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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SOUTH YUBA RIVER CITIZENS  
LEAGUE and FRIENDS OF THE  
RIVER,

NO. CIV. S-06-2845 LKK/JFM

Plaintiffs,

v.

O R D E R

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

\_\_\_\_\_ /

The remaining claims in this suit concern two dams and related water diversions on the Yuba River. The dams are operated by the Army Corps of Engineers ("Corps"). The river is home to populations of Chinook salmon, steelhead, and green sturgeon listed as threatened under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* In 2007, the National Marine Fisheries Service ("NMFS") issued a Biological Opinion ("BiOp") concluding that the Corps' future operations would not violate the ESA. Plaintiffs,

1 two environmental groups, claim that NMFS's BiOp is arbitrary and  
2 capricious and that the Corps' operations are causing take of  
3 protected salmon and steelhead.<sup>1</sup> Remaining defendants in this case  
4 are NMFS, the Corps, and various federal officials, collectively  
5 the "Federal Defendants."

6 Pending before the court are four motions. In one, plaintiffs  
7 seek summary judgment solely on the issue of plaintiffs' standing  
8 to bring their claims. Separately, plaintiffs and Federal  
9 Defendants have filed cross motions for summary judgment as to  
10 liability. Finally, plaintiffs seek a preliminary injunction  
11 pending final resolution of this suit.

12 For the reasons stated below, the court concludes that  
13 plaintiffs have standing and that the BiOp is arbitrary and  
14 capricious. Plaintiffs' claim regarding take raises two theories  
15 of liability. The court grants summary judgment to defendants as  
16 to the first and requests supplemental briefing as to the second.  
17 The court further requests supplemental briefing as to plaintiffs'  
18 motion for a preliminary injunction, regarding mootness and the  
19 effect of the Supreme Court's intervening decision in Monsanto Co.  
20 v. Geertson Seed Farms, \_\_\_ U.S. \_\_\_, 2010 WL 2471057, 2010 U.S.

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21  
22 <sup>1</sup> In a separate claim, plaintiffs further alleged that NMFS  
23 had unreasonably delayed publication of a rule specifying the  
24 protection owed to the green sturgeon under section 4(d) of the  
25 ESA, 16 U.S.C. § 1533(d). NMFS has since published such a rule.  
26 Endangered and Threatened Wildlife and Plants: Final Rulemaking To  
Establish Take Prohibitions for the Threatened Southern Distinct  
Population Segment of North American Green Sturgeon, 75 Fed. Reg.  
30,714 (June 2, 2010). The court agrees with the parties that this  
claim is now moot.

1 LEXIS 4980 (U.S. June 21, 2010).

2 **I. Background**

3 **A. The Endangered Species Act**

4 As recently reiterated by the Ninth Circuit, the ESA may be  
5 “the most comprehensive legislation for the preservation of  
6 endangered species ever enacted by any nation” and “reflects ‘a  
7 conscious decision by Congress to give endangered species priority  
8 over the ‘primary missions’ of federal agencies.’” Cal. ex rel.  
9 Lockyer v. United States Dep’t of Agric., 575 F.3d 999, 1018 (9th  
10 Cir. 2009) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180,  
11 185 (1978)).

12 The ESA’s protection is triggered when species are “listed”  
13 as “threatened” or “endangered” by the applicable federal agency--  
14 in this suit, NMFS. ESA § 4(c); 16 U.S.C. § 1533(c); 50 C.F.R. §  
15 402.01.<sup>2</sup> “Species,” for purposes of the ESA, means not only  
16 taxonomic species, but also “any subspecies . . . or distinct  
17 population segment of any species . . . which interbreeds when  
18 mature.” ESA § 3(16); 16 U.S.C. § 1532(16). In the particular  
19 context of salmon, NMFS treats a population as a “species” if it  
20 is an “evolutionar[il]y significant unit,” (“ESU”) which is a  
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22 <sup>2</sup> The ESA regulations were amended effective January 15, 2009.  
23 Interagency Cooperation Under The Endangered Species Act, 73 Fed.  
24 Reg. 76,272 (Dec. 16, 2008) (to be codified at 50 C.F.R. pt. 402).  
25 These amendments were repealed, and the former regulations adopted,  
26 on May 4, 2009. Interagency Cooperation Under The Endangered  
Species Act, 74 Fed. Reg. 20,421 (May 4, 2009) (to be codified at  
50 C.F.R. pt. 402). Accordingly, the regulations presently in  
effect are the same as the regulations in effect at the time the  
BiOp was issued.

1 population that is "substantially reproductively isolated from  
2 other conspecific population units; and [that] . . . represent[s]  
3 an important component in the evolutionary legacy of the species."  
4 Trout Unlimited v. Lohn, 559 F.3d 946, 950 (9th Cir. 2009) (quoting  
5 Policy on Applying the Definition of Species, 56 Fed. Reg. 58,612,  
6 58,618 (Nov. 20, 1991)).

7 Three threatened species are at issue in this suit; the ESU  
8 of Central Valley spring run Chinook salmon ("spring run Chinook"),  
9 the distinct population segment of Central Valley steelhead  
10 ("steelhead"), and the southern distinct population segment of  
11 North American green sturgeon ("green sturgeon"). 50 C.F.R. §§  
12 223.102(c)(1), (c)(4), (c)(17).

13 Plaintiffs invoke two of the ESA's mechanisms for protecting  
14 listed species, sections 7(a)(2) and 9. Section 7(a)(2) provides  
15 that

16 Each Federal agency shall, in consultation  
17 with and with the assistance of the Secretary  
18 [of Commerce or the Interior], insure that any  
19 action authorized, funded, or carried out by  
20 such agency . . . is not likely to jeopardize  
21 the continued existence of any endangered  
22 species or threatened species or result in the  
23 destruction or adverse modification of habitat  
24 of such species which is determined by the  
25 Secretary . . . to be critical . . .

22 ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2). In this suit, the Corps  
23 determined that the project was likely to affect the three listed  
24 species. Section 7 therefore obliged the Corps to seek a BiOp from  
25 NMFS regarding whether these effects exceed the limits set by  
26 section 7(a)(2). ESA § 7(b)(3); 16 U.S.C. § 1536(b)(3); 50 C.F.R.

1 § 402.12(a), (k). That BiOp is the subject of plaintiffs' third  
2 claim.

3 The ESA also generally prohibits "take" of endangered species.  
4 ESA § 9(a); 16 U.S.C. § 1538(a). Roughly stated, whereas section  
5 7 looks to populations, section 9 looks to individual organisms.  
6 ESA § 3(19); 16 U.S.C. § 1532(19). When a species is listed as  
7 threatened, rather than endangered, the Service must determine  
8 whether to apply section 9's protections to the species. Id., see  
9 also ESA § 4(d); 16 U.S.C. § 1533(d). When this suit was filed,  
10 take of steelhead and spring run Chinook was largely prohibited,  
11 but take of green sturgeon was not. See 50 C.F.R. §§ 223.101,  
12 223.203.

13 NMFS may relax the prohibition on take when take is incidental  
14 to activity for which NMFS has issued a "no jeopardy" BiOp. This  
15 relaxation takes the form of an "Incidental Take Statement," which  
16 is

17 a written statement that --

18 (i) specifies the impact of such incidental  
19 taking on the species,

20 (ii) specifies those reasonable and prudent  
21 measures that the Secretary considers  
22 necessary or appropriate to minimize such  
23 impact,

24 (iii) . . . , and

25 (iv) sets forth the terms and conditions  
26 (including, but not limited to, reporting  
requirements) that must be complied with  
by the Federal agency or applicant (if  
any), or both, to implement the measures  
specified under clauses (ii) and (iii).

1 ESA § 7(b)(4); 16 U.S.C. § 1536(b)(4). “[A]ny taking that is in  
2 compliance with the terms and conditions specified in a written  
3 [incidental take statement] . . . shall not be considered to be a  
4 prohibited taking of the species concerned.” ESA § 7(o)(2); 16  
5 U.S.C. § 1536(o)(2).  
6

7 **B. Biology of The Three Species**

8 In reviewing the biology of the three species, the court  
9 relies on the November 2007 BiOp at issue in this suit (hereinafter  
10 “BiOp”), supplemented by the administrative record.

11 **1. Spring Run Chinook Salmon**

12 Salmon are anadromous fish, meaning they hatch in freshwater  
13 streams, migrate to the ocean to mature, then return to freshwater  
14 to spawn. Spring run Chinook salmon generally begin their  
15 freshwater migration in January, reach their natal streams from  
16 March to July, hold in the river over summer, and spawn from August  
17 to October. BiOp at 6-7. This timing historically allowed spring  
18 run Chinook to spawn farther upstream than the more plentiful fall  
19 run, reproductively isolating the two populations. Id. at 25.  
20 Juvenile spring run Chinook typically spend a year or more in  
21 freshwater habitats before migrating downstream to the ocean. Id.  
22 at 6-7.

23 For spawning, salmon require clean, loose gravel in swift,  
24 relatively shallow riffles (patches of stream with rough water),  
25 suitable depths and velocities for construction of redds (the  
26 gravel “nests” in which eggs are deposited), and adequate

1 oxygenation for incubating eggs. Id. at 7. Juveniles need bank  
2 cover such as overhanging and submerged vegetation, root wads, and  
3 fallen woody debris. Id. at 7. Salmon are sensitive to water  
4 temperature throughout their life cycle. Id. at 6.

5 According to documents included in the NMFS administrative  
6 record, "more than 20 'historically large populations' of spring  
7 run chinook have been extirpated or reduced nearly to zero since  
8 1940." Admin. Record ("AR") 11334-35 (Cal. Dept. of Fish and Game,  
9 "Fish Species of Special Concern in California," at 39-40 (June  
10 1995)) (hereinafter "Species of Special Concern").<sup>3</sup> The average  
11 abundance for the entire ESU was 12,590 for the period of 1969 to  
12 1979, 13,334 for the period of 1980 to 1990, 6,554 from 1991 to  
13 2001, and 16,349 since 2002. BiOp at 10. However, there is very  
14 little information regarding abundance within the lower Yuba River.  
15 Id. at 18-19.

## 16 **2. Steelhead**

17 The BiOp explains that steelhead have life histories and  
18 habitat requirements that are similar to salmon, except that  
19 steelhead may spawn in multiple years. The BiOp discusses the  
20 needs of steelhead and spring run salmon together, referring to the  
21 species collectively as salmonids. Steelhead are also in similar  
22 decline. Historic populations were 1 to 2 million adults, reduced  
23 to about 40,000 in the early 1960s, to a spawning population of  
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25 <sup>3</sup> In this case, both NMFS and the Corps submitted  
26 administrative records. The court's citations refer to the NMFS  
record unless otherwise specified.

1 only about 3,600 female steelhead in 2005. BiOp at 11-12.

### 2 **3. Green Sturgeon**

3 Like salmon and steelhead, green sturgeon migrate between the  
4 ocean and freshwater. BiOp at 9. Adults generally migrate  
5 upstream beginning in February and spawn between March and July.  
6 Id. Spawning requires deep, turbulent, cold-water pools with large  
7 cobble substrate. Id. Juveniles spend from one to four years in  
8 fresh and estuarine waters before dispersing to marine waters. Id.  
9 at 10. The mainstem Sacramento River population is the only  
10 remaining spawning population for the southern distinct population  
11 segment of the green sturgeon (the "species" at issue here). Id.  
12 at 9. The best available evidence indicates that range-wide green  
13 sturgeon abundance is currently declining, mainly due to loss of  
14 historic habitat caused by impassable dams. BiOp at 12; see also  
15 Proposed Threatened Status for Southern Distinct Population Segment  
16 of North American Green Sturgeon, 70 Fed. Reg. 17,386, 17,391 (Apr.  
17 6, 2005).

### 18 **C. The Challenged Project**

19 The project at issue here is the Corps' "operations associated  
20 with Englebright and Daguerre Point Dams on the Yuba River in Yuba  
21 and Nevada Counties, CA." BiOp at 2.<sup>4</sup> This includes operation of  
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23 <sup>4</sup> In another case, the undersigned held that, by operation of  
24 Section 8 of the Reclamation Act of 1902, California Fish and Game  
25 Code § 5937 applied to dams operated by the Bureau of Reclamation.  
26 Natural Res. Def. Council v. Patterson, 791 F. Supp. 1425, 1435  
(E.D. Cal. 1992), Natural Res. Def. Council v. Patterson, 333 F.  
Supp. 2d 906, 917 (E.D. Cal. 2004). Plaintiffs have not invoked  
§ 5937 here. Accordingly, the court does not discuss it.



1 the dams themselves, including the fish ladders at Daguerre Point  
2 Dam ("Daguerre"), together with the Corps' "issuance of permits,  
3 licences and easements to non-Federal entities for their operations  
4 of water diversions and hydroelectric facilities at or near the  
5 dams." Id. Non-federal actions permitted or licensed by the Corps  
6 include operation of two hydroelectric generation facilities at  
7 Englebright and three diversions in the vicinity of Daguerre--the  
8 Brown's Valley, South-Yuba-Brophy, and Hallwood-Cordua diversions.

9 Pursuant to a request by the Corps, NMFS issued the long-term  
10 biological opinion for this project on November 21, 2007. BiOp at  
11 1.

#### 12 **D. Procedural History**

13 Plaintiffs, the South Yuba River Citizens League and the  
14 Friends of the River, filed suit in December 2006, challenging a  
15 2002 BiOp and bringing various other claims. After a protracted  
16 series of amendments and litigation of these other claims, the  
17 plaintiffs filed the operative Sixth Amended Complaint, which  
18 challenges the November 2007 BiOp described above. This complaint  
19 alleges four claims pertinent to the present motions. First,  
20 plaintiffs claim that NMFS acted arbitrarily and capriciously by  
21 adopting the BiOp in violation of section 7 of the ESA (plaintiffs'  
22 third claim). Second, plaintiffs claim that the Corps violated  
23 section 9 of the ESA by operating the dams in a way that causes  
24 take, notwithstanding the fact that the BiOp includes an incidental  
25 take statement (plaintiffs' fourth claim). This claim includes two  
26 theories of liability, which the Federal Defendants helpfully label

1 as claims 4A and 4B. Claim 4A alleges that the incidental take  
2 statement was invalid ab initio, such that it could never shield  
3 the Corps from liability for take. Claim 4B alleges that the Corps  
4 has violated the terms and conditions imposed by the incidental  
5 take statement, thereby exceeding the scope of its protection.  
6 Third, plaintiffs argued that the Yuba County Water Agency ("YCWA")  
7 violated section 9 for largely the same reasons--invalidity of the  
8 incidental take statement and the Corps' failure to comply with the  
9 terms and conditions (plaintiffs' sixth claim). Plaintiffs settled  
10 this claim concurrently with the filing of the motion for summary  
11 judgment on liability. Pursuant to this court-approved settlement,  
12 YCWA remains party to the case as an intervenor, and YCWA has filed  
13 briefs opposing plaintiffs' motions. Various other non-federal  
14 entities have also intervened in this suit as defendants but  
15 largely have not filed briefing on the instant motions. Fourth and  
16 finally, plaintiffs claimed that NMFS had unreasonably delayed  
17 publication of rules protecting the green sturgeon under section  
18 4(d) of the ESA. As noted above, the parties properly agree that  
19 this claim has been rendered moot by subsequent publication of such  
20 a 4(d) rule.

21 Accordingly, the claims at issue are plaintiffs' claim that  
22 the BiOp was arbitrary and capricious and plaintiffs' claim that  
23 the Corps is causing take prohibited by section 9.

