 Valley resulting from the harmful irrigation practices th[e] [Interim Contracts] perpetuate” and suggests  
13 impacts to the California least tern and giant garter snake, Doc. 2 at ¶¶ 4, 28, all of which plausibly may  
14 include impacts within the Interim Contractors’ delivery areas. Yet, again, these allegations are not  
15 evidence. *See F.D.I.C. v. Deglau*, 207 F.3d 153, 172 (3d Cir. 2000) (refusing to consider allegations in  
16 complaint in evaluating propriety of injunctive relief). Despite several rounds of supplemental briefing,  
17 Plaintiffs have not submitted any evidence in support of their claimed harms.

18 Particularly in light of the limited geographic scope of the harms that are to be considered in the  
19 NEPA review at issue, the Court concludes that the disruptive consequences of rescinding the 2016-18  
20 Interim Contracts outstrip the consequences that would flow from leaving the Interim Contracts in place.

21 **b. Impact of EA/FONSI Vacatur on Interim Contract Implementation**

22 Federal Defendants argue that the above conclusion—that rescinding the 2016-18 Interim  
23 Contracts would be more disruptive than not doing so—should control the Court’s evaluation of whether  
24 the EA/FONSI should be vacated. In support of this argument, Federal Defendants rely in large part on  
25 40 C.F.R. §§ 1505.2 and 1506.1 to support the proposition that setting aside the EA/FONSI would have

1 the same practical effect as setting aside the Interim Contracts. Doc. 46 at 2. Whenever an agency  
2 determines it must prepare an EIS, 40 C.F.R. § 1505.2 requires the agency to “prepare a concise public  
3 record of decision” (“ROD”) and sets forth the required content of any such ROD. 40 C.F.R. §  
4 1506.1(a), in turn provides:

5           Until an agency issues a record of decision as provided in § 1505.2 (except  
6           as provided in paragraph (c) of this section), no action concerning the  
7           proposal shall be taken which would:

- 8                           (1) Have an adverse environmental impact; or  
9                           (2) Limit the choice of reasonable alternatives.

10 Therefore, in any case requiring the preparation of an EIS, the agency may not take any action  
11 concerning the proposed project that would have an adverse environmental impact unless and until the  
12 required ROD issues.

13           In the present case, the agency determined that no EIS and ROD were required, and instead  
14 issued the EA and FONSI. This is in accordance with 40 C.F.R. § 1501.4, which commands the agency  
15 “based on the [EA] [to] make its determination whether to prepare an [EIS],” and further requires the  
16 issuance of a FONSI whenever “the agency determines on the basis of the environmental assessment not  
17 to prepare a statement.”

18           The Court agrees with Federal Defendants that if the EA is vacated, the FONSI cannot stand  
19 alone because it is “supported by” the EA. *See Finding of No Significant Impact & Final Environmental*  
20 *Assessment, Central Valley Project Interim Renewal Contract for Westlands Water District, Santa Clara*  
21 *Valley Water District, and Pajaro Valley Water Management Agency 2016- 2018 (February 2016)*  
22 (“FONSI”), Doc. 51-1, at ECF p. 5<sup>9</sup>. With neither the EA nor the FONSI in place, water deliveries

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23 <sup>9</sup> The Court takes judicial notice of this public record. *See* Fed. R. Evid. 201(b); *San Luis & Delta–Mendota Water Auth. v.*  
24 *Salazar*, 686 F. Supp. 2d 1026, 1031 (E.D. Cal. 2009) (taking judicial notice of public records published by administrative  
25 bodies). While the court may take judicial notice of these types of documents, the documents are judicially noticeable “only  
for the purpose of determining what statements are contained therein, not to prove the truth of the contents or any party’s  
assertion of what the contents mean.” *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 975 (E.D. Cal. 2004).