## 24 **II. Standing**

25 Constitutional standing requires that the plaintiff allege an  
26 injury in fact that is fairly traceable to the complained of harm

1 and that is likely to be redressable by the court. Friends of the  
2 Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167,  
3 180-81 (2000).

4 Plaintiffs argue that they have standing because the  
5 organizations' members regularly use the affected area of the Yuba  
6 River "for recreational, educational, aesthetic and spiritual  
7 enjoyment," including interest in the listed species. These  
8 assertions are supported by declarations from individual members  
9 of the plaintiff organizations. Plaintiffs allege that the  
10 operations harm fish, limiting plaintiffs' ability to derive  
11 enjoyment therefrom, and that a court order remanding the BiOp and  
12 enjoining take will protect fish and remedy this injury.

13 Plaintiffs filed a motion solely seeking a judicial  
14 determination of the above. YCWA opposed this motion prior to  
15 settling the claims against it. YCWA argued, in essence, that  
16 because plaintiffs' claims would fail on the merits, plaintiffs had  
17 failed to show injury sufficient to grant standing. This argument  
18 misconstrues the standing inquiry, the purpose of which "is to  
19 ensure that the plaintiff has a concrete dispute with the  
20 defendant, not that the plaintiff will ultimately prevail against  
21 the defendant." Hall v. Norton, 266 F.3d 969, 976-77 (9th Cir.  
22 2001).

23 Federal Defendants explicitly state that they do not dispute  
24 plaintiffs' standing. Indeed, Federal Defendants argue that  
25 standing was not in dispute, such that plaintiffs should not be  
26 entitled to fees in connection with the above motion. Aside from

1 noting that this argument is in some tension with YCWA's decision  
2 to argue that plaintiffs lack standing, the court does not resolve  
3 this question here. The present questions regarding liability are  
4 complicated enough that discussion of fees may be postponed to  
5 another day.

6 Federal Defendants further argue that plaintiffs' freestanding  
7 motion on standing is procedurally improper. The Ninth Circuit has  
8 not addressed whether Fed. R. Civ. P. 56 permits a motion seeking  
9 partial adjudication of issues other than liability. An apparent  
10 majority of courts outside the Ninth Circuit, including the Second,  
11 Third, and Seventh Circuits, have held that a motion for summary  
12 judgment must seek a judicial determination that at least fully  
13 resolves liability on a claim.<sup>5</sup> Under that rule, a defendant may  
14 move for summary judgment solely on the ground that a plaintiff  
15 lacks standing, but a plaintiff may not bring a converse motion  
16 because granting the latter would not determine liability on the  
17 claim. Most district courts within the Ninth Circuit, however,  
18 have held that Rule 56 permits motions of the latter type.<sup>6</sup>

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20 <sup>5</sup> See Commonwealth Ins. Co. of N.Y. v. O. Henry Tent and  
21 Awning Co., 266 F. 2d 200, 201 (7th Cir. 1959), Coffman v. Federal  
22 Laboratories, 171 F.2d 94 (3rd Cir. 1949), Audi Vision, Inc. v. RCA  
23 Mfg. Co., 136 F.2d 621 (2d Cir. 1943); see also, e.g., SEC v.  
24 Thrasher, 152 F. Supp. 2d 291, 295 (S.D.N.Y. 2001) (quoting Arado  
25 v. Gen. Fire Extinguisher Corp., 626 F. Supp. 506, 509 (N.D. Ill.  
1985)) ("Rule 56(d)'s issue-narrowing provision operates only in  
the wake of an unsuccessful (and proper) motion under Rule 56(a)  
or 56(b) . . . There is no such thing as an independent motion  
under Rule 56(d)."); but see, e.g., Monge v. Cortes, 413 F. Supp.  
2d 54, 59 (D.P.R. 2006).

26 <sup>6</sup> See ASIS Internet Services v. Optin Global, Inc. 2008 WL  
1902217 \*15 n.10 (N.D. Cal. 2008) (in dicta, considering and

1 In the context of the pending cross-motions on liability, the  
2 court may plainly determine standing; indeed, the court has an  
3 independent obligation to do so. Accordingly, the procedural  
4 argument raised by the Federal Defendants is only relevant to  
5 plaintiffs' potential fee recovery. Again, the court postpones  
6 this issue until another day.

### 7 **III. Liability**

8 Plaintiffs' third claim argues that NMFS's BiOp is arbitrary  
9 and capricious in its no-jeopardy conclusion, in its critical  
10 habitat designation, and in the attached incidental take statement.  
11 The court agrees with these ultimate conclusions, although the  
12 court rejects some of plaintiffs' underlying arguments.

13 Plaintiffs' fourth claim argues that the Corps has caused  
14 take. The court rejects the legal theory underlying claim 4A, that  
15 the incidental take statement was void ab initio. As to claim 4B,  
16 it appears that factual questions remain, but that this claim has  
17 been rendered moot.

#### 18 **A. Standards of Review**

19 Plaintiffs' various arguments regarding the sufficiency of the  
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21 rejecting Arado), In re Hat, Nos. 4-32497-B, 05-2506-B, 2007 WL  
22 2580688 (Bankr. E.D. Cal. Sept. 4, 2007) (holding that local rule  
23 56-260 and the policy underlying Fed. R. Civ. P. 56 both supported  
24 allowing free-standing motions for partial adjudication of parts  
25 of claims), Bushnell v. Vis Corp., 1996 WL 506914 \*11 (N.D. Cal.  
26 1996), Advanced Semiconductor Materials America, Inc. v. Applied  
Materials, Inc. 1995 WL 419747 \*3 (N.D. Cal. 1995), State Farm Fire  
& Acualty Co. v. Geary, 699 F. Supp. 756, 759 (N.D. Cal. 1987),  
DiSandro v. Makuhuena Corp., 588 F. Supp. 889, 892 (D. Haw. 1984);  
but see Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc.,  
209 F. Supp. 2d 1059, 1065 (E.D. Cal. 2002).

1 BiOp challenge final agency actions subject to "arbitrary and  
2 capricious" review under the Administrative Procedure Act. 5  
3 U.S.C. § 706(2)(A); Bennett v. Spear, 520 U.S. 154, 178 (1997).  
4 Under such review, the court does not employ the usual summary  
5 judgment standard for determining whether a genuine issue of  
6 material fact exists. Conservation Cong. v. United States Forest  
7 Serv., 555 F. Supp. 2d 1093, 1100 (E.D. Cal. 2008). This is  
8 because the court is not generally called upon to resolve facts in  
9 reviewing agency action. Occidental Eng'g Co. v. INS, 753 F.2d  
10 766, 769-70 (9th Cir. 1985). Instead, the court's function is to  
11 determine whether or not, as a matter of law, the evidence in the  
12 administrative record permitted the agency to make the decision it  
13 did. Id.

14 The APA authorizes the court to set aside agency action that  
15 is "arbitrary, capricious, an abuse of discretion, or otherwise not  
16 in accordance with the law." 5 U.S.C. § 706(2)(A); Nw. Envt'l  
17 Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 682 (9th Cir.  
18 2007). An agency decision is arbitrary and capricious where the  
19 agency "relied on factors Congress did not intend it to consider,  
20 entirely failed to consider an important aspect of the problem, or  
21 offered an explanation that runs counter to the evidence before the  
22 agency or is so implausible that it could not be ascribed to a  
23 difference in view or the product of agency expertise." Lands  
24 Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)  
25 (quotations omitted). The agency "must articulate a rational  
26 connection between the facts found and the conclusions reached."

1 Earth Island Inst. v. United States Forest Serv., 442 F.3d 1147,  
2 1157 (9th Cir. 2006) (citing Midwater Trawlers Co-op v. Env'tl. Def.  
3 Ctr., 282 F.3d 710, 716 (9th Cir. 2002)).

4 This relatively deferential standard is especially appropriate  
5 when reviewing factual determinations that implicate an agency's  
6 scientific expertise. Ariz. Cattle Growers' Ass'n v. United States  
7 Fish & Wildlife, BLM, 273 F.3d 1229, 1236 (9th Cir. 2001). Even  
8 for scientific questions, however, a court must intervene when the  
9 agency's determination is counter to the evidence or otherwise  
10 unsupported. See, e.g., Sierra Club v. United States EPA, 346 F.3d  
11 955, 962 (9th Cir. 2003), amended by 352 F.3d 1187 (9th Cir. 2003)  
12 (rejecting agency's factual conclusion about cause of air quality  
13 exceedance).

14 Plaintiffs' fourth claim, which alleges that the Corps has  
15 caused take, is not wholly subject to arbitrary and capricious  
16 review, as explained by the court's Order filed December 23, 2008  
17 (Dkt. No. 184). In that order, the court explained that  
18 plaintiffs' claim that the incidental take statement was invalid  
19 (claim 4A) would be subject to arbitrary and capricious review no  
20 matter how that argument was packaged. Order at 19-20.<sup>7</sup> The  
21 allegations that the defendants had violated the terms and  
22

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23 <sup>7</sup> This order concerned reconsideration of an order by the  
24 Magistrate Judge regarding compulsion of discovery. The order  
25 expressed no opinion as to the viability or merits of the above  
26 claims, instead recognizing that such questions went beyond the  
scope of the discovery dispute. Order at 21 (citing 8 C. Wright,  
A. Miller, & R. Marcus, *Federal Practice and Procedure* § 2008 (2d  
ed.)).

1 conditions of the incidental take statement and actually caused  
2 take (claim 4B), however, require the court to look beyond the  
3 administrative record. Id. at 21. The latter allegations  
4 therefore implicate the ordinary summary judgment standard under  
5 Fed. R. Civ. P. 56. Because the court's analysis of this claim  
6 requires only fleeting discussion of this standard, the court does  
7 not repeat it here.

8 **B. Jeopardy Analysis**

9 The BiOp concludes that the project will not "jeopardize the  
10 continued existence of" listed species. See ESA § 7(a)(2);  
11 U.S.C. § 1536(a)(2). In part, plaintiffs challenge the sufficiency  
12 of NMFS's analysis, alleging that NMFS failed to consider aspects  
13 of the problem or to explain the basis for its conclusions. See  
14 Sixth Amended Complaint ¶¶ 101, 104-09. Beyond these "show your  
15 work" arguments, plaintiffs argue that the evidence compelled a  
16 jeopardy conclusion. See id. ¶¶ 102-03. Upon careful review, the  
17 record demonstrates that NMFS has not supported its position, but  
18 not that a jeopardy conclusion was inescapable.

19 The applicable regulations define "jeopardize the continued  
20 existence of" to mean "to engage in an action that reasonably would  
21 be expected, directly or indirectly, to reduce appreciably the  
22 likelihood of both the survival and recovery of a listed species  
23 in the wild by reducing the reproduction, numbers, or distribution  
24 of that species." 50 C.F.R. § 402.02; see also Nat'l Wildlife  
25 Fed'n v. NMFS, 524 F.3d 917, 933 (9th Cir. 2008) (survival and  
26



1 recovery are distinct).<sup>8</sup> The BiOp provides “genetic and life-  
2 history diversity” as a fourth criteria, and the court defers to  
3 NMFS’s interpretation of its own regulation here. BiOp at 32.  
4 Coeur Alaska, Inc. v. Se. Alaska Conservation Council, \_\_\_ U.S.  
5 \_\_\_, \_\_\_ 129 S. Ct. 2458, 2468 (2009) (citing Auer v. Robbins, 519  
6 U.S. 452, 461 (1997)).

7 Federal Defendants correctly note that both “jeopardize” and  
8 “reduce” are verbs. “Agency action can only ‘jeopardize’ a  
9 species’ existence if that agency action *causes some deterioration*  
10 in the species’ pre-action condition.” Nat’l Wildlife Fed’n, 524  
11 F.3d at 930 (emphasis added).

12 Although the focus of the jeopardy inquiry is on the effects  
13 of agency action, these effects can only be understood in context.  
14 This context includes “the current status of the listed species,”  
15 the “environmental baseline,” and future “cumulative effects.” 50  
16 C.F.R. §§ 402.02, 402.14(g)(2)-(3). The regulations define the  
17 environmental baseline to include “the past and present impacts of  
18 all Federal, State or private actions and other human activities  
19 in the action area” and “the anticipated impacts of all proposed  
20 Federal projects in the action area that have already undergone

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21  
22 <sup>8</sup> This appeal resulted in two published opinions. The initial  
23 opinion was published at Nat’l Wildlife Fed’n v. NMFS, 481 F.3d  
24 1224 (9th Cir. 2007). The panel then granted a petition for  
25 rehearing, subsequently issuing an amended opinion published at 524  
26 F.3d 917 (9th Cir. 2008). This amended opinion discussed, among  
other things, the intervening decision in Nat’l Ass’n of Home  
Builders v. Defenders of Wildlife, 551 U.S. 644 (2007). Plaintiffs  
primarily and inexplicably cite to the former opinion. Although  
both reached the same conclusion, this court cites solely to the  
later.

1 formal or early section 7 consultation.” 50 C.F.R. § 402.02.<sup>9</sup>  
2 Cumulative effects are “those effects of future State or private  
3 activities, not involving Federal activities, that are reasonably  
4 certain to occur within the action area of the Federal action  
5 subject to consultation.” Id.

6 In light of the complexity of this case, the court summarizes  
7 its analysis of the no-jeopardy conclusion before discussing the  
8 issues in detail. Plaintiffs argue that numerous effects of the  
9 project, the environmental baseline, and future non-federal  
10 projects are harmful to listed species. Some, but not all, of  
11 these effects are recognized by the BiOp. As Federal Defendants  
12 now characterize it, the BiOp concludes that these recognized  
13 effects would not jeopardize the species because (1) the local  
14 populations of the three listed species are “stable”  
15 notwithstanding these ongoing harmful effects, (2) to the extent  
16 that the project changes local conditions, these changes will be  
17 favorable to local populations of listed fish, and (3) various  
18 future projects will further benefit the three species. Fed.

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19  
20 <sup>9</sup> As noted above, the court owes some deference to an agency’s  
21 interpretation of its own regulation. Deference is not the same  
22 as abrogating responsibility. Auer recognized that an agency  
23 interpretation will not be upheld when “inconsistent with the  
24 regulation.” 519 U.S. at 461 (quotations omitted). Similarly,  
25 both the interpretation and the regulation itself must be  
26 consistent with the governing statute. See, e.g., Gifford Pinchot  
Task Force v. United States Fish & Wildlife Serv., 378 F.3d 1059,  
1069, amended by 387 F.3d 968 (9th Cir. Wash. 2004) (citing Chevron  
U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984))  
(rejecting regulation as contrary to the ESA). As the court  
explains in part III(B) (4) (a) below, the court rejects in part the  
interpretation of the quoted regulatory language offered by Federal  
Defendants in this case.

1 Defs.' Summ. J. Mem. at 10, 14. In other words, if the status quo  
2 is acceptable and the project will improve conditions, the project  
3 will not jeopardize the species. The court cannot accept this  
4 argument because, contrary to Federal Defendants' arguments in this  
5 litigation, the BiOp does not conclude that local populations are  
6 stable. Without this predicate, the BiOp offers no basis for  
7 concluding that the project's unmitigated effects would not  
8 jeopardize the species. The BiOp therefore fails to provide a  
9 "rational connection" between the facts found and the no-jeopardy  
10 conclusion. Earth Island Inst., 442 F.3d at 1157.

11 Separate from this argument, plaintiffs argue that the BiOp  
12 failed to discuss various other effects caused by the project or  
13 constituting part of the environmental background, thereby failing  
14 to consider important aspects of the problem. McNair, 537 F.3d at  
15 987. If the species were found to be stable, a top-down analysis  
16 predicated on stability *might* have rendered discussion of these  
17 omitted impacts unnecessary. Absent such a finding, many of these  
18 effects were sufficiently "important" to require discussion.

19 **1. Effects Recognized by the BiOp**

20 The court begins with the BiOp's discussion of effects of the  
21 project and the environmental baseline harmful to listed fish.  
22 Federal Defendants refer to these effects as "stressors." The  
23 stressors recognized by the BiOp include impairments to migration,  
24 effects on flow regimes, effects on spawning habitat, and  
25 entrainment and impingement at diversions. Although these  
26 categories are not wholly distinct, they provide structure to the

1 analysis. With the apparent exception of effects on regulated flow  
2 regimes, the BiOp attributes all of the following stressors to the  
3 project rather than the baseline.

4 **a. Migration Barriers**

5 The primary effects on migration stem from Daguerre Point Dam  
6 and Englebright Dam.

7 **i. Daguerre Point Dam's Effect on Migration**

8 Daguerre, the smaller and farther downstream of the two dams  
9 within the project area, detrimentally affects both upstream and  
10 downstream migration. Beginning with upstream migration, although  
11 the dam itself blocks upstream fish passage, salmonids (but not  
12 sturgeon) may circumvent this barrier through two fish ladders.  
13 These ladders were most recently "reconstructed" in 1964. Fed.  
14 Defs.' Statement of Undisputed Facts #23. The BiOp acknowledges  
15 four problems with these ladders, three of which the project  
16 attempts to mitigate. BiOp at 26. First, the ladders must be  
17 closed entirely at high flows. Id.; see also AR 12793 (U.S. Army  
18 Corps of Engineers, Sacramento District, "Daguerre Point Dam, Yuba  
19 River, California, Preliminary Fish Passage Improvement Study," at  
20 12 (August 2001)) (hereinafter "Preliminary Passage Study")  
21 (explaining that ladders must be closed at flows over 15,000 cubic  
22 feet per second). The BiOp does not describe the duration of these  
23 closures, but evidence in the record indicates that the duration  
24 can exceed a month. AR 4614 (Cal. Dept. Fish and Game, "A Status  
25 Review of the Spring Run Chinook Salmon (*Oncorhynchus Tshawytscha*)  
26 in The Sacramento River Drainage," at § VII p. 49 (June 1998))

1 (hereinafter "Spring Run Chinook Status"). High flows coincide  
2 with the conditions under which spring run Chinook and steelhead  
3 migrate upstream. BiOp at 26.

4 Second, when flows are high but not so high as to require  
5 closure of the ladders, fish have difficulty finding the ladders.  
6 Id. Fish find the ladders because of the water flowing down them,  
7 which forms an "attraction flow." During high flows, "a very small  
8 percentage of attraction flows com[es] out of the ladders compared  
9 to the massive sheet flow coming over the dam. The angle of the  
10 orifices and proximity to the plunge pool also increases the  
11 difficulty for fish to find the entrances to the ladders." Id.,  
12 see also id. at 22 ("Daguerre Point Dam includes suboptimal ladder  
13 design and sheet flow across the dam spillway that may obscure  
14 attraction to the ladder entrances, particularly during high flow  
15 periods"), AR 12793 (Preliminary Passage Study at 12). Since 2001,  
16 the Corps has attempted to mitigate this problem by installing  
17 seasonal flash boards that direct additional flows toward the  
18 ladders. BiOp at 22. The BiOp asserts that monitoring data since  
19 2006 indicates that this has "resulted in an immediate and dramatic  
20 increase in the passage of salmon up the ladders." Id.

21 Upstream migration is also hampered when woody debris collects  
22 in the ladders. Id. (debris "clog[s]" the ladders). The Corps has  
23 installed a log boom to keep debris out of the northern ladder  
24 (where the problem is more severe), and the Corps and/or the  
25 California Department of Fish and Game ("DFG") ordinarily inspects  
26 both ladders weekly in order to clear out debris. Id. at 22, 32-

1 33.<sup>10</sup>

2 The fourth barrier to upstream migration at Daguerre is the  
3 formation of a gravel and sediment bar immediately upstream from  
4 the fish ladders. BiOp at 22. Gravel buildup can itself block  
5 fish passage, as well as further reduce attraction flows on the  
6 ladders. Id. at 22. The Corps has implemented a plan to ensure  
7 that a 30 foot by 3 foot channel remains open to facilitate fish  
8 passage and avoid blocking attraction flows. Id.

9 Although the Corps has attempted to ameliorate the above four  
10 impediments to upstream migration, the BiOp does not take a clear  
11 position on the efficacy of these efforts. The BiOp states that  
12 “[u]pstream passage conditions at Daguerre Point Dam are . . .  
13 considered inadequate for Chinook salmon and steelhead throughout  
14 much of the year” and that “[u]pstream passage at Daguerre Point  
15 Dam is often problematic for migrating salmonids due to  
16 inadequacies of the fish ladders.” Id. at 26, 31. These  
17

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18 <sup>10</sup> Plaintiffs assert that the Corps is unable to clean the  
19 ladders at periods of high flows. The only evidence in the  
20 administrative record cited in support of this assertion is a  
21 January 10, 2006 email sent by Corps employee Doug Grothe, which  
22 states “now that the flows have subsided a bit, we have scheduled  
23 an excavator to be out on Wednesday to remove the rest of the  
24 debris in the ladder.” AR 9113. This document provides only  
25 imperfect support for plaintiffs’ position. The same page of the  
26 record describes cleaning efforts that occurred on January 7, 2006,  
the email makes no mention of whether the excavator *could not* have  
been brought in earlier, and provides no indication of whether this  
is a recurring problem. This has led to a request for admission  
from the Corps, which in turn raises questions about the propriety  
of such evidence in claims reviewed under section 706(2) of the  
APA. See Order filed Dec. 23, 2008 at 31. Because the underlying  
fact has little, if any, bearing on the resolution of this suit,  
the court does not further address it.

1 statements use the present tense, and occur in the BiOp's  
2 discussion of the effects of the action. Thus, the BiOp indicates  
3 that the recent efforts have not totally cured these inadequacies  
4 and problems. The BiOp notes that even when salmonids successfully  
5 navigate the fish ladders, the ladders' inadequacies often delay  
6 migration, which depletes salmonids' energy stores, makes fish  
7 susceptible to predation, decreases egg viability, and changes the  
8 spatial distribution of spawners. Id. at 27, 31.

9       Daguerre also interferes with downstream migration. Id. at  
10 27. "The large pool at the base of the dam creates an area of  
11 unnatural advantage for predatory fish . . . where juvenile  
12 salmonids can be disoriented or injured as they plunge over the  
13 face of the dam into the turbulent waters at the base." Id. The  
14 BiOp does not describe any actions taken to mitigate this effect.

15                   **ii. Englebright Dam's Effect on Migration**

16       The farther upstream of the two dams in the project is  
17 Englebright Dam. The BiOp states that "[t]he greatest impact to  
18 listed salmonids associated with the Corps' operations on the Yuba  
19 River" is the absolute barrier to migration posed by Englebright  
20 dam. BiOp at 31.<sup>11</sup> Englebright contains no fish ladders. Id. at  
21 2, 25. This prevents access to otherwise suitable habitat for  
22 salmonids. "[T]he majority of historical spawning and holding  
23 habitat for spring-run Chinook salmon and steelhead occurred above  
24 Englebright Dam." Id. at 25. Blocking access to this habitat not

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25  
26       <sup>11</sup> Englebright would also be a barrier to sturgeon migration,  
except that Daguerre prevents sturgeon from reaching Englebright.

1 only decreases the total amount of available habitat, it also  
2 increases the spatial overlap between spring run and fall run  
3 Chinook, allowing the species to interbreed and thereby decreasing  
4 the species' genetic diversity. Id. at 25. Later-spawning fall  
5 run Chinook can also physically disrupt spring run eggs by digging  
6 spawning redds in locations where spring run eggs are incubating.  
7 Id. Another dimension of this impact is that by concentrating  
8 populations, Englebright increases the populations' susceptibility  
9 to a catastrophic event such as a chemical spill or massive flood.  
10 Id. The BiOp discusses no efforts to mitigate these impacts.

11       The parties dispute whether, for purposes of the jeopardy  
12 analysis, Englebright's prevention of migration is an effect of the  
13 project or instead part of the baseline. As noted above, section  
14 7 prohibits federal agency action that would "jeopardize" species.  
15 The section 7 analysis therefore looks to effects on species caused  
16 by agency action. Nat'l Wildlife Fed'n, 524 F.3d at 930. Effects  
17 not attributable to agency action, whether directly or indirectly,  
18 cannot themselves demonstrate a violation of section 7. In another  
19 case concerning ongoing dam operation, the Ninth Circuit explained  
20 that "existence of the dams must be included in the environmental  
21 baseline" of effects that are not "caused" by the project under  
22 consideration. Id. at 931. Where the federal agency retains  
23 discretion regarding a dam's operation, however, section 7 requires  
24 consideration of whether effects attributable to this operation  
25 jeopardize the species. Id. This distinction is easy to state but  
26 hard to apply. In this case, the Federal Defendants argue that



1 Englebright Dam's effect as a migration barrier results from the  
2 existence of the dam. Plaintiffs contend that this effect is  
3 attributable to the Corps' ongoing operation of the dam, which  
4 plaintiffs contend should include provision of a fish ladder to  
5 enable upstream migration, a service to involuntarily transport  
6 juveniles to enable downstream migration, and various other efforts  
7 included in the operation of some analogous dams.

8       Regardless of the Federal Defendants' litigation position, the  
9 BiOp itself discussed Englebright's prevention of *future*  
10 migration as part of the analysis of the "effects of the action,"  
11 rather than as part of the baseline, distinguishing these future  
12 effects from past effects on migration. BiOp at 18, 25. Even if  
13 the BiOp could have used a different assumption, that possibility  
14 does not provide a basis for upholding the decision the agency  
15 actually made. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.  
16 Ins. Co., 463 U.S. 29, 50 (1983) ("an agency's action must be  
17 upheld, if at all, on the basis articulated by the agency  
18 itself."). Alternatively, even if the court were to conclude that  
19 the BiOp treated these future effects as part of the baseline and  
20 that this treatment was permissible under the ESA, the BiOp's  
21 jeopardy analysis would still be deficient. Assuming that there  
22 was some method by which the court could 'subtract out'  
23 Englebright's impacts on migration and attribute these to the  
24 baseline, the BiOp would still fail to adequately discuss the other  
25 unmitigated stressors.

26 ///

1                   **b.     Flow Regimes and Temperature**

2                   “Low Summer flows (both natural and controlled)” in the  
3 project area “can cause elevated water temperatures in spring-run  
4 holding and spawning habitat, resulting in pre-spawning mortality  
5 and reduced reproductive success.” BiOp at 17. Salmon and  
6 steelhead at all life stages are harmed by these increased  
7 temperatures. Id. at 6.

8                   Englebright formerly contributed to this problem in two ways,  
9 although the BiOp concludes that the first has been ameliorated.  
10 This first effect was through irregularity, as Englebright would  
11 periodically (and unexpectedly) halt flows. Id. at 22.  
12 Englebright releases water almost exclusively through two  
13 hydroelectric facilities. Id. at 2. Historically, when these  
14 facilities unexpectedly shut down--whether accidentally or because  
15 of an emergency--downstream flows were immediately and drastically  
16 curtailed, with harsh effects on downstream salmonids. Id. at 22.  
17 In 2006, a flow bypass system was installed in the larger of the  
18 two powerhouses, which allows 88% of that facility’s flow to be  
19 released in event of a shutdown. Id. The BiOp concludes that this  
20 eliminated the problem of unexpected flow disruption. Id. at 23.

21                   Separate from the problem of unexpected flow interruption, the  
22 scheduled releases from Englebright and Daguerre can be  
23 “insufficient” for listed species. Id. at 17. This problem  
24 results from diversion of water to other users. Id. at 23.  
25 Plaintiffs have not argued that the Corps has authority over these  
26 flow regimes, and thus the court accepts the BiOp’s attribution of

1 this effect to the environmental baseline. Id. at 17.<sup>12</sup>

2 The BiOp indicates that this stressor has been partially  
3 ameliorated. A decision of the California State Water Resources  
4 Control Board in 2003 imposed "new minimum flow requirements and  
5 flow fluctuation criteria on the lower Yuba River." Id. These  
6 flows "did not provide the level of flow protection recommended by  
7 DFG or NMFS," although they constituted an improvement over prior  
8 practice. Id. at 23-24. More recently, the Yuba Accord Fisheries  
9 Agreement ("Yuba Accord") proposes to further "manag[e] flows from  
10 . . . Englebright Lake to further enhance critical habitat and  
11 water temperature in the Yuba River." Id. at 4-5, 24. The  
12 benefits of this management extend to the "lower Yuba River," and  
13 thus appear to encompass areas below Daguerre as well as areas  
14 immediately below Englebright. Id. at 24. The Yuba Accord's flow  
15 schedules were adopted on an interim basis in 2005. Id. In 2007,  
16 when the BiOp was adopted, the agreement was "expected to be  
17 finalized and implemented in early 2008." Id. The new management  
18 "improve[s] flow schedules" for fish, providing benefits "that are  
19 at least equal to but often greater than" those provided by 2003  
20 schedules. Id. at 24. As with other mitigation efforts, however,  
21 the BiOp does not quantify this improvement. In particular, the  
22 BiOp's statements comparing the Yuba Accord flows and the 2003  
23 flows suggest that the neither regime meets the recommendations of  
24 NMFS or DFG. Insofar as these flow regimes fall short of those

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<sup>12</sup> But see footnote 4, supra.

1 recommended by NMFS, they apparently constitute a continuing  
2 stressor.<sup>13</sup>

3 **c. Gravel and Spawning Habitat**

4 Englebright limits recruitment of gravel and large woody  
5 material. As noted above, salmonids require clean gravel beds in  
6 which to spawn. Woody material is also necessary for the  
7 protection of salmonids as it provides a cover from predators and  
8 a velocity refuge. BiOp at 7-8. Historically, the river would  
9 carry these materials downstream past the dam site, but these  
10 materials are now trapped behind the dam. Id. at 26.  
11 Englebright's elimination of this effect "has practically  
12 eliminated viable spawning habitat in the area immediately below  
13 the dam [and] down through the Narrows Canyon," and this effect is  
14 felt to a lesser degree throughout the river below the dam. Id.  
15 at 29.

16 In response to Englebright's interference with gravel  
17 recruitment, the Corps planned to adopt a gravel augmentation  
18 program, which injects additional gravel into the river. Id. at  
19 5. At the time the BiOp was prepared, this program had not yet  
20 begun. Id.<sup>14</sup> The BiOp does not indicate that Daguerre separately

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21 <sup>13</sup> Plaintiffs also argue that the proposed Wheatland diversion  
22 and global warming will alter flow regimes. The court discusses  
23 these issues below.

24 <sup>14</sup> This gravel injection program has since commenced.  
25 Although future events cannot themselves retroactively justify a  
26 decision, the fact that this program has in fact occurred provides  
some indication that, at the time the BiOp was adopted, it was  
reasonably certain to occur. On the facts of this case, the court  
concludes that the BiOp's reliance on the proposed gravel injection

1 interferes with gravel, and plaintiffs do not contend that this is  
2 the case.