1 pursuant to the 2016-18 Interim Contracts during the remand period would then be subject to 40 C.F.R.  
2 § 1506.1. In the absence of a ROD specific to the 2016-18 Interim Contracts, to the extent deliveries  
3 under those Interim Contracts are found to have any “adverse environmental impact,” Defendants would  
4 need to reduce or potentially even suspend deliveries. Doc. 46 at 2. Accordingly, because even the  
5 flawed EA mentions some forms of adverse environmental impact within the Interim Contractors’  
6 delivery areas, *see, e.g.*, EA/FONSI, Doc. 51-1 at ECF p. 48 (“[T]he resumption of agricultural activities  
7 on lands fallowed for more than one year has the potential to remove dens, reduce prey and force kit  
8 foxes into unfamiliar areas.”), reduction or suspension of deliveries is a real possibility as a result of 40  
9 C.F.R. § 1506.1, the applicability of which does not turn on the “significance” of environmental harm.  
10 The Court also notes that it has been unable to identify a single case in which a NEPA document has  
11 been vacated but an ongoing project approved by that document has been permitted to continue in whole  
12 or in part.

13 The Court is unpersuaded by Plaintiffs’ citation to *Northern Cheyenne Tribe v. Norton*, 503 F.3d  
14 836 (9th Cir. 2007). In that case, the Ninth Circuit considered the propriety of a district court’s decision  
15 to enjoin partially coal bed methane extraction after finding that an EIS reviewing the extraction project,  
16 while “generally sufficient under NEPA, . . . improperly failed to consider” a certain alternative. *Id.* at  
17 841. Plaintiffs in that case cited 40 C.F.R. § 1506.1(c)(3), which prohibits any agency in the process of  
18 preparing a programmatic EIS from “undertak[ing] in the interim any major Federal action covered by  
19 the program which may significantly affect the quality of the human environment unless such action:  
20 (1) Is justified independently of the program; (2) Is itself accompanied by an adequate environmental  
21 impact statement; and (3) Will not prejudice the ultimate decision on the program.” The Ninth Circuit  
22 rejected the plaintiffs’ argument that this provision “requires that no development proceed until after a  
23 valid EIS is completed,” instead holding that “a NEPA violation is subject to traditional standards in  
24 equity for injunctive relief and does not require an automatic blanket injunction against all  
25 development.” 503 F.3d at 843. *Northern Cheyenne Tribe* answers (in the negative) only the question of

1 whether a NEPA violation mandates an absolute stop to any project approved by a flawed NEPA  
2 document. Because the issue was not raised, *Northern Cheyenne Tribe* does not address the question of  
3 whether vacatur of the EIS itself would have made it impossible for the action agency to implement the  
4 project in question in light of 40 C.F.R. § 1506.1.

5 The Court therefore concludes that vacatur of the EA/FONSI would likely cause the same  
6 disruptive consequences as suspending implementation of the Interim Contracts. At least on the present  
7 record, the consequences of Interim Contract suspension outstrip the consequences that would flow from  
8 leaving the Interim Contracts in place. This must be balanced against the agency's error. As discussed  
9 above, regarding the Ninth Circuit's concern in the *PCFFA Appellate Ruling* that any reduced quantity  
10 alternative evaluated in an EA covering the Interim Contracts should take into consideration up-to-date  
11 and accurate water needs information, the Court believes it is likely that the agency will be able to cure  
12 this error on remand. As to the admitted errors regarding the no-action alternative, the use of such a  
13 "meaningless" alternatives analysis calls into question the validity of the agency's issuance of an  
14 EA/FONSI, rather than an EIS. However, because the scope of the impacts to be considered is limited to  
15 impacts within the delivery area, it is possible the impacts revealed by a comparison of the proposed  
16 Interim Contracts to a proper "baseline" no-action alternative would still warrant the re-issuance of an  
17 EA/FONSI. The present record simply does not permit a firm determination of the likelihood that the  
18 agency can cure the faulty alternatives analysis defect on remand. Although this failure of proof by the  
19 moving party weighs in favor of vacatur, the Court believes the actual evidence of harm that would be  
20 caused by vacatur outweighs the seriousness factor. As a result, any intervention that would suspend  
21 implementation of the 2016-18 Interim Contracts would be inappropriate on the present record, and,  
22 relatedly, vacatur of the EA/FONSI would likewise be inappropriate because vacatur of the NEPA  
23 document likely would have the same practical effect as suspension of the Interim Contracts.

#### 24 **4. Dismissal**

25 Federal Defendants argue that the Court should dismiss this case upon remand because the

1 claims in this case are no longer ripe for review. Doc. 28 at 5. Federal Defendants cite *American Wild*  
2 *Horse Preservation Campaign v. Salazar*, 115 F. Supp. 3d 1 (D.D.C. 2012), in which the district court  
3 granted an agency's request for voluntary remand of an administrative decision authorizing rounding up,  
4 castrating, and returning of gelded wild horses to public land, a decision alleged to be in violation of the  
5 Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340. The court further concluded that  
6 the claims based upon the remanded administrative decision should be dismissed because no relevant  
7 agency decision remained for the Court to consider. *Id.* at \*4. Of particular note, nothing in the case  
8 suggested any disputed activities would be ongoing during the period of remand, nor could any party  
9 anticipate what the agency's decision would be at the conclusion of remand. *See id.*

10 The situation here is very different. The Court is permitting continued implementation of the  
11 Interim Contracts despite the agency's admission that the NEPA document covering those contracts is  
12 flawed. Moreover, one of Federal Defendants' central arguments—that vacatur of the EA/FONSI will  
13 likely have the same disruptive consequences as any order prohibiting implementation of the Interim  
14 Contracts themselves—depends in part on the underlying assumption that implementation of the Interim  
15 Contracts will cause some environmental harm.

16 “District courts have the authority to stay court proceedings and retain jurisdiction over cases  
17 even when an agency's request for a voluntary remand is granted.” *XP Vehicles, Inc. v. United States*  
18 *Dep't of Energy*, 156 F. Supp. 3d 185, 193 (D.D.C. 2016). “While this is not always done, courts have  
19 exercised their discretion to do so when, for example, the court wishes to ensure that a voluntary remand  
20 will not, in fact, prejudice the non-movant.” *Id.*; *see also Greater Yellowstone Coal. v. U.S. E.P.A.*, No.  
21 4:12-CV-60-BLW, 2013 WL 1760286, at \*5 (D. Idaho Apr. 24, 2013) (after granting motion for  
22 voluntary remand, retaining jurisdiction to “ensure a timely remand process and to allow the parties to  
23 challenge any new [agency] decision in this case.”); *Friends of Park v. Nat'l Park Serv.*, No. 2:13-CV-  
24 03453-DCN, 2014 WL 6969680, at \*4 (D.S.C. Dec. 9, 2014) (after granting motion for voluntary  
25

1 remand, retaining jurisdiction to “ensure compliance” with the regulation alleged to have been violated).  
2 The Court will order periodic status reports on the progress of the remand.

3 **5. Fees and Costs**

4 Finally, Federal Defendants’ opening brief suggested that if voluntary remand is authorized in  
5 this case “each party should bear its own costs for the limited duration of this case.” In the Briefing  
6 Order, the Court reasoned that *Li v. Keisler*, 505 F. 3d 913, 919 (9th Cir. 2007), cited by Federal  
7 Defendants, did not support the position advanced. Briefing Order at 7. Rather, *Li* suggests a case-by-  
8 case inquiry into whether substantial justification was present by, for example, examining whether the  
9 government’s action was contrary to clearly established law. 505 F.3d at 920. The Court invited further  
10 briefing, Briefing Order at 7, but Federal Defendants have not provided any. Therefore, the Court will  
11 treat this issue as abandoned.

12 **IV. CONCLUSION AND ORDER**

13 For the reasons set forth above:

14 (1) Federal Defendants’ motion for voluntary remand WITHOUT VACATUR of the EA/FONSI  
15 is GRANTED;

16 (2) Plaintiffs’ request to vacate, set-aside, or otherwise rescind the 2016-18 Interim Contracts is  
17 DENIED on the present record;

18 (3) All proceedings in this case are STAYED until further notice;

19 (4) The Court will retain jurisdiction over this matter; and

20 (5) Federal Defendants shall submit a brief status report on the progress of remand every ninety  
21 days, starting ninety days from electronic service of this order.

22 IT IS SO ORDERED.

23 Dated: **December 15, 2016**

**/s/ Lawrence J. O’Neill**  
24 UNITED STATES CHIEF DISTRICT JUDGE