3 The incidental take statement requires a similar program for  
4 injecting woody material below Englebright. Id. at 40. This  
5 program has not yet begun, and neither party discusses its  
6 potential effectiveness. See, e.g., Fed. Defs.' Statement of  
7 Undisputed Facts #64.

8 **d. Entrainment and Impingement**

9 Where water is diverted, a screen is used to keep fish from  
10 being "entrained," i.e., diverted from the river to the diversion  
11 channel. Although these screens are necessary to protect fish,  
12 they also present a risk to fish, as fish can be "impinged," i.e.,  
13 trapped against the screen by the force of water.

14 The BiOp criticizes the screen at the South-Yuba/Brophy  
15 diversion above Daguerre as presenting both risks. This screen  
16 "fails to meet many of the criteria developed by NMFS and DFG for  
17 adequate fish screen operation and fish safety." BiOp at 28.  
18 Specifically, the interstitial spaces between rocks making up the  
19 weir are large enough to let fish through, there is no adequate  
20 "sweeping flow" which can prevent impingement, and juvenile  
21 salmonids become "entrained behind the barrier either by passing  
22 through the weir or being washed over the top during high flows."  
23 Id. The BiOp noted that the Corps was working to remedy these  
24 problems, but that "there [were] no guarantees that a new screen

25 \_\_\_\_\_  
26 program was itself reasonable.

1 [would] be constructed.” Id.

2 Two other diversions have superior screens. The Brown’s  
3 Valley Diversion, built in 1999, is “state of the art[,] . . .  
4 meets all current NMFS and DFG screening criteria[,] and is no  
5 longer considered to pose a threat to entrainment of juvenile  
6 salmonids.” Id. at 28. The Hallwood-Cordua diversion was rebuilt  
7 in 2000. Id. at 28. The screen still “does not fully meet all DFG  
8 and NMFS criteria,” but the rebuilding “greatly improved the  
9 effectiveness of the screen.” Id.

10 **2. Whether The Recognized Stressors Jeopardize the Species’**  
11 **Likelihood of Survival**

12 As the above shows, the BiOp recognizes that numerous  
13 mechanisms stress listed fish. In this litigation, Federal  
14 Defendants argue that the BiOp identified measures that would  
15 “greatly decrease[,],” “significantly ameliorate[,],” and  
16 “substantially mitigate” the effects of some stressors. These  
17 efforts target only a narrow subset of the stressors affecting  
18 listed species. See Fed. Defs.’ Summ. J. Mem. at 15 (conceding  
19 this point). Even for the ameliorated stressors, the BiOp suggests  
20 that amelioration is wholly successful for only two, the fish  
21 screen at the Brown’s Valley diversion and the flow bypass  
22 mechanism at the Narrows II powerhouse. Thus, of the effects the  
23 BiOp attributes to the proposed action, Englebright’s prevention  
24 of migration, Daguerre’s interference with downstream salmonid  
25 migration, and Daguerre’s prevention of sturgeon migration are  
26 wholly unmitigated. Mitigation is only partial with regard to

1 Daguerre's impacts on upstream salmonid migration and fish  
2 screening at the Hallwood Cordura diversion. Brophy's problems  
3 with entrainment and impingement and the dams' effects on  
4 deposition of gravel and wooden material have not yet been  
5 mitigated. The BiOp also indicates that problems with flow regimes  
6 have not been fully eliminated, such that flows continue to stress  
7 fish, but the BiOp apparently treats this stressor as part of the  
8 baseline.

9 Imposition of a stressor on a species does not necessarily  
10 decrease the reproduction, numbers, distribution or diversity of  
11 the local population. In principle, for example, any stretch of  
12 stream has a finite carrying capacity for juvenile salmonids. If,  
13 notwithstanding a migration barrier, the number of adults reaching  
14 the spawning ground each year is sufficient to produce juveniles  
15 in excess of this capacity, then the migration barrier may not  
16 reduce the local population. See, e.g., U.S. Fish & Wildlife Serv.  
17 & Nat'l Marine Fisheries Serv., *Endangered Species Consultation*  
18 *Handbook: Procedures for Conducting Consultation and Conference*  
19 *Activities Under Section 7 of the Endangered Species Act* 4-24 to  
20 4-25, 4-30 to 4-31 (1998) (hereinafter "Section 7 Handbook")  
21 (describing populations' abilities to absorb some impacts).<sup>15</sup>

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23 <sup>15</sup> Although this principle may underlie the BiOp's analysis,  
24 neither NMFS's briefing in this case, the BiOp, nor the handbook  
25 cited above provide an example illustrating this principle. This  
26 court has created the above factual example from whole cloth, and  
may misstate this principle. Moreover, this example is meant  
purely for illustration. Nothing suggests that the example  
describes the facts in this case.

1 NMFS's handbook contemplates a method of analysis wherein NMFS will  
2 calculate the magnitude of the stressor and then determine whether  
3 the local population can absorb this impact without a long-term  
4 decline. Id. This inquiry is obviously context sensitive, as  
5 exposure to one stressor limits a population's ability to tolerate  
6 others.

7 Even where stressors will cause a decline in one or more of  
8 the four viability factors identified by the BiOp, the magnitude  
9 of this decline may be low enough that the decline does not  
10 jeopardize the species as a whole. See, e.g., Selkirk, 336 F.3d  
11 at 957 (upholding BiOp's conclusion that although project's impacts  
12 were incompletely mitigated, they were mitigated enough so as to  
13 avoid jeopardizing the species at issue); see also Butte Env'tl.  
14 Council v. United States Army Corps of Eng'rs, \_\_\_ F.3d \_\_\_, \_\_\_  
15 2010 WL 2163186, \*7, 2010 U.S. App. LEXIS 11024 \*26 (9th Cir. Cal.  
16 June 1, 2010) (reaching a similar conclusion for critical habitat  
17 analysis).

18 The court therefore turns to the BiOp's analysis of whether  
19 the stressors imposed by the proposed project would jeopardize the  
20 species' survival. The court quotes this analysis at length:

21 Lack of access to diverse habitats upstream of  
22 the dams reduces all four viability factors  
23 (abundance, productivity, spatial structure  
24 and genetic diversity) for these species.  
25 Juvenile losses from diversions, predation,  
26 and low-quality rearing habitat affect  
abundance and productivity of the populations.  
Reductions in spawning gravels affect  
productivity and spatial structure of the  
species, and the forced overlap of spawning  
habitat between spring-run and fall-run



1 Chinook salmon affects the genetic diversity  
2 of the threatened spring-run Chinook salmon.

3 It is likely that the facilities and  
4 operational procedures used in the past, if  
5 left uncorrected, would cause continued  
6 declines in population viability of these  
7 species and in the conservation value of  
8 critical habitat. However, there have been  
9 several recent changes to the facilities and  
10 operational procedures related to the Corp's  
11 Yuba River operations which are expected to  
12 improve conditions for Yuba River fisheries.  
13 And recent salmonid monitoring data, while  
14 insufficient to allow detection of definite  
15 trends, do not suggest any significant,  
16 ongoing decline of salmonid populations or  
17 habitat variables in the lower Yuba River.

18 . . .

19 In considering the current baseline  
20 conditions, future cumulative effects, and the  
21 above listed recent actions taken to improve  
22 conditions on the lower Yuba River, NMFS has  
23 determined that the level of effects caused by  
24 Corps operations will be unlikely to cause a  
25 reduction in the population numbers,  
26 reproductive success or the distribution of  
listed fish in the Yuba River to the point of  
appreciably reducing these populations'  
likelihood of survival into the future.

18 BiOp, 32-33. In the omitted passage of this analysis, the BiOp  
19 summarizes six "recent actions" referred to in the second and third  
20 paragraphs quoted above: improvements to the Browns Valley and  
21 Cordura Hallwood diversions, use of flash boards at Daguerre,  
22 debris cleaning at the Daguerre ladders, channel cleaning upstream  
23 of Daguerre, and use of a flow bypass system at the larger  
24 powerhouse below Englebright. As noted above, these six changes  
25 do not fully eliminate the project's impacts.

26 Plaintiffs argue that without discussing the magnitude of the

1 unmitigated stressors' impact, the BiOp cannot support the  
2 conclusion that these impacts will not jeopardize the species.  
3 Federal Defendants argue that although the BiOp did not discuss the  
4 impacts of the unmitigated stressors individually, the BiOp  
5 considered their net effect.

6 It appears that NMFS may employ an analytic method that  
7 captures aggregate impact without discussing impacts individually.  
8 In Selkirk, plaintiffs claimed that the BiOp failed to discuss  
9 future private forestry projects as part of the cumulative effects  
10 analysis. 336 F.3d at 964. Rather than discuss individual  
11 projects separately, the BiOp in Selkirk had analyzed an umbrella  
12 agreement governing these projects. The Ninth Circuit rejected  
13 plaintiffs' claim, holding that the Fish and Wildlife Service did  
14 not need to "list, detail, and discuss" every individual project  
15 so long as it employed a device that accurately captured their  
16 cumulative effects, and that the umbrella agreement discussed in  
17 that case was such a device. Id. This caveat is crucial. A  
18 broad-level analysis is impermissible where it will mask individual  
19 effects rather than measure them. Pac. Coast Fed'n of Fishermen's  
20 Ass'ns v. NMFS, 265 F.3d 1028, 1036-37 (9th Cir. 2001) (analysis  
21 on a large spatial scale insufficient to support no-jeopardy  
22 opinion where scale would ignore "projects with a relatively small  
23 area of impact but that carried a high risk of degradation," which  
24 might have significant aggregate impacts).

25 The BiOp in this case does not explicitly adopt a net impacts  
26 analysis. At most, the discussion of population monitoring data

1 in the analysis quoted above provides some implication of such an  
2 approach. In briefing the present motions, Federal Defendants  
3 argue that the BiOp determined "that populations on the Yuba are  
4 at least stable, and that the actions proposed as part of the  
5 project are likely to improve habitat quality." Fed. Defs.' Summ.  
6 J. Mem. at 14. If NMFS had concluded that populations were stable  
7 in recent history despite the persistence of stressors, this would  
8 provide some indication that the populations could withstand the  
9 stressors.<sup>16</sup> Because the stressors discussed above will be no  
10 worse than those in recent history, it would follow that the  
11 project would not cause a decline.

12 Contrary to defendants' litigation position, however, the BiOp  
13 carefully avoids reaching the underlying conclusion of stability.  
14 The BiOp simply notes that the data do not allow for detection of  
15 "definite trends" and that the data "do not suggest any  
16 significant, ongoing decline of salmonid populations or habitat  
17 variables." BiOp at 32. The BiOp does not discuss population  
18 trends for green sturgeon at all. The statement that the data "do  
19 not suggest any significant, ongoing decline" does not mean that  
20 the data "suggest that populations are not in significant, ongoing  
21 decline" or "suggest that salmonid populations are stable." No  
22 such affirmation of stability appears in the BiOp, nor have Federal  
23

24

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25 <sup>16</sup> Put differently, NMFS might not need to know why every  
26 individual fish dies if NMFS knows that the aggregate number of  
deaths does not reduce the likelihood of survival and recovery.

1 Defendants cited such a statement in the administrative record.<sup>17</sup>  
2 In sum, while the data "do not suggest" a decline, that is because  
3 they are so inconclusive that they "do not suggest" anything at  
4 all.<sup>18</sup> Presumably in recognition of this problem, at oral argument  
5 Federal Defendants explicitly disclaimed any reliance on population  
6 trend data in the BiOp's jeopardy analysis. Federal Defendants

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8 <sup>17</sup> Further recognizing the mixed and inconclusive nature of  
9 this data, the Federal Defendants state that as measured through  
10 one technique, "the recent data from 2006 through 2008 indicates  
11 a reduction in total [salmonid] abundance compared to 2003-2005,  
12 [but that] passage in May (the primary spring-run migration month)  
of 2007, was the highest detected in that month" since monitoring  
began. Fed. Defs.' Statement of Undisputed Facts #36. The BiOp  
indicated that NMFS could not even determine whether any green  
sturgeon spawned in the project area. BiOp at 21.

13 Because the BiOp does not conclude that populations are  
14 stable, the court does not address whether such a conclusion would  
15 be "counter to the evidence." McNair, 537 F.3d at 987. Thus, the  
16 court does not impose a requirement of significance or confidence  
17 on the data. The court merely defers to NMFS's own conclusion that  
18 the data reveal neither a "definite trend" nor a "suggestion."  
19 This case is therefore unlike Stop H-3 Ass'n v. Dole, 740 F.2d  
20 1442, 1460 (9th Cir. 1984), where the agency concluded that the  
data, although weak, allowed the agency to draw conclusions used  
in the jeopardy analysis. See also Conservation Cong., 555 F.  
Supp. 2d at 1103 (where agency concluded that "available data is  
not sufficient to conclude the causes of" range wide decline in a  
species, including whether this decline was caused by changes in  
habitat, agency's concurrent decision to use habitat as proxy for  
species health under the National Forest Management Act was  
arbitrary and capricious).

21 <sup>18</sup> Plaintiffs argue that the data demonstrate a downward  
22 trend, such that even the determination that the data "do not  
23 suggest any . . . decline" was counter to the evidence. Pls.'  
24 Reply to Fed. Defs.' Opp'n, at 4. As to spring run Chinook, the  
25 court's lay reading of the numbers is that the totals from recent  
26 years are smaller. See Fed. Defs.' Statement of Undisputed Facts  
#35, 38. NMFS contends that problems with the monitoring and  
changes in surveying times preclude an apples to apples comparison  
of these figures. In light of this explanation and in the absence  
of further argument on the issue, the court defers to NMFS's  
limited determination on this issue.

1 have not identified any other method of net effects analysis.

2       The court further notes that the BiOp itself concludes that  
3 survival and recovery must be evaluated in light of four viability  
4 factors, but Federal Defendants' "stability" argument appears to  
5 implicate only one of these factors, abundance. The available data  
6 appear to be limited to monitoring at the Daguerre fish ladders.  
7 Neither the BiOp nor Federal Defendants explain how such data  
8 measures productivity, spatial distribution or genetic diversity.  
9 BiOp at 32, see also Fed. Defs.' Statement of Undisputed Facts #36  
10 (discussing monitoring data's indications of abundance, but not  
11 other factors).

12       Accordingly, the BiOp recognizes that past practices have  
13 caused a decline, recognizes that some of these practices  
14 (including numerous effects attributed to the action itself) are  
15 ongoing but have not been fully mitigated, and ultimately concludes  
16 that "the level of effects caused by Corps operations will be  
17 unlikely to cause a reduction in the population numbers,  
18 reproductive success or the distribution of listed fish in the Yuba  
19 River to the point of appreciably reducing these populations'  
20 likelihood of survival into the future." BiOp at 33. Without  
21 more, this does not provide a "rational connection between the  
22 facts found and the conclusions reached." Earth Island Inst., 442  
23 F.3d at 1157. In a case considering whether NMFS had properly  
24 concluded that its proposed "reasonable and prudent alternatives"  
25 ("RPA"s) would avoid jeopardy, the Ninth Circuit explained that  
26 mere recognition of RPA's effects accompanied by a statement that

1 these effects will not jeopardize a species is insufficient. Pac.  
2 Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of  
3 Reclamation, 426 F.3d 1082, 1092 (9th Cir. 2005). In another case  
4 concerning dam operation, where the BiOp conceded that the project  
5 would cause "significant" impairments to habitat, the BiOp could  
6 not conclude that these impairments would not jeopardize survival  
7 or recovery without knowing "in-river survival levels necessary to  
8 support recovery" and "at what point survival and recovery will be  
9 placed at risk" by habitat degradation. Nat'l Wildlife Fed'n, 524  
10 F.3d at 936; see also Bennett, 520 U.S. at 176 (jeopardy analysis  
11 cannot be "on the basis of speculation or surmise."). In order to  
12 determine that the stressors will not cause a decline in  
13 reproduction, population, distribution, or diversity, the BiOp must  
14 discuss (through some method) the magnitude of the stressors'  
15 impact, the populations' ability to tolerate this impact, and the  
16 reason why any decline will not reduce the overall likelihood of  
17 survival or recovery.<sup>19</sup> A court "cannot simply take the agency's  
18 word that the listed species will be protected under the planned  
19 operations: 'If this were sufficient, the NMFS could simply assert  
20 that its decisions were protective and so withstand all scrutiny.'" Id.  
21 at 935 n.16 (quoting Pacific Coast Fed'n, 426 F.3d at 1092).

22 Accordingly, although the BiOp properly concludes that the  
23

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24 <sup>19</sup> Perhaps tellingly, the BiOp in this case does not explain  
25 whether its no-jeopardy conclusion is based on the conclusion that  
26 the project will not cause a decline in any of these factors or  
instead on the conclusion that there will be a decline which is too  
insignificant to jeopardize survival or recovery.

1 project, as proposed in 2007, will partially reduce the impact of  
2 prior stressors, this is itself insufficient. Because the BiOp  
3 concludes that the project will continue to impose stressors on  
4 listed species without explaining why these stressors will not  
5 jeopardize the species, the BiOp's no-jeopardy conclusion is  
6 arbitrary and capricious.

### 7 **3. Cumulative Effects Discussed by the BiOp**

8 As noted above, the jeopardy analysis must include discussion  
9 of "cumulative effects," i.e., "effects of future State or private  
10 activities, not involving Federal activities, that are reasonably  
11 certain to occur within the action area of the Federal action  
12 subject to consultation." 50 C.F.R. § 402.02. Especially where,  
13 as here, the federal project imposes stressors on the listed  
14 species, the jeopardy analysis must consider both whether the  
15 species is currently able to tolerate the stressor and whether the  
16 species will continue to be able to do so in light of future non-  
17 federal actions.

18 Plaintiffs challenge the BiOp's discussion of one source of  
19 cumulative effects, YCWA's proposed Wheatland project. See BiOp  
20 at 29. At the time the BiOp was adopted, YCWA had proposed and  
21 received funding for this project, which would divert an additional  
22 41,000 acre-feet of water annually through the Brophy diversion in  
23 order to supply various agricultural users. Id. Because the  
24 effects of the Wheatland project have not yet occurred, such  
25 effects could not be captured by the net effects analysis proffered  
26 by Federal Defendants in this litigation.

1           The Wheatland project will alter flow regimes and will  
2 aggravate problems at the Brophy fish screen. Beginning with flow  
3 regimes, the BiOp predicts that the Wheatland project will increase  
4 flows between Daguerre and Englebright during the summer, as  
5 additional water is released from Englebright to supply the  
6 diversion. Id. at 30. These increased flows "in the primary  
7 spawning and rearing reaches" above Daguerre are expected to  
8 benefit salmonids. Id. The Wheatland project will also decrease  
9 summer flows below Daguerre. Although this decrease should only  
10 occur when flows exceed minimum flow requirements, this reduction  
11 is nonetheless expected to have an adverse impact. Id.

12           The BiOp reasoned that as for salmonids, Wheatland's adverse  
13 effects on flows below Daguerre would be offset by Wheatland's  
14 beneficial effects above. Id. The court disagrees with  
15 plaintiffs' argument that this conclusion is unsupported by the  
16 record. The BiOp discusses the particular impacts above and below  
17 Daguerre before qualitatively comparing the two, and the court  
18 cannot determine that this conclusion was arbitrary or capricious.  
19 Left out of this discussion, however, are the green sturgeon, which  
20 are confined below Daguerre. Accordingly, the BiOp did not support  
21 its conclusion that the Corps' operations, when considered in the  
22 context of the future Wheatland project, will not jeopardize the  
23 green sturgeon.

24           Separate from the effects on flow regimes, the Wheatland  
25 project will aggravate the existing problem of entrainment at the  
26



1 Brophy diversion by increasing flows diverted there.<sup>20</sup> The BiOp  
2 concludes that "the expected 40 percent increase in entrainment at  
3 the South Yuba-Brophy diversion is *expected to cause a reduction*  
4 *in survival of juvenile steelhead and spring-run Chinook salmon in*  
5 *the Yuba River.*" BiOp at 30 (emphasis added).<sup>21</sup> The BiOp does not

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7 <sup>20</sup> Federal Defendants argue that the settlement agreement  
8 between plaintiffs and YCWA waives plaintiffs' rights to argue that  
9 the BiOp is deficient in light of its analysis of the Brophy  
10 Diversion. The court-approved settlement agreement states that  
11 "Plaintiffs admit and state for the record that for purposes of  
12 this Action and any future litigation that no further relief  
13 regarding the Brophy Diversion beyond the terms of this Settlement  
14 is or will be required until the status of the Daguerre Point Dam  
15 is finally resolved." Dkt. No. 291, ¶ 14 (June 16, 2009).  
16 However, the agreement also provides that

17 Nothing in this paragraph or agreement,  
18 however, shall preclude the Plaintiffs from  
19 arguing in this Action that any NMFS  
20 biological opinions (and accompanying  
21 incidental take statements) issued under the  
22 ESA are arbitrary and capricious or contrary  
23 to law in part due to the biological opinions'  
24 analysis of the Brophy Diversion's potential  
25 impacts on ESA-protected species and/or due to  
26 the incidental take statement's treatment of  
27 the Brophy Diversion's potential impact on  
28 ESA-protected species.

19 Id. Accordingly, plaintiffs have not waived the right to challenge  
20 the BiOp's analysis or non-analysis of the Brophy Diversion's  
21 effects.

21 <sup>21</sup> Although Federal Defendants now characterize the BiOp as  
22 having concluded that the beneficial effects on flows above  
23 Daguerre would offset *both* decreases in flow below Daguerre *and*  
24 increased entrainment at Brophy, this reading is plainly contrary  
25 to the BiOp's language.

24 Similarly, Federal Defendants now argue that there will be a  
25 40% increase in diversions at Wheatland, but that the BiOp "does  
26 not quantify the increased impacts" of these diversions on  
27 entrainment. Fed. Defs.' Resp. to Pls.' Statement of Undisputed  
28 Facts #84. This argument is contradicted by the plain language of  
29 the BiOp, as quoted above.

1 explain why the Corps' activities, when combined with this increase  
2 in entrainment, will not jeopardize the listed salmonids. Id. at  
3 33, 38 (asserting without further discussion that the combined  
4 effects will not appreciably reduce the species' likelihood of  
5 survival or recovery).

6 The BiOp does note that "[t]he Corps has been participating  
7 with the Brophy Irrigation District, NMFS, DFG, and the FWS to  
8 investigate, design, and implement an economical plan to replace  
9 the current rock weir screening device on the South Yuba-Brophy  
10 Diversion with a new positive barrier fish screen that will meet  
11 all current CDF<sup>[22]</sup> and NMFS fish screen criteria for anadromous  
12 salmonids." BiOp at 36. The BiOp explicitly recognized, however,  
13 that it was uncertain whether or when such a screen would be  
14 constructed. Id. at 28. The BiOp's jeopardy analysis did not rely  
15 on completion of this screen, instead merely concluding that the  
16 proposed project would not interfere with such completion. Id. at  
17 36. Although a term and condition of the incidental take statement  
18 was that "the Corps shall diligently pursue the ongoing effort to  
19 fully screen the South Yuba Brophy irrigation diversion to meet all  
20 DFG and NMFS screening criteria," id. at 40, the BiOp does not  
21 guarantee or require that this screen be completed before the  
22 Wheatland project is implemented. Accordingly, the BiOp leaves  
23 open the possibility of a period of increased entrainment, and the  
24 BiOp does not analyze the effects of this period. This omission

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25  
26 <sup>22</sup> Although the BiOp refers to CDF, the California Department  
of Forestry, it appears that it may have meant DFG.

1 renders the BiOp arbitrary and capricious. Pac. Coast Fed'n of  
2 Fishermen's Ass'ns, 426 F.3d at 1091 (failure to discuss effects  
3 that will occur prior to implementation of mitigation measures  
4 arbitrary and capricious).

5 **4. Stressors Allegedly Not Discussed by The BiOp**

6 Separate from all the above, plaintiffs argue that the BiOp  
7 arbitrarily and capriciously failed to discuss hatcheries, the San  
8 Francisco Bay Delta, the species' overall depressed conditions,  
9 global warming, and poaching. Plaintiffs contend that these  
10 omissions demonstrate that NMFS "failed to consider . . . important  
11 aspect[s] of the problem," McNair, 537 F.3d at 987, and that NMFS  
12 violated the ESA's mandate to use the "best scientific and  
13 commercial data available." ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2).

14 Plaintiffs rely on the "Lindley Study" in support of many of  
15 these arguments. This study, titled "Framework for Assessing  
16 Viability of Threatened and Endangered Chinook Salmon and Steelhead  
17 in the Sacramento-San Joaquin Basin," was published by the  
18 California Bay-Delta Authority Science Program and the John Muir  
19 Institute of the Environment in February of 2007. Lead author  
20 Steven T. Lindley, together with three more of the study's twelve  
21 authors, are NMFS scientists. NMFS did not include this study in  
22 the administrative record. NMFS disputes whether the court may  
23 consider this study in a record review case and whether the study  
24 constitutes "best available science" that NMFS was obliged to  
25 consider. Because these questions are fact specific, the court  
26 addresses them in the context of specific omitted issues.

1           The apparent threshold issue, to which the parties have paid  
2 little attention, is the determination of what constitutes an  
3 *important* aspect of the problem. Plainly, some issues are so  
4 obviously insignificant that NMFS's silence thereon is not  
5 arbitrary and capricious. No reasonable layperson would expect  
6 that continental drift, changes in the stock market, or bad vibes  
7 from those in the area are significantly impacting fish on the Yuba  
8 River, and absent scientific evidence contradicting this lay  
9 expectation, NMFS need not explain why these issues are irrelevant.  
10 It appears just as plain, however, that important issues are not  
11 only those actually imposing significant effects on the species.  
12 NMFS must sometimes explain why a potential impact will not be  
13 significant. This principle follows from the nature of judicial  
14 review of agency action. As aptly explained by the First Circuit,  
15 "agency decisions must make sense to reviewing courts. . . . even  
16 in technical areas of regulation." Puerto Rico Sun Oil Co. v.  
17 United States EPA, 8 F.3d 73, 77 (1st Cir. 1993). Courts must  
18 extend reasonable deference to NMFS's determinations regarding the  
19 extent to which a circumstance affects listed species. NMFS pays  
20 for this deference with the obligation to actually make  
21 determinations on the record. It would be inconsistent with the  
22 court's duty to assume that, in every BiOp, for every issue not  
23 discussed, NMFS considered the issue and found it insignificant.  
24 Moreover, when the record is silent as to the magnitude of an  
25 impact, the court cannot make the initial evaluation of that  
26 magnitude.

1           The question remains as to how to separate the important from  
2 the unimportant. As with many other questions in this case, the  
3 parties have provided no pertinent discussion and the court is  
4 aware of little authority. The Ninth Circuit has held that  
5 an agency need not consider another agency's evaluation of the  
6 facts, but these cases did not address whether the underlying facts  
7 were important. Sw. Ctr. for Biological Diversity v. United States  
8 Forest Serv., 100 F.3d 1443, 1449 (9th Cir. 1996) (Forest Service  
9 could ignore Fish and Wildlife Service's stated Mexican Spotted Owl  
10 policy), Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697,  
11 701 (9th Cir. 1996).<sup>23</sup>

12           Despite the absence of authority, this case does not present  
13 a close question. The "problem" here is whether the project will  
14 jeopardize listed species. Any effect that is likely to adversely  
15 affect the species is plainly an important aspect of this problem.  
16 "Likely to adversely affect" is a term used in NMFS's own  
17 regulations, for which NMFS has already provided an interpretation.  
18 50 C.F.R. §§ 402.13(a), 402.14(b)(1). An agency action is "not  
19 likely to adversely affect" the species

20                   when effects on listed species are expected to  
21                   be discountable, or insignificant, or  
22                   completely beneficial. . . . Insignificant  
                    effects relate to the size of the impact and

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23           <sup>23</sup> Moreover, these cases do not apply here. They involved  
24 salvage timber sales governed by the Rescissions Act of 1995, Pub.  
25 L. No. 104-19, § 2001, 109 Stat. 194, 240-47, which "expedite[s]  
26 the award of salvage timber sale contracts" and partially  
"exempt[s] [such sales] from all applicable federal environmental  
and natural resource laws." Sw. Ctr. for Biological Diversity, 100  
F.3d at 1445-46.

1           should never reach the scale where take  
2           occurs.     Discountable effects are those  
3           extremely unlikely to occur.   Based on best  
4           judgment, a person would not: (1) be able to  
          meaningfully measure, detect, or evaluate  
          insignificant effects; or (2) expect  
          discountable effects to occur.

5   Section 7 Handbook 3-12 to 3-13; see also Natural Res. Def. Council  
6   v. Evans, 364 F. Supp. 2d 1083, 1129 (N.D. Cal. 2003).   There  
7   appears to be no reason not to adopt this standard here.

8           Here, plaintiffs contend that the BiOp impermissibly ignored  
9   five issues.   For four of these, evidence in the administrative  
10   record suggests, to a lay observer, that the issue is one that is  
11   "likely to adversely affect" listed species, and the Federal  
12   Defendants have not identified any evidence in the record to the  
13   contrary.   For the fifth, global warming, plaintiffs provide the  
14   extra-record Lindley Study, authored in significant part by NMFS  
15   scientists, indicating that global warming will adversely affect  
16   the Yuba River, and other courts have held that failure to consider  
17   global warming in other areas rendered BiOps arbitrary and  
18   capricious.   It may be that these five factors have no meaningful  
19   effect on listed species, and NMFS may have thought that this fact  
20   was so obvious as to require no discussion.   The reality of  
21   judicial review, however, obliges NMFS to respond to this evidence  
22   with a reasoned explanation.

23           Having laid this groundwork, the court discusses one other  
24   general issue before turning to the specific impacts.   Federal  
25   Defendants argue that the 'net effects' analysis obviated any need  
26   for separate discussion of the various impacts that plaintiffs

1 allege were omitted. Because the court has held that the BiOp  
2 failed to provide and support any net effects analysis, further  
3 discussion of this argument is unnecessary.

4 **a. Hatcheries**

5 Plaintiffs argue that the BiOp improperly failed to include  
6 effects of hatchery fish in environmental baseline. Plaintiffs'  
7 argument centers on the Feather River Hatchery; there is no  
8 hatchery operating directly on the Yuba River. The Feather River  
9 Hatchery nominally releases a stock of spring run Chinook. The  
10 record demonstrates a consensus of opinion that despite this label,  
11 the Feather River Hatchery has historically failed to segregate  
12 spring and fall run Chinook stocks, such that the purported spring  
13 run hatchery Chinook have been hybridized with fall run fish.<sup>24</sup>  
14 These same authorities conclude that this hybridization represents  
15 a threat to the genetic diversity and integrity of naturally  
16 spawning spring run Chinook populations range-wide, as hatchery  
17 fish interbreed with, compete with, or displace un-hybridized  
18 natural spawners. See also BiOp at 25 (discussing interbreeding  
19 of spring run and fall run Chinook as a threat to the species'  
20 survival or recovery without discussing hatcheries as a cause of  
21 such interbreeding). Federal Defendants do not dispute that where  
22 hatchery fish are present, they pose these impacts.

23 Although there is no hatchery on the Yuba, the BiOp indicates

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24  
25 <sup>24</sup> AR 11335, 11340 (Species of Special Concern at 40, 45), AR  
26 4588 (Spring Run Chinook Status at § VII p. 23), AR 13383 (NMFS,  
"Population Structure of Threatened and Endangered Chinook Salmon  
ESUs in California's Central Valley Basin," at 12 (April 2004)).

1 that some hatchery fish stray into the Yuba River and that these  
2 fish likely come from the Feather River Hatchery. BiOp at 18-19.  
3 The 1995 DFG study cited above concluded that “[i]n the wild,  
4 hybridization between [Feather River] hatchery and wild fish almost  
5 certainly has occurred in the . . . Yuba River.” AR 11337 (Species  
6 of Special Concern at 42). Plaintiffs cite various other studies  
7 in the record which indicate that hybridization with hatchery fish  
8 is a threat to steelhead and Chinook salmon generally, but the  
9 parties have not identified any other authority in the record  
10 addressing whether hatcheries are impacting the Yuba River  
11 populations.

12 The BiOp did not discuss the impacts of hatchery strays on  
13 listed species in the Yuba River. Federal Defendants argue that  
14 discussion of the Feather River Hatchery was unnecessary because  
15 the hatchery is outside the “action area,” and therefore not part  
16 of the “environmental baseline.” The implementing regulation  
17 defines “action area” as “all areas to be affected directly or  
18 indirectly by the Federal action.” 50 C.F.R. § 402.02. This  
19 definition is used to define the “environmental baseline” as “the  
20 past and present impacts of all Federal, State, or private actions  
21 and other human activities in the *action area*.” Id. (emphasis  
22 added). Thus, Federal Defendants argue that because the proposed  
23 project will not affect the Feather River, the BiOp need not  
24 consider whether actions on the Feather River affect conditions in  
25 the Yuba River. This interpretation of the Service’s obligation  
26 under the ESA is untenable; it would permit the service to ignore



1 aspects of the context in which the proposed action will occur.  
2 Nat'l Wildlife Fed'n, 524 F.3d at 930 (citing Pac. Coast Fed'n, 426  
3 F.3d at 1093). Although the court owes deference to the NMFS's  
4 interpretation of its own regulation, this deference has limits.  
5 The regulation must be understood to require analysis of "impacts"  
6 in the action area, rather than "activities" in the action area.

7 Federal Defendants next observe that the spring run Chinook  
8 ESU at issue in this case is defined to include hatchery fish.  
9 Federal Defendants do not explain the significance to this  
10 observation. The BiOp itself recognizes genetic diversity as a  
11 factor influencing survival and recovery. BiOp at 32. The fact  
12 that hatchery fish are included within the ESU does not demonstrate  
13 that hatchery fish cannot cause a decline in genetic diversity.

14 Finally, Federal Defendants argue that discussion of  
15 hatcheries is unnecessary because there is insufficient evidence  
16 that hatcheries were having an impact on the spring-run Chinook in  
17 the Yuba River. The record demonstrates that the potential effect  
18 of hatcheries on the baseline was not so slight that it could be  
19 disregarded without comment. The BiOp acknowledged that  
20 interbreeding between spring and fall run Chinook was a threat to  
21 the survival or recovery of spring run. BiOp at 25, 32. The  
22 record demonstrates an apparent consensus that where fish from the  
23 Feather River Hatchery are present, the hatchery fish aggravate the  
24 threat of hybridization. The BiOp further acknowledged that at  
25 least some such fish are present in the Yuba River. BiOp at 18-19;  
26 see also AR 11337 (Species of Special Concern at 42). Based on

1 these facts, the Feather River Hatchery's potential impact on the  
2 baseline would not appear to be so insignificant or discountable  
3 that NMFS could entirely ignore it. While it may be that, as  
4 Federal Defendants now contend, these strays are too few in number  
5 to play a large role in the environmental baseline, defendants cite  
6 no document in the record indicating that NMFS actually reached  
7 this conclusion. Failure to consider hatcheries therefore rendered  
8 the BiOp's no-jeopardy conclusion arbitrary and capricious.

9 **b. The San Francisco Bay Delta**

10 Plaintiffs argue that conditions in the San Francisco Bay  
11 Delta are adversely impacting the listed species, relying on  
12 various evidence in the administrative record. See, e.g., AR  
13 13518-19, 13019, 13029, 4635-38, 11337.

14 Federal Defendants concede that Delta conditions harm fish.  
15 Federal Defendants nonetheless argue that discussion of the Delta  
16 was not required because "the [Central Valley Project] does not  
17 affect conditions on the Yuba." Fed. Defs.' Summ. J. Mem. at 28.  
18 The BiOp acknowledges that the three species at issue migrate  
19 through the Delta. BiOp at 7, 9-10. It appears that during such  
20 migration, fish may be stressed by Delta conditions. Thus, even  
21 if the Delta does not affect habitat in the Yuba River, it  
22 apparently affects the fish at issue. Insofar as the Delta  
23 conditions affect populations within the action area, the BiOp must  
24 consider whether those conditions limit the populations' ability  
25 to withstand the project's impacts. Nat'l Wildlife Fed'n, 524 F.3d  
26 at 929 (jeopardy analysis cannot occur "in a vacuum.").

1           Accordingly, the BiOp is arbitrary and capricious insofar as  
2 it fails to discuss the extent to which Delta conditions affect  
3 populations of listed species in the Yuba River. As explained in  
4 the following section, on remand, the BiOp may also need to discuss  
5 the effects of Delta conditions on the listed species generally.

6                   **c.   Listed Salmonids' Overall Viability**

7           Plaintiffs argue that the Lindley Study explains that spring  
8 run Chinook are "as a whole . . . not viable" and are "in jeopardy  
9 of extinction" because their abundance has greatly decreased and  
10 because their small spatial distribution leaves the species  
11 vulnerable to a catastrophic event. Pls.' Summ. J. Mem. at 14.  
12 Plaintiffs assert that by failing to discuss these findings, the  
13 BiOp ignores important aspects of the problem and fails to use the  
14 best available science.

15           The BiOp notes the overall depressed condition of spring-run  
16 Chinook, concluding that the species was "at moderate to high risk  
17 of extinction." BiOp at 10-11. The BiOp specifically mentions the  
18 historic overall decline in the species and the species' particular  
19 vulnerability arising from low spatial distribution. Plaintiffs  
20 have not shown that the Lindley Study's discussion of these issues  
21 was "in some way better than" the evidence NMFS actually relied on.  
22 Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1080 (9th Cir.  
23 2006). Accordingly, plaintiffs have not shown that the Lindley  
24 Study represents the best available science on this issue.

25           As to the charge that the BiOp acknowledged but failed to  
26 consider the species' overall condition, such consideration is

1 required where a project will reduce the likelihood of survival or  
2 recovery. Without knowing the species' overall status, the agency  
3 cannot determine whether the reduction is "appreciable." Even  
4 where the action will cause harm that is not "appreciable," the  
5 agency must evaluate the species' overall status to determine  
6 whether the harm will tip the species into jeopardy or deepen  
7 existing jeopardy. Nat'l Wildlife Fed'n, 524 F.3d at 930.<sup>25</sup> Where  
8 the project will not decrease the local populations' chances of  
9 survival or recovery, however, the BiOp may reach a no-jeopardy  
10 conclusion without extensive discussion of the species' overall  
11 status, because there is no way that the project will jeopardize  
12 the species. In this case, however, the BiOp failed to support its  
13 conclusion that the project will not cause harm. If, on remand,  
14 NMFS concludes that the project will negatively affect local  
15 populations, NMFS must further discuss the species' overall status.

16 **d. Global Warming**

17 Plaintiffs argue that the BiOp's failure to discuss global

18  
19 <sup>25</sup> Federal Defendants have suggested that because "jeopardize"  
20 refers to relative change, "jeopardy" is not a term with meaning  
under the ESA. Nat'l Wildlife Fed'n explained that:

21 an agency may not take action that will tip a  
22 species from a state of precarious survival  
23 into a state of likely extinction. Likewise,  
24 even where baseline conditions already  
jeopardize a species, an agency may not take  
action that deepens the jeopardy by causing  
additional harm.

25 524 F.3d at 930. The quoted text implies that a species may be "in  
26 jeopardy" for purposes of the ESA, although this case also affirms  
that an action does not jeopardize a species unless it aggravates  
the species' condition.

1 warming is another failure to consider an important aspect of the  
2 problem or the best available science. Relying primarily on the  
3 Lindley Study, plaintiffs argue that:

4 climate change is expected to dramatically  
5 alter the hydrology of California's rivers and  
6 species that inhabit them by causing a shift  
7 in the timing of stream flows from spring and  
8 summer to earlier periods in the water year,  
9 decreased precipitation, increased occurrence  
10 of both extreme droughts and extreme floods,  
11 and reduced spawning habitat in the Central  
12 Valley.

13 Pls.' Summ. J. Mem. at 15 (citing Lindley Study at 17-18). See  
14 also id. at 30.

15 Federal Defendants argue that the primary impact of climate  
16 change on listed species will be on water temperature. Federal  
17 Defendants then argue that the BiOp extensively discussed water  
18 temperature's effects on species, that the primary determinant of  
19 temperature is flow regimes, and that the Yuba Accord provides for  
20 flows specifically to address impacts on temperature. From this  
21 Federal Defendants conclude that separate discussion of climate  
22 change was unnecessary. Without questioning NMFS's assertion that  
23 the *primary* effect of climate change will be on water temperature,  
24 the court notes that the Lindley Study indicates that climate  
25 change will alter flow regimes generally. For example, the Lindley  
26 Study predicts that flows will occur earlier in the year, that  
average rainfall may decline, and that extreme droughts and floods  
will become more common. The BiOp acknowledges that flow regimes  
affect listed species in ways other than temperature--for example,  
species require migration flows at certain times.

1           This argument presents a difficult question for the court.  
2 Other cases concerning listed fish have held that failure to  
3 discuss the impacts of climate change rendered BiOps arbitrary and  
4 capricious. See Natural Res. Def. Council v. Kempthorne, 506 F.  
5 Supp. 2d 322, 367-71 (E.D. Cal. 2007), Pac. Coast Fed'n of  
6 Fishermen's Ass'ns v. Gutierrez, No. 1:06-cv-00245, 2008 U.S. Dist.  
7 LEXIS 31462 (E.D. Cal. Apr. 16, 2008). The court recognizes that  
8 the Yuba River is a different waterway. While plaintiffs' own  
9 evidence suggests that climate change's impact on the Yuba River  
10 will be less severe, this evidence hardly suggests insignificant  
11 impacts. Lindley Study at 18 ("Under the expected warming of  
12 around 5°C, substantial habitat would be lost, with significant  
13 amounts of habitat remaining primarily in the Feather and Yuba  
14 rivers . . . ."), see also id at 17 ("[w]ithin some limits, water  
15 storage reservoirs might be operated to mitigate changes to the  
16 hydrograph caused by climate change."). The court cannot conclude  
17 that global warming's potential impacts are so slight that NMFS  
18 could ignore them without discussion. Although the BiOp discussed  
19 present impacts on temperature, the BiOp does not address whether  
20 global warming will alter the temperature that results from a given  
21 flow regime, nor does the BiOp address whether global warming will  
22 inhibit the ability to provide the presently-anticipated flow  
23 regimes. The Lindley Study calls both into question.

24           Federal Defendants separately argue that the court should  
25 disregard the Lindley Study because it was not included in the  
26 administrative record. Although this study was authored in part

1 by NMFS scientists and available prior to completion of the BiOp,  
2 it is not clear whether NMFS actually considered this study in  
3 formulating the BiOp. C.f. Order filed December 23, 2008 at 27-28.  
4 The court need not resolve this issue, because the Lindley Study  
5 is used here to "determine whether the agency has considered all  
6 relevant factors and has explained its decision." Sw. Ctr. for  
7 Biological Diversity, 100 F.3d at 1450 (quotations omitted). Extra  
8 record materials may be considered when they "address issues not  
9 already there" in the record. Id. at 1451 (quoting Friends of the  
10 Earth v. Hintz, 800 F.2d 822, 829 (9th Cir. 1986)). Insofar as no  
11 party has identified any evidence in the administrative record  
12 addressing the above questions regarding global warming, the  
13 Lindley Study may be considered for this purpose. Accord High  
14 Sierra Hikers Ass'n v. Weingardt, No. C-00-01239, 2007 U.S. Dist.  
15 LEXIS 84746, \*7-8 (N.D. Cal. Oct. 30, 2007).

16 Accordingly, the court holds that by failing to discuss global  
17 warming, NMFS failed to address an important part of the problem.

18 **e. Poaching**

19 Finally, plaintiffs argue that the Daguerre fish ladders'  
20 steps present pools in which salmonids may easily be poached.  
21 Pls.' Mem. at 9. The 1998 Spring Run Chinook Status report states  
22 that poaching is an ongoing problem at Daguerre. AR 4614 (Spring  
23 Run Chinook Status at § VII p. 49). In 2001, the Corps determined  
24 that "poaching adult salmon at ladders and at the base of the dam  
25 is a persistent problem documented by DFG." AR 12794 (Preliminary  
26 Passage Study at 13).

1 Federal Defendants argue that poaching is no longer  
2 significant, relying on an extra-record declaration that poaching  
3 has not occurred since 2003. Fed. Defs.' Response to Pls.'  
4 Statement of Undisputed Facts #70 (citing Decl. of Doug Grothe in  
5 Supp. of Fed. Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. ¶ 22  
6 (filed June 10, 2009)). This after-created evidence cannot justify  
7 the BiOp's no-jeopardy conclusion. Moreover, nothing indicates  
8 what, if anything, changed between 2001 and 2003.

9 As it stands, the record indicates that poaching is not  
10 insignificant (because it results in take) and not discountable  
11 (because, absent explanation as to what has changed to prevent a  
12 formerly significant problem, a reasonable person would not  
13 conclude that it was unlikely to re-occur). Accordingly, poaching  
14 was an important aspect of the problem that NMFS failed to discuss.

##### 15 **5. Plaintiffs' Separate Arguments Regarding Recovery**

16 Under the existing regulations, the jeopardy analysis must  
17 consider impacts on both survival and recovery. Nat'l Wildlife  
18 Fed'n, 524 F.3d at 933 (interpreting 50 C.F.R. § 402.02). Actions  
19 impairing survival necessarily also impair recovery. See  
20 Interagency Cooperation; Endangered Species Act of 1973, 48 Fed.  
21 Reg. 29,990, 29,992 (June 29, 1983). The BiOp's recovery analysis  
22 was therefore deficient for the reasons previously discussed.

23 Plaintiffs raise an additional challenge particular to the  
24 recovery analysis. To guide the agency on remand and potentially  
25 forestall future litigation in this case, the court discusses this  
26 argument here. The BiOp's recovery analysis identifies five



1 planned recovery measures: (1) the Yuba Accord, (2) a gravel  
2 augmentation program, (3) improvements to the South Yuba-Brophy  
3 Diversion Screening, (4) Daguerre Fish Passage Improvement Project,  
4 and (5) the Upper Yuba River Studies Program. BiOp 34-37.  
5 Plaintiffs argue that completion of these measures was uncertain,  
6 such that the BiOp could not permissibly rely upon these measures.

7 Plaintiffs correctly contend that a BiOp may only rely on  
8 mitigation efforts that are "under agency control or otherwise  
9 reasonably certain to occur." Nat'l Wildlife Fed'n, 524 F.3d at  
10 936 n.17. Plaintiffs err, however, by getting the BiOp's recovery  
11 analysis backwards. The BiOp does not rely on completion of these  
12 five recovery measures to support the conclusion that the project  
13 would not jeopardize recovery. Instead, the BiOp reasons that  
14 interference with these measures would reduce the likelihood of  
15 recovery. The BiOp's determination that "no element of the  
16 proposed Yuba River operations would appreciably diminish the  
17 likelihood of these recovery actions being implemented" was offered  
18 as a necessary but not sufficient condition for the no-jeopardy  
19 conclusion. BiOp at 37, see also id. at 33-34. If, on the remand,  
20 NMFS relies on completion of these measures in its renewed jeopardy  
21 analysis, this reliance should be made explicit.<sup>26</sup>

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22  
23 <sup>26</sup> In litigating this case, Federal Defendants argue that "the  
24 BiOp analyzed several upcoming actions on the Yuba, . . . and  
25 determined that they had the potential to significantly enhance  
26 habitat conditions on the river. . . . This determination  
solidified the BiOp's conclusion that continued operation of the  
two dams would not jeopardize the Yuba River populations of the  
fish species." Fed Defs.' Reply at 3. While anticipation of these  
measures might "solidify" a conclusion reached on independent

1           **6. Summary Regarding Jeopardy Analysis**

2           The court has identified numerous defects in the BiOp's  
3 jeopardy analysis. The BiOp fails to provide a rational connection  
4 between the factual determination that the project will perpetuate  
5 unmitigated stressors and the conclusion that these stressors will  
6 not jeopardize listed fish. The BiOp further fails to explain how  
7 species will be able to tolerate the combination of the project's  
8 impacts and the adverse effects anticipated to result from the  
9 Wheatland project. The BiOp also failed to consider various  
10 important aspects of the problem, most notably hatcheries, global  
11 warming and poaching. For these reasons, the BiOp's jeopardy  
12 analysis is deficient.<sup>27</sup>

13           **C. Critical Habitat**

14           Separate from the prohibition on actions that would  
15 "jeopardize" survival or recovery, section 7 prohibits actions that  
16 "result in the destruction or adverse modification of [designated

17 \_\_\_\_\_  
18 grounds, it cannot cure the defects in the survival analysis  
19 discussed above. The BiOp contains no discussion of whether these  
20 measures will fully eliminate stressors recognized by the BiOp,  
21 whether these measures will provide separate benefits sufficient  
22 to offset the stressors' impacts, or whether the remaining  
23 stressors are too insignificant to jeopardize the species. That  
24 is, assuming that the BiOp could have relied on these actions,  
25 nothing indicates that NMFS concluded that the actions' benefits  
26 outweighed the impacts of the ongoing stressors for purposes of the  
jeopardy analysis.

27           <sup>27</sup> The court reiterates that although the BiOp treated  
Englebright Dam's prevention of future migration as an effect of  
the project, the jeopardy analysis is deficient regardless of  
whether NMFS is held to this interpretation, and that as a result,  
the court does not determine whether the ESA would have permitted  
Englebright's effects on migration to be treated as part of the  
baseline.

1 critical] habitat . . . .” ESA § 7(a)(2); 16 U.S.C. § 1536(a)(2).  
2 At the time the BiOp was adopted, no critical habitat had been  
3 designated for green sturgeon. BiOp at 6. Accordingly, the  
4 critical habitat analysis considers solely impacts on salmonids.

5 In discussing effects on critical habitat, the BiOp describes  
6 virtually every project effect as an effect on habitat. BiOp at  
7 29. The “integration and synthesis of effects” regarding critical  
8 habitat, which the court repeats in full, states that

9 Many of the above-listed actions and programs  
10 (both completed and pending) are actually  
11 designed to improve the quality and quantity  
12 of the [primary constituent elements] of  
13 critical habitat upon which spring-run Chinook  
14 salmon and steelhead rely. Those measures  
15 that improve flows, water temperatures, or  
16 passage conditions, or augment spawning gravel  
17 in depleted areas, are expected to increase  
18 the conservation value of critical habitat in  
19 the Yuba River. It is therefore reasonable to  
20 expect that the Corps’ proposed operations on  
21 the Yuba River should at least maintain, if  
22 not slightly improve[,] the value of critical  
23 habitat for the conservation of spring-run  
24 Chinook salmon and steelhead above the value  
25 that was present when critical habitat was  
26 designated on the Yuba River in 2005.

19 BiOp at 38. “[A]ctions and programs” apparently refers to both the  
20 future recovery measures and the “recent changes” partially  
21 ameliorating the project’s effects.

22 The parties’ arguments regarding critical habitat are just as  
23 brief as the BiOp’s discussion of the issue. Plaintiffs first  
24 argue that the critical habitat analysis relied on the five future  
25 recovery measures discussed in part III(B)(5) above, but that these

1 measures were not reasonably certain to occur.<sup>28</sup> The critical  
2 habitat analysis, unlike the jeopardy analysis, relies on  
3 completion of "many of" these measures. Reliance is appropriate  
4 only where the programs are "under agency control or otherwise  
5 reasonably certain to occur." Nat'l Wildlife Fed'n, 524 F.3d at  
6 936 n.17. A "reasonabl[e] certain[ty]" requires "specific and  
7 binding plans" including "a clear, definite commitment of  
8 resources." Id. at 935-36; see also Natural Res. Def. Council v.  
9 Kemphorne, 506 F. Supp. 2d 322, 355 (E.D. Cal. 2007), Natural Res.  
10 Def. Council v. Rodgers, 381 F. Supp. 2d 1212, 1241 (E.D. Cal.  
11 2005), Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d  
12 1139, 1152 (D. Ariz. 2002).

13 The first of these five recovery measures, the Yuba Accord,  
14 was "reasonably certain to occur" despite being outside the Corps'  
15 control. The flow regimes called for by this agreement were  
16 adopted on an interim basis in 2005. BiOp at 24. In October 2007,  
17 prior to the issuance of the BiOp, the final agreement was signed,  
18 with anticipated implementation in the next year. Id. Plaintiffs  
19 offer no arguments as to why this particular measure was uncertain.  
20 The court further notes that this agreement was implemented in  
21 early 2008 as planned. Cal. State Water Res. Control Bd. Order WR  
22 2008-0014 (Mar. 18, 2008), as amended by Order WR 2008-0025 (May  
23 20, 2009). While events subsequent to the BiOp's adoption cannot

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24  
25 <sup>28</sup> These measures are (1) the Yuba Accord, (2) a gravel  
26 augmentation program, (3) improvements to the South Yuba-Brophy  
Diversion Screening, (4) Daguerre Fish Passage Improvement Project,  
and (5) the Upper Yuba River Studies Program. BiOp 34-37.

1 retroactively validate the BiOp, this provides some evidence that  
2 the BiOp's prediction regarding this agreement was well supported.

3 The fifth mitigation measure, the Upper Yuba River Studies  
4 Program, is also outside the Corps' control. Federal Defendants  
5 effectively concede that this measure is not certain to occur.  
6 This program has "exhausted its initial budget, but is continuing  
7 to pursue additional sources of funding." BiOp at 37. Federal  
8 Defendants instead argue that the BiOp does not actually rely on  
9 this measure in its critical habitat analysis. Although the BiOp  
10 could have been clearer in this regard, this appears to be the  
11 case. The Upper Yuba River Studies Program seeks "to determine if  
12 the reintroduction of wild Chinook salmon and steelhead to the  
13 upper Yuba River above Englebright Dam is biologically,  
14 environmentally and socio-economically feasible over the long  
15 term." Id. Thus, this measure solely concerns habitat above  
16 Englebright Dam. Because critical habitat has been designated  
17 solely below Englebright, this measure is not implicated in the  
18 analysis of whether the project will destroy or adversely modify  
19 designated critical habitat. The BiOp properly recognized that  
20 interference with this program would have reduced the likelihood  
21 of recovery, but the court accepts NMFS's argument that the BiOp  
22 did not rely on this program in its critical habitat analysis. The  
23 court further observes that the critical habitat analysis did not  
24 specifically refer to this measure.

25 The second, third, and fourth recovery measures serve double  
26 duty, as these are also "reasonable and prudent measures" imposed

1 by the incidental take statement. Although it is unclear whether  
2 these measures are binding in the sense that a party may seek  
3 injunctive relief compelling their completion, they are enforceable  
4 in that failure to comply therewith exposes the Corps and its  
5 employees to potential civil and criminal liability for take of  
6 listed species. Bennett, 520 U.S. at 170. Plaintiffs do not  
7 dispute that the incidental take statement commits the Corps to  
8 these measures, instead disputing whether these measures commit the  
9 Corps to anything. These "reasonable and prudent measures" and  
10 their accompanying "terms and conditions" require the Corps to  
11 implement a long-term gravel augmentation program within three  
12 years, to "diligently pursue the ongoing effort to fully screen the  
13 South Yuba-Brophy irrigation diversion to meet all DFG and NMFS  
14 screening criteria," and as to fish passage at Daguerre, to  
15 complete a fish passage study by 2012 and to commence  
16 implementation of a fish passage program by 2017. Plaintiffs argue  
17 that the gravel program has no defined goals, such that it is  
18 unclear what benefit it will provide; that the Brophy screening has  
19 no deadline, so it represents no enforceable commitment; and that  
20 the Daguerre program suffers both defects, because it is unclear  
21 what specific benefits the program would provide or when the  
22 program would be completed.

23       These arguments overlap with plaintiffs' broader challenge to  
24 the critical habitat analysis. Plaintiffs contend that the BiOp  
25 did not support its conclusion that these measures would avoid  
26 adverse modification of critical habitat. Section 7 prohibits

1 "destruction" and "adverse modification" of critical habitat.  
2 "Destroy" and "modify," like "jeopardize," are verbs describing a  
3 change in condition. In a rehash of their arguments on jeopardy,  
4 plaintiffs argue that the various stressors caused by the BiOp  
5 constitute adverse modifications to critical habitat and that these  
6 impacts are incompletely mitigated. Plaintiffs solely add, in the  
7 critical habitat argument, that recovery measures are also too  
8 vague to support a conclusion that the project's impacts will be  
9 overcome. Except for the final sentence of the critical habitat  
10 analysis, the BiOp invites plaintiffs' critique.<sup>29</sup> The BiOp  
11 largely equates effects on a species' likelihood of survival or  
12 recovery with effects on habitat, describing most of the stressors  
13 summarized above as detriments to habitat attributable to the  
14 project. BiOp at 29. The BiOp acknowledged that the recent  
15 changes in operations had not fully ameliorated the impacts  
16 directly caused by the project. For example, the BiOp describes

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17  
18 <sup>29</sup> This sentence is the conclusion that operations "should at  
19 least maintain . . . the value of critical habitat . . . *above the*  
20 *value that was present when critical habitat was designated on the*  
21 *Yuba River in 2005.*" BiOp at 38 (emphasis added). Although  
22 plaintiffs have not addressed this language, the court notes that  
23 National Wildlife Federation suggests that use of the 2005 baseline  
24 is impermissible. National Wildlife Federation prohibited NMFS  
25 from using a baseline of habitat as it existed at the time the  
26 species was listed. 524 F.3d at 934. The Ninth Circuit's  
reasoning appears to apply equally to a baseline of habitat as it  
existed at the time habitat was designated. The court explained  
that use of a point in time predating the action as a baseline for  
the critical habitat analysis "is incompatible with the statute's  
plain language and clear purpose of improving endangered species'  
condition over time." *Id.* at 934 n.15. Of course, if habitat  
improved between 2005 and 2007, the BiOp's approach would  
presumably be more protective of habitat than the "environmental  
baseline" approach discussed in National Wildlife Federation.

1 the fact that "Daguerre . . . blocks or delays" upstream salmonid  
2 passage as an "impact[] to critical habitat caused by the proposed  
3 project." Id.

4 Federal Defendants similarly treat critical habitat as a mere  
5 rephrasing of the jeopardy analysis. Rather than defend the  
6 analysis apparently adopted by the BiOp and argue that these  
7 impacts would be no worse than those existing at the time of the  
8 2005 baseline, Federal Defendants concede that all impacts on  
9 habitat must be mitigated. Federal Defendants instead again argue  
10 that mitigation need not be mapped to specific impacts so long as  
11 the BiOp supports its conclusion that the net effects will be  
12 neutral. Fed. Defs.' Summ. J. Mem. at 23.

13 Taking the parties' litigation positions at face value, the  
14 court concludes that the BiOp did not demonstrate that the  
15 "impacts" on habitat would be at worst neutral. As noted above,  
16 measures implemented prior to the BiOp's adoption had not fully  
17 eliminated these impacts. Although the critical habitat analysis,  
18 unlike the jeopardy analysis, further relies on future mitigation  
19 measures, plaintiffs correctly argue that the precise benefits to  
20 be conveyed by these mitigation measures are uncertain and that  
21 many of these measures would not take effect for a number of years.  
22 The Ninth Circuit has held that a BiOp may not rely on future  
23 mitigation to support a no adverse modification conclusion without  
24 discussing the interim effects on the species. Nat'l Wildlife  
25 Fed'n, 524 F.3d at 935. More generally, the BiOp provides no  
26 reasoning supporting the conclusion that the restoration measures



1 will provide benefits whose magnitude outweighs that project's  
2 impacts.

3 More fundamentally, the court cannot discern the reasoning  
4 underlying the critical habitat analysis. If the method of  
5 analysis compares habitat conditions resulting from the proposed  
6 project with habitat conditions as they existed in 2005, some of  
7 plaintiffs' arguments would be inapplicable. The BiOp makes only  
8 fleeting mention of this method of analysis, however, and other  
9 passages indicate an alternate approach. The court also has doubts  
10 as to whether such a method would comport with the statute.

11 In summary, if the BiOp concluded that the project would not  
12 adversely modify critical habitat because the project's net  
13 "impacts" on habitat were at worst neutral when measured against  
14 conditions immediately preceding the BiOp, this conclusion was  
15 arbitrary and capricious in that the BiOp failed to provide a  
16 rational connection between the facts and this conclusion. Pac.  
17 Coast Fed'n, 426 F.3d at 1092. If the BiOp instead based its  
18 critical habitat conclusion on some other analysis, the conclusion  
19 is nonetheless arbitrary and capricious because the BiOp does not  
20 explain its reasoning such that the agency's "path may reasonably  
21 be discerned." FCC v. Fox TV Stations, Inc., \_\_\_ U.S. \_\_\_, 129 S.  
22 Ct. 1800, 1810 (2009) (internal quotation omitted); see also Puerto  
23 Rico Sun Oil Co., 8 F.3d at 81 (where agency failed to explain  
24 basis for decision, decision arbitrary and capricious regardless  
25 of whether there was no basis or whether instead there was a basis  
26 that was not explained).

1 **D. Incidental Take Statement**

2 As noted above, when NMFS concludes that a proposed action  
3 will comply with section 7(a)(2), if NMFS further concludes that  
4 taking of species in connection with the action will not violate  
5 section 7(a)(2), NMFS may issue an incidental take statement  
6 ("ITS") that specifies the impact of incidental take on species,  
7 sets forth "reasonable and prudent measures" to minimize this  
8 impact, and sets forth mandatory "terms and conditions" that will  
9 ensure effectuation of those measures. ESA § 7(b)(4); 16 U.S.C.  
10 § 1536(b)(4).

11 An ITS is auxiliary to a BiOp, because it depends on the  
12 underlying no-jeopardy conclusion. When the BiOp is withdrawn, the  
13 ITS is necessarily invalidated. Or. Natural Res. Council v. Allen,  
14 476 F.3d 1031, 1037 (9th Cir. 2007) ("ONRC"). The court  
15 nonetheless addresses plaintiffs' challenges to the ITS. See id.  
16 (after explaining that revocation of the underlying BiOp rendered  
17 the ITS invalid, going on to discuss independent defects in the  
18 ITS). Many of these challenges rise and fall with the challenge  
19 to the jeopardy analysis; accordingly, the court explains those  
20 particular portions of the ITS that must be revisited in light of  
21 the remand of the BiOp.

22 Plaintiffs first argue that the ITS improperly measures take.  
23 An ITS must specify the amount of allowable take. 50 C.F.R. §  
24 402.14(i). This limit should be a numerical cap, and an ITS "that  
25 utilizes a surrogate instead of a numerical cap on take must  
26 explain why it was impracticable to express a numerical measure of

1 take." ONRC, 476 F.3d at 1037.

2 In this case, the BiOp explains that a direct numerical  
3 measure of take is impossible, in light of

4 the variability and uncertainty associated  
5 with the response of listed species to the  
6 effects of the project, the population size of  
7 each species, annual variations in the timing  
8 of migration, individual water use within the  
9 project area, and uncertainties regarding  
10 meteorological conditions, water storage  
11 conditions and the annual variability in water  
12 management practices by upstream entities.

13 BiOp at 39. This explanation satisfies ONRC. In place of a  
14 numerical limit on take, the BiOp here employs four ecological  
15 surrogates: prevention of flow fluctuations which exceed those  
16 authorized in the Federal Energy Regulatory Commission license for  
17 the Yuba Project, injection of at least 500 tons of appropriately  
18 sized gravel in 2007, cleaning of sediment, wood, and debris from  
19 the Daguerre fish ladders, and maintenance of a channel "of  
20 adequate depth and width to allow unimpaired passage of adult  
21 salmonids" at the ladder exits. Id.<sup>30</sup>

22 Surrogates must "set forth a trigger that, when reached,  
23 results in an unacceptable level of incidental take, invalidating  
24 the safe harbor provision [of the ESA], and requiring the parties  
25 to re-initiate consultation." ONRC, 476 F.3d at 1038 (quoting  
26 Ariz. Cattle, 273 F.3d at 1249) (internal quotation marks removed,  
modification in original). The first two surrogates plainly

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25 <sup>30</sup> The BiOp enumerates these as three surrogates, treating the  
26 third and fourth surrogates mentioned above as aspects of a single  
metric. BiOp at 39.

1 satisfy this requirement. The surrogates regarding Daguerre, while  
2 more definite than those at issue in ONRC and Ariz. Cattle, may be  
3 difficult to enforce. As to the fish ladders, the ITS does not  
4 specify how often these ladders must be cleaned, and thus, how long  
5 ladders must be obstructed before take will be deemed to have  
6 occurred. As to the channel, although the court presumes that the  
7 ecological surrogate was intended to incorporate the 30 feet by 3  
8 feet dimensions specified elsewhere in the BiOp as sufficient, the  
9 ITS does not specify this. BiOp at 33. Without determining  
10 whether these ambiguities invalidate the BiOp, the court observes  
11 that these issues should be clarified on remand.

12 Plaintiffs next argue that these surrogates are insufficiently  
13 correlated with take caused by the project. In part, plaintiffs  
14 argue that the BiOp did not demonstrate the quantity of take  
15 associated with these surrogates. The ITS need not demonstrate a  
16 specific number of takings likely to be caused by violation of the  
17 surrogate, and the surrogates here are correlated with some of the  
18 project's major impacts. Ariz. Cattle, 273 F.3d at 1250.  
19 Nonetheless, the project imposes other stressors that may cause  
20 take not reflected by these surrogates, such as entrainment and  
21 Daguerre's effect on downstream migration. The surrogates must  
22 reflect the take actually caused by the project, and Federal  
23 Defendants have not identified anything in the record demonstrating  
24 that no such take will occur. Accordingly, the BiOp fails to  
25 explain the link between the surrogates and take.

26 Separate from arguments regarding surrogates, plaintiffs

1 challenge the "reasonable and prudent measures" and "terms and  
2 conditions" imposed by the ITS. An ITS must "specif[y] those  
3 reasonable and prudent measures that the Secretary considers  
4 necessary or appropriate to minimize [the impact of incidental  
5 take]," ESA § 7(b)(4)(C)(ii), as well as "terms and conditions  
6 (including, but not limited to, reporting requirements) that must  
7 be complied with . . . to implement" these measures, ESA §  
8 7(b)(4)(C)(iv). In this case, the ITS specifies five reasonable  
9 and prudent measures, which are elaborated on as terms and  
10 conditions. The ITS obliges the Corps to:

- 11 1. use information obtained from the pilot gravel injection  
12 project to develop and implement a long-term gravel  
13 augmentation program within three years.
- 14 2. initiate a study to determine an effective method of  
15 replenishing large woody material, and to implement this  
16 program so as to bring additional woody material to the  
17 lower Yuba River within four years.
- 18 3. develop and implement a program "to improve fish passage  
19 for adult and juvenile spring-run Chinook salmon,  
20 steelhead and green sturgeon at Daguerre Point Dam,"  
21 completing a feasibility study and the planning,  
22 engineering and design phases within five years, and  
23 commencing implementation within ten years.
- 24 4. maintain the fish ladder clearing and sediment  
25 management programs at Daguerre pending completion of  
26

1           the above.<sup>31</sup>

2           5.   “diligently pursue the ongoing effort to fully screen  
3           the South Yuba-Brophy irrigation diversion to meet all  
4           DFG and NMFS screening criteria.”

5           Plaintiffs argue that these measures do too little to minimize  
6 take. Although the statute requires that these measures “minimize”  
7 the impact of take on the listed species, no party has provided  
8 authority interpreting “minimize” in this context. Where the  
9 measures imposed by an ITS do not ensure that take occurs at a  
10 level that does not jeopardize the species, however, the measures  
11 are plainly inadequate. In light of the invalidity of the BiOp’s  
12 no-jeopardy conclusion, the court cannot conclude that the measures  
13 here achieve this goal. The court does not decide what else the  
14 obligation to “minimize” take requires.

15 **E.   Take**

16           Plaintiffs’ fourth claim argues that the Corps has caused take  
17 without the protection of an ITS, either because the ITS was void  
18 when issued or because the Corps has failed to comply with the  
19 terms and conditions of the ITS.

20           As to the first theory, plaintiffs offer no authority to  
21 support the proposition that an ITS may be void ab initio. For the

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23           <sup>31</sup> The fourth “reasonable prudent measure” requires the Corps  
24 to avoid “avoidable impairment” at Daguerre pending completion of  
25 the third measure. Plaintiffs contend that “avoidable impairment”  
26 is impermissibly vague. The court would agree, except that the  
BiOp provides context defining this term in the “terms and  
conditions,” which state that this measure will be achieved if the  
Corps continues its ladder cleaning and sediment management  
programs.

1 reasons articulated by the Federal Defendants, the court rejects  
2 this proposition here. An ITS provides a qualified shield against  
3 liability for take to the receiving agency and its employees.  
4 Ariz. Cattle, 273 F.3d at 1239 ("if the terms and conditions of the  
5 Incidental Take Statement are disregarded and a taking does occur,  
6 the action agency or the applicant may be subject to potentially  
7 severe civil and criminal penalties under Section 9."), Ramsey v.  
8 Kantor, 96 F.3d 434, 442 (9th Cir. 1996) (actions "contemplated by  
9 an incidental take statement issued under Section 7 of the ESA and  
10 . . . conducted in compliance with the requirements of that  
11 statement" do not violate section 9.). In general, so long as an  
12 action agency provides the service with all relevant information,  
13 the action agency may rely on the Service's assessment of whether  
14 a proposed action will cause jeopardy. Res. Ltd. v. Robertson, 35  
15 F.3d 1300, 1305 (9th Cir. 1994). Plaintiffs have not alleged that  
16 the Corps withheld any information here.

17 Plaintiffs' only discussion of this issue is to retreat from  
18 their complaint and argue that regardless of whether the ITS was  
19 initially valid, if it is violated now, future activities by the  
20 Corps will cause take. Putting aside plaintiffs' claim 4B,  
21 prohibited taking has not yet occurred, however, so it cannot be  
22 said that the Corps is currently "alleged to be in violation" of  
23 the statute. ESA § 11(g)(1)(A); 16 U.S.C. § 1540(g)(1)(A).  
24 Indeed, in light of plaintiffs' success on their challenge to the  
25 BiOp, the court will craft an injunction designed to avoid such a  
26 violation. Plaintiffs provide no authority supporting the

1 proposition that every claim challenging the validity of an ITS  
2 under the APA engenders a companion citizen suit under the ESA  
3 arguing that when the ITS is withdrawn, take will occur.

4 Plaintiffs' second theory of section 9 liability argues that  
5 the Corps has violated the terms and conditions imposed by the ITS.  
6 Federal Defendants argue that as a matter of law, the Corps cannot  
7 be in violation of the first three terms, because these terms  
8 impose deadlines for action that have not yet passed. As to the  
9 remaining two terms, Federal Defendants move for summary judgment  
10 on the ground that plaintiffs, who will bear the burden of proof  
11 on this issue, have not provided evidence of noncompliance.

12 In opposing Federal Defendants' motion, plaintiffs argue that  
13 the evidence indicates that it will be impossible for the Corps to  
14 meet the deadline imposed by term and condition 3A, which requires  
15 completion of a feasibility study and planning, engineering and  
16 design phases of a fish passage improvement project for Daguerre  
17 by November 2012. Plaintiffs' argument is based on the Corps'  
18 inability to secure funding for these actions in the 2007 to 2010  
19 fiscal years and the Corps' own estimates of the time required to  
20 complete each step as presented in the biological assessment the  
21 Corps that preceded the BiOp. Corps. Admin. Record 1439, Reply  
22 Decl. of Patricia Weisselberg Ex. 1. In light of this evidence,  
23 the court rejects the Federal Defendants' invitation to conclude  
24 that this provision will be completely unenforceable until the  
25 deadline has passed. Plaintiffs have succeeded in raising a  
26 disputed question of material fact with regard to whether it will



1 be impossible (as opposed to merely unlikely) for the Corps to  
2 comply with this obligation.

3 Plaintiffs also argue that the Corps has violated term and  
4 condition four, which undisputedly presently binds the Corps, by  
5 failing to implement the Daguerre fish ladder clearing and sediment  
6 management programs required by the BiOp. Plaintiffs contend that,  
7 as part of these programs, the Corps must take water depth  
8 measurements across Daguerre's face in June each year to determine  
9 whether the 30 foot by 3 foot channel is being maintained.  
10 Plaintiffs further contend that the Corps' maintenance logs  
11 indicate that no such measurements were taken in June 2008.  
12 Weisselberg Reply Decl. Ex. 4. Plaintiffs separately argue that  
13 the Corps has violated its weekly maintenance obligations. The  
14 Corps disputes these factual contentions, citing a log purporting  
15 to show both that depth was measured in June 2008 and providing a  
16 statement of the official responsible for monitoring of the fish  
17 ladders, but it appears that this presents a dispute for trial.

18 The court notes, however, that it is unclear whether any  
19 remedies are available on these claims other than those available  
20 on the section 7 claim. Accordingly, plaintiffs are directed to  
21 file a brief explaining why litigation of this claim should proceed  
22 or, in the alternative, dismiss this claim.

#### 23 **IV. Remedy**

24 The parties in this case have agreed to bifurcate liability  
25 and remedy in litigation of this matter. See Order filed Sept. 2,  
26 2008 (Dkt. No. 165). The parties further agreed that plaintiffs'

1 motion for a preliminary injunction, filed mere weeks before the  
2 summary judgment motions on liability, did not need to be resolved  
3 separate from the summary judgment motions. The court regrettably  
4 allowed the matter to remain under submission for a period of time  
5 that, while not unheard of for summary judgment motions, exceeds  
6 that which is appropriate for preliminary injunctions.

7 At this point, it is unclear whether a preliminary injunction  
8 is necessary to avoid harms pending litigation of a permanent  
9 remedy. The court is reluctant to distract the parties from  
10 litigating final remedy by ordering further briefing on this issue.  
11 Nonetheless, the court directs the parties to submit supplemental  
12 briefing on whether, in light of the passage of time, the  
13 particular injunction requested by plaintiffs is necessary to avoid  
14 irreparable injury pending adoption of a final remedy. This  
15 briefing should address the impacts of the Supreme Court's recent  
16 decision in Monsanto Co. v. Geertson Seed Farms, \_\_\_ U.S. \_\_\_, 2010  
17 WL 2471057, 2010 U.S. LEXIS 4980 (June 21, 2010).

## 18 **V. Conclusion**

19 For the reasons stated above:

- 20 1. Plaintiffs' motion for partial summary adjudication as  
21 to standing (Dkt. No. 247) is DENIED AS MOOT.
- 22 2. Plaintiffs' motion for summary judgment as to liability  
23 (Dkt. No. 279) is GRANTED IN PART AND DENIED IN PART.
- 24 2. Federal Defendants' motion for summary judgment as to  
25 liability (Dkt. No. 295) is GRANTED IN PART AND DENIED  
26 IN PART.

- 1           3.    The court GRANTS summary judgment to plaintiffs as to  
2           the question of liability on plaintiffs' third claim.  
3           NMFS acted arbitrarily and capriciously in reaching the  
4           BiOp's no-jeopardy and no adverse modification  
5           conclusions, and in issuing the ITS.    Federal  
6           Defendants' cross motion is denied on this issue.
- 7           4.    The court GRANTS summary judgment to Federal Defendants  
8           as to liability on plaintiffs' claim 4A.  Plaintiffs'  
9           cross motion is denied on this issue.
- 10          5.    It appears that a disputed question of material fact  
11          remains as to plaintiffs' claim 4B, alleging that the  
12          Corps violated the terms and conditions of the ITS.  
13          Federal Defendants' motion for summary judgment is  
14          therefore DENIED as to this claim.  Plaintiffs did not  
15          seek summary judgment on this issue.
- 16          6.    Plaintiffs SHALL file a supplemental brief no later than  
17          July 23, 2010.  This brief shall address
- 18               a.    Whether claim 4B, if successful, would entitle  
19               plaintiffs to any remedy beyond that available  
20               under claim 3.
- 21               b.    Whether the particular terms of the preliminary  
22               injunction requested by plaintiffs are presently  
23               necessary to avoid irreparable injury, in light of  
24               Monsanto Co., \_\_\_ U.S. \_\_\_, 2010 WL 2471057, 2010  
25               U.S. LEXIS 4980.
- 26          7.    Federal Defendants SHALL file an opposition to the above

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no later than August 6, 2010. The intervenor defendants  
MAY file concurrent opposition briefs.

8. Plaintiffs MAY file a reply no later than August 13,  
2010.

This is not a final order as to all claims and all parties for  
purposes of Fed. R. Civ. P. 54(b). If a party should file an appeal  
from this non-appealable order, this court is not divested of  
jurisdiction. Estate of Connors v. O'Connor, 6 F.3d 656, 658 (9th  
Cir. 1993); United States v. Garner, 663 F.2d 834, 838 (9th Cir.  
1981).

IT IS SO ORDERED.

DATED: July 8, 2010.

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT