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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE CALIFORNIA NATURAL RESOURCES AGENCY, *et al.*,

Plaintiffs,

v.

WILBUR ROSS, *et al.*,

Defendants.

Case No. 1:20-cv-426-DAD-EPG

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: May 7, 2020
Time: 9:30 a.m.
Judge: Hon. Dale A. Drozd

Courtroom 5, 7th Floor
2500 Tulare Street
Fresno CA 93721

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INTRODUCTION

Plaintiffs ("CNRA") demand imposition of preliminary injunctive relief already requested by the *Pacific Coast Federation of Fishermen's Associations v. Ross* ("*PCFFA*") plaintiffs almost two months ago. Specifically, in their motion (ECF Nos. 53-60), CNRA seeks to compel the imposition of a particular set of operations identified in a Reasonable and Prudent Alternative Action ("RPA") in the National Marine Fisheries Service's ("NMFS") 2009 Biological Opinion ("BiOp") for the period from May 11 through May 31, 2020. CNRA has delayed seeking this relief and, more fundamentally, has presented no valid basis for the Court to award it. There is no likelihood of irreparable harm to any protected species at issue that would occur from May 11-31 in the absence of an injunction. Furthermore, CNRA is unlikely to succeed on the merits of either its National Environmental Policy Act ("NEPA") or California Endangered Species Act ("CESA") claims. Therefore, CNRA's Motion should be denied.

FACTUAL BACKGROUND

Federal Defendants' opposition to the *PCFFA* plaintiffs' motion for preliminary injunction, Fed. Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. at 2–8, *PCFFA*, ECF 119, provided the background of the Central Valley Project ("CVP"), Endangered Species Act ("ESA") consultation history on the long-term coordinated operations of the CVP and State Water Project ("SWP"), and a description of the Bureau of Reclamation's ("BOR") 2019 Operational Plan ("Plan"). We incorporate by reference that factual background and provide additional background here only to explain the continuous coordination between BOR, the federal fishery agencies, and state agencies and to apprise the Court of Delta operations and the impacts on listed species relevant to this brief.

I. Joint Operation of the CVP and SWP: State and Federal Coordination.

BOR and the California Department of Water Resources ("DWR") operate their respective facilities in accordance with a Coordinated Operations Agreement ("COA"). ECF 120-5, *PCFFA*, at 4-17 ("BA"). Through the COA, BOR and DWR share the obligation for meeting in-basin uses. *Id*. When coordinating their joint operations, BOR and DWR consider factors including required in-Delta flows, Delta outflow, water quality, schedules for the joint use facilities, pumping/wheeling arrangements, reservoir storage amounts, expected demands, weather

conditions, and any facility limitations. *Id*. In addition to daily coordination between BOR and DWR, a Water Operations Management Team ("WOMT") comprised of agency managers from BOR, DWR, NMFS, U.S. Fish and Wildlife Service ("FWS") and California Department of Fish and Wildlife ("CDFW") "coordinates at least weekly on overall water operations to oversee the implementation of various real-time provisions." Decl. of Kristin White ¶ 17, *PCCFA*, ECF 137-1 ("Second White Decl."). The WOMT incorporates advice from the interagency Salmon Monitoring Team and smelt Monitoring Team, which in addition to BOR, also includes DWR, NMFS, FWS and CDFW, to evaluate real-time information regarding status, distribution, and potential effects to ESA-listed fish from Delta operation. *Id.*; Decl. of Kristin White ¶ 45, *PCFFA*, ECF 119-1 ("First White Decl.").

II. CVP/SWP Plan for Combined Operations: Delta Outflow, Pumping Limits.

As described in our *PCFFA* Opposition, in early 2019, BOR and DWR submitted a proposed plan for revised CVP operations ("Plan") to NMFS and FWS for ESA consultation. ECF 119, *PCFFA*, at 3–4. BOR and DWR's goal was to develop a plan that provided similar or better protections for species while maximizing water deliveries. ECF 120-2, *PCFFA*, at 10–11 ("BiOP Summary"). The Services provided input and, through that ongoing consultation, BOR and DWR incorporated changes to the Plan, including additional commitments to improve conditions for listed species. BiOp Summary at 5–6; ECF 120-1, *PCFFA*, at 13, 47 ("ROD"); ECF 120-3, *PCFFA*, at 62 ("FWS BiOp"), 150; ECF 120-4, *PCFFA*, at 16, 19, 56 ("NMFS BiOp).

In 2019, as part of its Plan, BOR and DWR proposed an updated science-based approach for managing Delta pumping, moving away from the strictly calendar-based inflow to export (I:E) ratio that the State wishes to revert to, based on new studies showing that, despite the long-term magnitude of export reductions under the I:E ratio, survival of chinook salmon was not correlated with combined exports at the CVP and SWP pumps. Decl. of Joshua Israel ¶ 19, *PCFFA*, ECF 137-4 ("First Israel Decl."). In the replacement operation, BOR, DWR and the Services focused more directly on the biological objectives by incorporating export restrictions based on a combination of real-time monitoring, ecological conditions, and loss thresholds. First Israel Decl. ¶ 20; Brown Decl. ¶¶ 9, 10, 12; Decl. of Matt Nobriga ¶ 17 ("Nobriga Decl."). This new plan was

intended to provide a similar or greater level of protection as the 2008 FWS and 2009 NMFS BiOps by limiting entrainment and loss at the export facilities based on a conservative threshold. NMFS BiOp at 534.

Protections for delta smelt and salmonids begin with a restriction on OMR to levels no more negative than –5,000 cfs and then additional protections are added based on real-time environmental and species conditions. *See*, *e.g.*, Nobriga Decl. ¶ 17. For salmonids, the Plan includes loss thresholds that are based on 90% of the maximum loss measured over the past 10 years. NMFS BiOP at 534-35. When 50% of the threshold is reached exports are restricted, and then further restricted when 75% of the threshold is reached. NMFS BiOp at 534-35. These restrictions last for an extended period, so BOR's goal is to operate in a manner that avoids restrictions on exports due to reaching the 50% and 75% of the loss threshold. First Israel Decl. ¶ 12. Critically, these loss thresholds are seasonally distinct for steelhead with a December 1 - March 31 threshold intended to protect Sacramento Basin fish and an April 1-June 15 threshold intended to protect San Joaquin Basin fish. NMFS BiOp at 534-35. To avoid multiple years at or near the maximum historical salvage, a cumulative loss threshold requires staying below the total historical salvage for the duration of the Biological Opinion (10 years), and includes an independent peer review if salvage exceeds 50% before year 5. BA at 4-68 to 4-69.

For delta smelt, Reclamation's plan describes that from mid-March until June 30 or when water temperatures in the South Delta become lethal to delta smelt, OMR flow will be no more negative than -5,000 cfs. Nobriga Decl. ¶ 17. The operation also includes a larval and juvenile delta smelt restriction that assesses the vulnerability of the population to loss due to entrainment. BA at 4-68. BOR may choose to begin operating to an OMR flow of -3,500 cfs beginning April 1 if conditions indicate the water is fairly turbid and entrainment risk is higher. Nobriga Decl. ¶ 17. This focus on OMR and turbidity is the result of FWS's development of life cycle models that relate a 21-year history of delta smelt births and deaths from 1995 through 2015 to environmental conditions observed through several available long-term data sets. *Id*. at 14. These operational actions are anticipated to keep larval and juvenile entrainment losses low. FWS BiOp at 153.

OMR management is supported by a weekly assessment prepared by BOR and DWR,

modified with technical assistance from NMFS, FWS, and CDFW through Salmon and smelt Monitoring Teams. First White Decl. ¶ 45. OMR Management would continue until June 30 (for delta smelt and Chinook salmon), until June 15 (for steelhead), or when species-specific off ramps occur. BA at 4-71.

III. Delta Species Update

Currently, salvage[1] at the State and Federal facilities is below historical averages. Second Israel Decl. ¶ ¶ 14; 18. The most current salvage and loss data for the species, based on the WOMT's weekly Assessment of CVP and SWP Delta Operations on ESA Listed Species at issue in this case are:

> **Steelhead:** Based on historical data, 83% of annual steelhead salvage is expected to have already occurred. Second Israel Decl. ¶ 16. The single year loss threshold for steelhead between April and June 15 is 1,552, and the 50% loss threshold between April and June 15 is 776. *Id.* Current loss from April 1-June 15, as of April 28, 2020, is 244.8. *Id.* The goal is to avoid exceeding the 50% loss threshold with proactive restriction and current estimates based on historic salvage indicated that the 50% loss threshold will not be exceeded. Id. ¶ 16.
> **Delta smelt:** As of April 28, no adult Delta smelt have been salvaged at the CVP and SWP. One larval delta smelt was salvaged at the CVP fish collection facility this water year on April 13, 2020. *Id*. ¶ 9.
> **Longfin smelt**: As of April 28, no adult Longfin smelt have been salvaged. *Id*. ¶ 10. 1,986 juvenile Longfin smelt had been salvaged. *Id*. On April 28, 2020, the Delta smelt Monitoring Team, reported that Longfin smelt salvage has declined at the CVP facilities, while concomitantly increasing at the SWP facilities. Second Israel Decl. ¶ 11.
> **Winter-run Chinook salmon:** As of April 28, the total loss of 188 winter-run chinook salmon so far this year represents 3.8% of the single-year loss threshold performance measure in the 2019 NMFS BiOp. Second Israel Decl. ¶ 17. 99.8% of expected salvage of winter-run Chinook salmon is estimated to have occurred. Second Israel Decl. ¶ 18. If winter-run Chinook salmon continue to be lost at a similar rate as to historic patterns, it is likely the cumulative loss will be 188 before the end of the salvage season in mid-June, or approximately 3.7% of the single-year 50% loss performance measure at the end of the salvage season, which does not exceed the Reclamation loss threshold performance measures and is far below historical loss conditions under the 2009 NMFS BiOp. *Id.* ¶ 18.

ARGUMENT[2]

[1] Salvage is "entrainment or injury of [fish species] that come in contact with the fish facility as water is being diverted." FWS BiOp at 135-36.

[2] Our *PCFFA* Opposition set forth the relevant preliminary injunction, ESA, and APA standards. ECF

I. CNRA HAS FAILED TO DEMONSTRATE IRREPARABLE HARM.

CNRA has not met its burden to clearly show that irreparable harm is likely in the absence of its requested injunction. *Winter v. NRDC*, 555 U.S. 7, 22 (2008). "A mere *possibility* of irreparable harm is insufficient." *Earth Island Inst. v. Elliott*, 290 F. Supp. 3d 1102, 1124 (E.D. Cal. 2017). Additionally, "[a] court may not consider harm that will occur irrespective of an injunction, i.e. harm that the award of an injunction will not alleviate or prevent." *Id.* Like the *PCFFA* Plaintiffs before them, CNRA also incorrectly "advocat[es] application of an irreparable harm analysis that is largely untethered from any sense of the magnitude of that impact to the overall population of that species." ECF 142 at 8. As Federal Defendants have previously explained, demonstrating irreparable harm requires more than showing that members of a listed species may be taken, since the ESA expressly contemplates and specifically authorizes such take consistent with an Incidental Take Statement ("ITS"). ECF 137, *PCFFA* at 7-9; *see also* ECF 142, *PCFFA*, at 7-9. Here, any take of ESA-listed species that might occur from May 11-31 will not exceed the take authorized in the presumptively valid 2019 ITSs and would not constitute irreparable harm.

A. CNRA's Delay In Seeking Relief Undercuts Its Claims of Irreparable Harm.

"A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief." *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213–14 (9th Cir. 1984) ("By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action."). Indeed, for plaintiffs seeking a temporary restraining order ("TRO") – as CNRA effectively is here[3] – the Court "will consider whether the applicant could have sought relief . . . at an earlier date without the necessity for seeking last-minute relief." Local Rule 231. If "the applicant unduly delayed in seeking injunctive relief," that delay can "constitute[] laches or contradict[] the applicant's allegations of irreparable injury," and the Court "may deny the motion solely on either ground." *Id.* Accordingly, courts in this district routinely deny motions based on delay alone. *See*,

119, *PCFFA*, at 2, 8-9. We incorporate those discussions here.

[3] CNRA asked the Court to decide its motion on an emergency basis, with expedited briefing (ECF 52), and it seeks relief for a limited duration (May 11-31), not throughout the case.

e.g., *Mammoth Specialty Lodging, LLC v. We-Ka-Jassa Inv. Fund*, No. CIV S-10-0864 LKK/JFM, 2010 WL 1539811 (E.D. Cal. Apr. 16, 2010) (denying TRO and preliminary injunction because plaintiff waited more than two weeks).

Since CNRA filed its first complaint on February 20, 2020 (ECF 1), the *PCFFA* plaintiffs have moved for a preliminary injunction, which is now fully briefed (ECF Nos. 81-86, 119-120, 153, *PCFFA*), and sought a TRO, which the Court denied (ECF 142, *PCFFA*). At no point did CNRA join the *PCFFA* plaintiffs in seeking emergency relief, even though CNRA here admits that its requested relief is subsumed within the preliminary injunction sought in *PCFFA*. ECF 54 at 2 n.1 ("California's motion and more limited request for relief is intended to supplement, rather than replace, the [*PCFFA]* plaintiffs' motion . . . California understands that its motion may be moot if the Court grants the *PCFFA* plaintiffs' motion"). Nor did CNRA previously indicate a desire to seek its own emergency relief. Instead, CNRA waited until after the *PCFFA* TRO was decided and the *PCFFA* preliminary injunction briefing was complete to request an injunction for harm it alleges will occur in less than two weeks.

CNRA states it was waiting until it could also bring an ESA claim, ECF 52 at 2, but in its Motion, CNRA simply incorporates *PCFFA's* ESA arguments, which have already been briefed. ECF 54 at 8-9. CNRA's Motion adds alleged violations of NEPA and CESA, ECF 54 at 9-19, but a motion premised on such claims could have been brought any time after the ROD was issued on February 18, 2020, and certainly at the same time as *PCFFA* plaintiffs on March 5, 2020 (ECF 81, *PCFFA*). *See S.G. Farms v. San Joaquin Cty. Bd. of Supervisors*, No. 219CV01075 KJMEFB, 2019 WL 2491528, at *2 (E.D. Cal. June 14, 2019) (rejecting argument that plaintiffs' delay in seeking TRO was warranted because, although the regulations that plaintiffs challenged had just become effective, "plaintiffs raised several other bases for their" injunction "independent of" those regulations which could have supported an injunction months earlier).

Similarly, CNRA's allegations that "recently discovered and developed" evidence prompted their belated motion fall short. ECF 52 at 2. CNRA has known the details of operations under the 2019 BiOps since those BiOps were issued in October 2019, including what operational constraints would be in place in May 2020, and operation of the CVP to those specifications is

certainly not *new* evidence. In fact, DWR, an agency within CNRA, was itself an applicant in the ESA Section 7 consultation that resulted in the 2019 BiOps. ECF 51 ¶ 9. Certainly, *PCFFA* plaintiffs believed they had enough knowledge almost two months ago to seek the same injunctive relief that CNRA seeks here, based on the same allegations of irreparable harm to ESA-listed species. DWR, through its participation in WOMT and other technical working groups, had contemporaneous first-hand knowledge of those same facts. In reality, CNRA has no justification for sitting out two months of briefing only to raise new allegations now, on the eve of a decision regarding the *PCFFA* preliminary injunction motion. CNRA's deliberate choice to delay its filing has wasted both party and judicial resources and "weighs against the need for a preliminary injunction." *Mitchell v. Imperato*, No. 2:19-CV-297 WBS EFB, 2019 WL 1018696, at *2 n.4 (E.D. Cal. Mar. 4, 2019).

B. Delta smelt Will Not Suffer Any Irreparable Harm from May 11-31.

As to delta smelt, CNRA's primary argument is that increased export pumping, without I:E requirements, allegedly "may" allow the Low Salinity Zone ("LSZ") habitat preferred by delta smelt to move upstream to the deeper river channels of the western Delta, thereby reducing survivability. ECF 54 at 20-21. This argument relies exclusively on Dr. Herbold's declaration (*id.*); however, his analysis is either mistaken or flawed. Although Dr. Herbold claims operating the Plan will shift the LSZ "several kilometers upstream" compared to where it would have been located if operations were under the 2009 NMFS BiOp (ECF 55 ¶¶ 67-68), in reality, the figure he relies on shows that the difference in the LSZ's location may be approximately 1 km and may not be observable in real data as the Plan is implemented through time.[4] Nobriga Decl. ¶¶ 18-20. Thus, CNRA's alleged reduction in delta smelt survivability from implementation of the Plan from May 11-31 is not supported by the evidence presented. CNRA's insistence on the I:E ratio's alleged importance to delta smelt is also misplaced. The I:E ratio was a part of the 2009 NMFS RPA meant

[4] Dr. Herbold may have confused the "without action" model scenario with the "proposed action" model scenario. Nobriga Decl. ¶ 20. The "without action" scenario assumed the CVP and SWP were largely non-operational. *Id.*

to address San Joaquin basin salmonids and was neither included nor analyzed in the 2008 FWS BiOp. ECF 137, *PCFFA*, at 7; Nobriga Decl. ¶ 18. Any benefits to delta smelt from less negative OMR flow and higher Delta outflow were ancillary, and FWS did not consider the I:E ratio a necessary measure to protect delta smelt. Nobriga Decl. ¶ 18.

Contrary to Plaintiffs' allegations, delta smelt are not expected to be at increased risk under Plan operations, and the Plan includes various components to protect against irreparable harm to delta smelt from May 11-31. [5] First, surveys indicate that delta smelt are not likely to be found where entrainment risk is the highest – the San Joaquin River or south Delta channels. Nobriga Dec. ¶¶ 6-10. To date, there has been no survey catch of delta smelt in either area. ECF 161; Nobriga Decl. ¶ 10. Additionally, under the Plan, OMR will be no more negative than -5,000 cfs until June 30 or when water temperatures in the South Delta become lethal to delta smelt. Nobriga Dec. ¶ 17; FWS BiOp at 49, 150. This matters because reducing negative OMR flows will limit turbidity, and delta smelt entrainment risk is higher when the water in Old and/or Middle Rivers is turbid compared to when it is clear.[6] Nobriga Dec. ¶ 11. Finally, under either current or prior operations, from February-June, California Water Resources Control Board Decision-1641 ("D-1641") requires the CVP and SWP to meet Delta outflow (or its converse, salinity) requirements determined by the prior month's hydrology to protect fish and their habitat. *Id*. ¶ 21. Thus, the flows required under D-1641 are higher when it is wet than when it is dry, and, conversely, the allowable salinity intrusion is higher when it is dry than when it is wet. *Id.* Given the current dry

[5] In footnote 10, CNRA wrongly states that the Plan "relies on loss thresholds for steelhead to trigger protective actions that would reduce exports" based on delta smelt salvage numbers. In actuality, the 2019 FWS BiOp discussion that CNRA cites merely acknowledges that if steelhead loss thresholds are triggered, OMR could be more positive under the Plan. ECF 56-2 at 150-151. The Plan contains several smelt-specific protections separate from any steelhead loss thresholds or delta smelt salvage numbers, including OMR restrictions and a risk assessment process to manage entrainment levels of larval/juvenile delta smelt. *Id.*; FWS BiOp at 42-43.

[6] Dr. Herbold stated that an increase in turbidity at the Bacon Island gauge in Old River occurred in mid-February (ECF 55 at 11-12), but he failed to explain that a much stronger rise in turbidity caused by windy weather was also observed further downstream near the confluence of the Sacramento and San Joaquin Rivers, where any delta smelt that had moved into the Delta from areas downstream would first detect a gradient. Nobriga Decl. ¶ 12. Recent catch data indicate that delta smelt remain distributed in the higher turbidity waters of the Sacramento River-Cache Slough corridor. *Id.*

conditions, impacts to delta smelt would be very similar from May 11-31 regardless of whether BOR and DWR were operating under the 2019 BiOps or the 2008/2009 BiOps. *Id.* Thus, impacts to delta smelt also would be very similar regardless of whether CNRA's preliminary injunction were granted or denied. As a result, CNRA has failed to prove that delta smelt clearly will suffer irreparable harm in the absence of its requested relief.

C. Steelhead Will Not Suffer Any Irreparable Harm from May 11-31.

CNRA also has failed to prove that operations in May will result in irreparable harm to Central Valley steelhead. Based on historical data, 83% of annual steelhead salvage is expected to have already occurred. Second Israel Decl. ¶ 16. Despite more than 80% of the salvage expected for this year having already occurred, current losses as of April 29, 2020 from April 1- June 15 (the relevant time period for San Joaquin basin Central Valley steelhead) are 244, well below either the single year loss threshold (1,552) or the 50% loss threshold (776) established for the same time period. Second Israel Decl. ¶ 15. Further, as noted in the companion *PCFFA* litigation, the proposed action includes protective measures to ramp down pumping if salvage exceeds the 50% loss threshold. Critically, salvage numbers at CVP pumps are below even the 50% loss threshold – despite the majority of the expected steelhead salvage already having occurred.

As this Court recognized,

> Section 7 of the ESA contemplates that a project such as the one under consideration here may cause "incidental take" of listed species without necessarily resulting in jeopardy, 16 U.S.C. § 1536(b)(4), and every biological opinion issued in connection with the projects in recent history has anticipated and permitted some degree of entrainment/salvage and loss at or due to pumping operations.

ECF 142, *PCFFA*, at 10. Here, CNRA asks the Court to require BOR to implement a specific component of the 2009 BiOp. Notably, however, the performance metrics identified in the 2019 BiOps are based on observed losses in years when the 2009 BiOp was implemented. NMFS BiOp at 752. Because the salvage numbers at CVP facilities are now comparatively much lower than historic losses under the 2009 BiOp, Second Israel Decl. ¶ 14-16, CNRA makes no showing of irreparable harm.

It is equally without merit for CNRA to claim BOR's actions through the end of May are

likely to appreciably reduce the recovery of Central Valley steelhead. *Cf.* ECF 54 at 22. NMFS has already concluded that BOR's plan of operations would not jeopardize either the survival or recovery of the species, in part based on BOR's commitment to include, as part of the proposed action, specific real-time Old and Middle River restrictions and revised performance measures with cumulative and single-year loss thresholds. NMFS BiOp at 769-781. In addition, NMFS identified that several elements of BOR's proposed action "are aligned with or directly implement recovery actions identified in the [Central Valley steelhead] recovery plan." *Id.* CNRA's generalized arguments to the contrary do nothing to undermine NMFS's conclusions that the project will not jeopardize the recovery of the species. Moreover, CNRA's claim that "[BOR's] likely increase in pumping well beyond levels that would have been allowed under the previous biological opinions, resulting in the predicted increase in steelhead loss of 232%" ECF 54 at 22 is not only misleading, but is also not grounded in reality. First, CNRA misrepresents the underlying estimates, as NMFS itself cautioned that the results "should be considered a coarse screening level analysis due to limitations in the salvage-density model itself." NMFS BiOp at 510. Second, this number is a snapshot of the early analysis before development of the loss thresholds and does not accurately reflect NMFS's final conclusions. *See*, *PCFFA* ECF 120-4 at 519-556, 591, 773-776. Even more important is that the actual numbers of salvaged steelhead this year are comparatively lower than historic loss conditions under the 2009 BiOp. Second Israel Decl. ¶ 14-16; *compare to PCFFA* ECF 120-4 at 510. CNRA has failed to prove that steelhead will suffer irreparable harm.

D. Longfin smelt Will Not Suffer Any Irreparable Harm from May 11-31.

CNRA also makes vague allegations of irreparable harm to Longfin smelt, a species protected only under the CESA, not the federal ESA. ECF 54 at 4, 21. As explained below, the CESA does not apply to Federal Defendants. *See infra.* Arg. § II.B. Therefore, CNRA is not likely to succeed on the merits of its CESA claim against Federal Defendants, and any alleged harm to Longfin smelt is irrelevant when assessing CNRA's request for a preliminary injunction to that extent.

Moreover, Lngfin smelt salvage numbers to date have been in line with salvage in "Below Normal" and "Dry" years under the prior operational regime that CNRA seeks to impose. Second Israel Dec. ¶ 10. As of April 22, 2020, WOMT reported that salvage was declining at both facilities. Id. ¶ 11. More recently, on April 28, the Delta smelt Monitoring Team (which includes DWR and CDFW) reported that Longfin smelt salvage has "dropped off" at the CVP, while it "rose" at the SWP. *Id*. Even though the SWP is pumping at low levels, it has still salvaged a high number of Longfin smelt. *Id*. ¶¶ 11-12. Therefore, CNRA cannot show that implementing their requested relief will actually alleviate the harm to Longfin smelt that they allege will occur from May 11-31. Intervenor-Defendants (who are regulated by the CESA) further explain why this species is unlikely to suffer irreparable harm absent imposition of CNRA's preliminary injunction.[7]

II. CNRA FAILS TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.[8]

A. Reclamation Fulfilled NEPA's Requirements.

NEPA is a procedural statute that establishes the process by which federal agencies must evaluate and disclose the environmental effects of, and alternatives to, proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA serves the dual purpose of informing agency decision-makers and the public of the significant environmental effects of proposed major federal actions. *See Robertson v. Methow*

[7] Nor can CNRA show irreparable harm under NEPA. CNRA is unlikely to succeed on the merits of its NEPA claim, infra. Moreover, CNRA is wrong that a NEPA violation creates a presumption of irreparable harm. As this Court explained, *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004), upon which CNRA relies, was "effectively overruled" on that point by *Monsanto v. Geertson Seed Farms*, 561 U.S. 139 (2010) and *Winter*, 555 U.S. at 22. Thus, "a NEPA violation, without more, does not establish the requisite likelihood of irreparable harm." *Conservation Cong. v. U.S. Forest Serv*., 13-cv-01922-TLN, 2016 WL 6524860, at *5 (E.D. Cal. Nov. 3, 2016).

[8] CNRA makes no arguments regarding the likelihood of success of its ESA claims, instead referring the Court to the *PCFFA* Plaintiffs' briefing. ECF 54 at 15-16. Federal Defendants incorporate by reference our opposition thereto. ECF 119. We simply add that the take of ESA listed species resulting from the State of California's SWP operations also is covered by the 2019 BiOps and, in particular, their ITSs. Thus, if the 2019 BiOps and ITSs are legally infirm, then the State of California's SWP operations also violate the ESA.

Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA does not mandate particular results, but simply describes a necessary process.[9] Courts apply a narrow and deferential standard of review and should "presum[e] the agency action to be valid and affirm[] the agency action if a reasonable basis exists for its decision." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). A court may not "overturn an agency decision because it disagrees with the decision or with the agency's conclusions about environmental impacts." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010).

BOR thoroughly analyzed four action alternatives and the no action alternative. FEIS at 1-1—1-13. The FEIS takes NEPA's requisite "hard look" at all potential environmental effects. *Id.* at 1-3—1-8 (overview); *see, e.g.*, *Nw. Envtl. Advocates v. NMFS*, 460 F.3d 1125, 1139 (9th Cir. 2006) (NEPA does not require that "an agency engage in the most exhaustive environmental analysis theoretically possible," but only that it take a "hard look" at relevant factors). CNRA takes issue with BOR's thorough analysis of the impacts on delta smelt, of storm-related flexibility, and of mitigation for Longfin smelt, and also claims that a supplemental EIS was required. ECF 54 at 14-15. As shown below, the FEIS meets the "hard look" requirement in all three areas, as well as in its determination that a supplemental EIS was not required.

1. The EIS Provides A "Hard Look" At All Environmental Effects.

CNRA's argument that BOR's analysis is "tainted by the inclusion of speculative protection measures," i.e., the Delta Fish Species Conservation Hatchery, is wrong on the facts and wrong on the law. The conservation hatchery is included as a commitment in the proposed action analyzed in the 2019 FWS BiOp and in the ROD. BOR conducted a detailed analysis in the FEIS, explaining that the conservation hatchery is expected to benefit wild delta smelt by propagating smelt to augment the wild population. Ex. A (FEIS) at 5-76, 3-51; ECF 54 at 14; Ex.

[9] At NEPA's core is the requirement to prepare a "detailed statement" known as an EIS when the agency anticipates that its contemplated action may have significant environmental effects. *Id.*; 40 C.F.R. § 1508.11. NEPA regulations promulgated by the Council on Environmental Quality require an agency first to prepare and circulate a draft EIS for public comment before taking any action concerning the proposal that has "an adverse environmental impact" or "limit[s] the choice of reasonable alternatives." 40 C.F.R. §§ 1502.09(a), 1502.9(c)(1)(i), 1502.19; 1506.1(a). The agency's selected course of action generally should fall within the range of alternatives disclosed and analyzed the draft EIS. *Id.* § 1505.1(e).

B (FEIS App. O) at O-313, O-374, Ex. C (FEIS Appx. AB) at 4-80. That the hatchery will be operational by 2030 does not make it a "speculative protective measure" for purposes of analyzing effects. ECF 54 at 14. CNRA omits the fact that the hatchery is the second part of a phased process, with the first part relying on existing hatchery facilities to supplement the wild Delta smelt population within 3-5 years from issuance of the 2019 FWS BiOp. Ex. A. (FEIS) at 3-51; FWS BiOp at 171-72. CNRA did provide a comment to the EIS that the wild capture requirement may be difficult to meet, ECF 54 at 14, but BOR considered and responded to that comment, concluding that it was unsupported. Ex. D (MR 4) at 4-15-4-16. BOR satisfied NEPA's procedural requirements by making a "full and fair" assessment of the impacts of the hatchery on delta smelt. *League of Wilderness Defs v. Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014)

Next, CNRA critiques the analysis of pumping during storm-flex events. ECF 54 at 14-15. CNRA argues that the FEIS and BiOps are inconsistent, and that BOR did not explain its modeling assumptions. BOR has considerable discretion in determining how to measure environmental effects, and application of the CalSim II model is precisely the type of technical analysis where the "court's deference to the agency's judgment is at its peak." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1107 (9th Cir. 2016). DWR and Reclamation both use CalSimII, applying their operational expertise—based on historical operations and hydrology—to evaluate the anticipated effects of the storm-flexibility action. Ex. A (FEIS) at 18-19; Appx F1 at 1-2. The allowance for capture of excess flows in the Delta that result from storm related events occurs when Reclamation and DWR determine that there is a higher level of flow available for diversion. Ex. A (FEIS) at 3-43; Ex. E (State EIR) at 5-54. Importantly, the same section of the FEIS that CNRA cites also provides that "Reclamation and DWR *would not* pursue storm-related OMR flexibility if there are biological concerns." Ex. A (FEIS) at 3-32-44. The FEIS also states that "Reclamation and DWR would continue to monitor fish in real-time and would operate in accordance with the thresholds described in Section 3.4.5.6.2." Ex. A at 3-42.

In other words, pumping at 14,900 cfs during storm events is dependent on a risk analysis showing it would not have adverse effects on listed species beyond what is analyzed in the

FEIS and the BiOps. Ex. A. (FEIS) at 3-40-3-43; at 5-685-70; Ex. B (App O) at O-91-96; Ex. E at letter 45, Comment Response 50, 51. If the risk analysis shows that higher exports would not additionally affect fish, for example if the multi-agency salmon and smelt monitoring teams were to determine very few fish were expected to be influenced by increased pumping, and no additional impact to life history diversity was expected, then there is no biological reason to limit pumping during a storm event. *See* Ex. A. (FEIS) at 3-43-44 ("Reclamation and DWR would not pursue storm-related OMR flexibility" if an evaluation of biological conditions would cause them to trigger an OMR restriction and describing risk assessment process). Because the proposed action specifically limits the operation to the impacts analyzed in the FEIS, CNRA's claim that the impacts were not analyzed makes no sense and should be rejected.

Last, contrary to CNRA's claims, BOR's proposed action does not rely solely on monitoring for Longfin smelt. ECF 54 at 16 (arguing FEIS is substantively deficient because it "proposes only to monitor, and not to mitigate for, Longfin smelt losses"). The FEIS shows Reclamation took a "hard look" at the impacts on Longfin smelt, even identifying it as an area of controversy in the FEIS. Ex. A (FEIS) at 1-8--1-10. NEPA does not require that harms, even if significant, actually be mitigated; it only prescribes that an EIS discuss mitigation measures, with "'sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *South Fork Band Council of Western Shoshone of Nevada v. Interior*, 588 F.3d 718, 727 (9th Cir. 2009); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). The FEIS does include and evaluate mitigation; in fact, it includes the same mitigation that DWR and CDFW rely on in their analysis. The mitigation for Longfin described in the FEIS—8,000 acres of habitat restoration--is also identified as mitigation for Longfin smelt in California's compliance documents. *Compare* Ex. F (EIR) at II.1.8-3-4) (discussing the 2019 Biological Opinion 8000 acres of habitat restoration as relevant to state's analysis "because they provide additional minimization and mitigation for Delta smelt and Longfin smelt") *with* Ex. A (FEIS at 4-78), Ex. B (App O) at O-313 ("completion of the 8,000 acres of tidal habitat operation would have the potential to provide positive effects on Longfin smelt larvae in the north Delta and therefore provide some offsetting of potential negative effects from seasonal operations…"), O-314 (noting

expectation that anticipated state ITP would also limit Longfin smelt entrainment losses), O-476. Moreover, Reclamation's inclusion of monitoring is disclosed in the FEIS and is consistent with the effects analysis for Longfin smelt, which indicates that there is scientific uncertainty relating to CVP and SWP impacts on Longfin smelt and more study is needed. Ex. A (FEIS) at 1-8-1-9; 5-71; Ex. C (Appx AB) Ch.1-8; FEIS Appx C at 21 (describing fall midwater trawl survey and distribution and abundance survey). CNRA's attempt to apply a double standard to BOR's analysis should be rejected; the FEIS appropriately considered mitigation for Longfin smelt.

2. BOR Reasonably Concluded a Supplemental EIS Was Not Required.

CNRA's conclusory assertions that BOR was required to circulate a supplemental draft EIS because there were refinements to the proposed action and because BOR added additional modeling information is likewise without merit. As CNRA recognizes, a supplemental draft of an EIS is needed only if the agency makes "substantial changes to the proposed action that are relevant to environmental concerns" or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). The question of whether an SEIS is required "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Or. Nat. Res. Council,* 490 U.S. 360, 376 (1989).

Tellingly, CNRA never identifies a single element from their list of 23 supposed changes to the proposed action that "departs substantially" from the draft EIS in a manner that wasn't considered in the draft. Nor could they. BOR made refinements to Alternative 1, the proposed alternative, based on comments on the draft EIS, and input from FWS and NMFS through ESA consultation, including adding funding commitments for restoration and fish passage projects identified in the DEIS, clarifying operational elements, adding commitments to preserve the Shasta cold water pool, adding studies to better understand operational impacts, and adding independent panels to provide outside expertise. *Id*.; *compare, e.g.*, Ex. H (DEIS) at 3-17 with Ex. A (FEIS) at 3-24 (performance metrics); Ex. H at 3-18 with Ex. A at 3-26 (cold water management tiers); Ex. H at 3-21-22 with Ex. A at 3-29 (fall and winter refill); Ex. H at 3-23 with Ex. A at 3-31 (Shasta

Temperature Control Device); Ex. H at 3-22 with Ex. A at 3-31 (Battle Creek fish passage Project); DEIS at 4-10 with FEIS at 3-32 (Knights Landing fish passage repair); DEIS at 5-82, 5-90 with FEIS at 3-32 (yellow billed cuckoo study); DEIS at 3-24 with FEIS at 3-33 (ramping rates); DEIS at 3-26, 3-31-32, 3-36, 3-37 *with* FEIS at 3-36, 3-40, 3-42, 3-46, 3-47 (OMR refinements and studies).

Russell Country Sportsmen v. U.S. Forest Service, 668 F.3d 1037, 1045 (9th Cir. 2011), which CNRA cites, actually supports BOR' position. In *Russell Country*, the Ninth Circuit overturned the district court's finding that an SEIS was required, concluding that changes to the proposed action "did not involve substantial modifications that went to the heart of the proposed action" or "pose[] new and previously unconsidered environmental questions." *Id.* at 1049. It also noted that a modified alternative that lessens environmental impacts is less likely to be a substantial change. 668 F.3d at 1048. Here, Reclamation reasonably concluded a supplemental EIS was not required. Ex. D, E (FEIS App AA) ; ROD at 45.

Finally, CNRA wrongly asserts that an SEIS is required because additional modeling information contained in the FEIS supposedly added "significant new information" and raised substantial questions about environmental effects. ECF 54 at 18. This argument fails for several reasons. First, CNRA faults BOR for adding a sensitivity analysis that was requested by multiple commenters, including CDFW. CNRA should not then complain that the information was added, especially where it fails to even allege that the additional information significantly changed the effects analysis. Ex. D (FEIS MR 4) at 7; Ex. I (CDFW comment letter). Second, while BOR supplemented the modeling in the EIS, the Summer-Fall Habitat Action[10] was qualitatively considered in the DEIS. Ex. H (DEIS) at 3-36-38; 5-3; 5-8; 5-71-72; 5-124. It is also surprising that CNRA is complaining about the effects of the Summer-Fall habitat

[10] CNRA calls this the Fall X2 Action, but it is also called the Delta smelt Summer-Fall Habitat Action in DWR's EIR. CNRA cites FEIS section F1.1.1, which refers to the "Delta smelt Habitat Action" in the CalSimII Assumptions for Revised Alternative 1. This action is also referred to as the Delta smelt Summer-Fall Habitat Action in the DEIS (Ex. H at 3-37) and FEIS (Ex. A at 3-46). Fall X2 generally refers to the Delta salinity requirement in September-November under the 2008 FWS BiOp. Ex. A at 3-16.

action when the same action is included in DWR's proposed action, including the State ITP and EIR, its analysis is consistent with BOR's, and both agencies propose to implement the action through a collaborative planning process. *See* Ex. A (FEIS) at 3-46-3-49; Ex. F (EIR) at 3-33; and Ex. G (ITP) at 115.

BOR specifically evaluated whether the modeling in the FEIS presented new information relevant to environmental concerns and determined for each resource that it did not. *See, e.g.*, Ex. J (FEIS App. F1 - Discussion of Sensitivity Analysis) at 1.2.14.4 (assessing the results as compared to DEIS modeled output and analysis, and concluding "there are not substantive differences in effects."); *see also id. at* 78-92 (indicating the effects are similar to the DEIS). CNRA's complaint that the EIS modeling discloses that the final proposed action will reduce the size of the low salinity zone also misses the mark. The section CNRA cites, F1.1.2.14.4, includes a detailed explanation concluding that the revised modeling of the area of low salinity zone habitat is "consistent with the DEIS modeling in indicating the potential for negative effects to Delta smelt juveniles/subadults under Alternative 1...." Ex. J, K (FEIS App. F F1.1.2.14.4); *see also* Ex. F at 5-123-124. CNRA also fails to recognize that the modeling does not account for potential beneficial effects of Suisun Marsh Salinity Control Gates operations, *id* F1.1.2.14.4, although they recognize the benefits of gate operation in their own EIR analysis. Ex. F at 5-124. The additional modeling did "not reveal any significant new impacts, any substantial increases in the severity of an impact, or result in a new feasible alternative or mitigation measure that was dramatically different from what was analyzed in the Draft EIS." Ex. E (FEIS, AA MR 1) at 2.

In sum, the Court should defer to BOR's reasoned determination that an SEIS was not necessary. *See Marsh*, 490 U.S. at 376-78 (decision as to whether to prepare an SEIS "implicates substantial agency expertise" which requires the court to be at its most deferential).

B. <u>CNRA's California Endangered Species Act Claim Is Without Merit and Not Likely to Succeed.</u>

CNRA next argues that BOR has violated the APA by not complying with the CESA. ECF 54 at 9. This claim first appeared last week in the amended complaint CNRA filed contemporaneously with its motion. ECF 51 at 40 (5th Claim for Relief). CNRA has never

previously asserted that CESA applies to the CVP during its entire history, or objected to BOR's long-held position that it does not have CESA compliance obligations. *E.g.*, Ex. D (FEIS App AA). The comment letters from the State on the draft EIS and on the Final EIS did not mention a need for BOR to comply with the CESA. *See, e.g.*, Ex. I (State comment letters). CDWR's draft EIR for the Long term Operation of the SWP (2019) and its ITP recognize a separate operation of the CVP not constrained by CESA. Ex. F (EIR); Ex. G (ITP) at 96. Moreover, just last year, Governor Newsom vetoed a California Assembly bill that expressly proposed to apply CESA to the operations of the Central Valley Project. *See* Ex. M (SB 1) at § 2. Thus, the law never went into effect.

As shown below, there is no basis for applying CESA to the CVP under Federal law or even under CESA's own terms, and thus, CNRA is unlikely to succeed on its new-found CESA claim.[11]

1. Because There is No Congressional Authorization to Apply CESA to BOR, Such Application Violates Intergovernmental Immunity and Is Preempted.

Under the doctrine of intergovernmental immunity, states may not regulate the federal government absent "clear and unambiguous" congressional authorization. *See Hancock v. Train,* 426 U.S. 167 (1976) (inviting Congress to revise the Clean Air Act if it wants to authorize states to require permits from federal agencies). "It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 180 (1988) (citation omitted); *Hancock,* 426 U.S. at 178–179. While the Reclamation Act, the Central Valley Project Improvement Act ("CVPIA"), the WIIN Act and P.L. 99-546 (October 27, 1986) taken together recognize that the projects work best when they are operated in coordination, they by no means evince Congressional intent to broadly give the state authority to regulate the project through CESA, especially where, as here, it is inconsistent with the requirements of the federal ESA.Significantly, Pub.L. No. 99-546, which implemented

[11] The United States reserves the right to raise additional defenses beyond those presented here in its response to the First Amended Complaint as appropriate.

the coordinated operation agreement between the State and the United States, directed the Secretary to operate the CVP "in conformity with State water quality standards," and said nothing about CESA or any other California statute. Congress went further, however, directing that the Secretary could reject even those standards if he determines that they are not consistent with congressional directives applicable to the project. Pub. L. 99-546 § 101(b)(1).[12] CNRA points to three federal statutes in an attempt to show that Congress consented to its regulating BOR under the CESA: the Reclamation Act of 1902, the Central Valley Project Improvement Act ("CVPIA") of 1992, and the Water Infrastructure Improvement Act of 2016. None of these three statutes subjects BOR to the CESA.

The Reclamation Act of 1902 established "a massive program" for the federal government to construct and operate water projects. *California v. United States*, 438 U.S. 645, 650 (1978). In order to avoid inconsistent application of state and federal water laws, Section 8 of the Reclamation Act provides that the Secretary of the Interior, "in carrying out the provisions of this Act shall proceed in conformity" with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." 43 U.S.C. § 383.

CESA is not within the class of state laws covered by Section 8."The purpose of section 8 is to protect the State's sovereign authority to regulate the appropriation and use of state waters." *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 797 (9th Cir. 2013); *see also California* at 675 ("[t]he legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law.") However, Section 8 is primarily a statement of non-interference with the laws of a state when such laws are not in conflict with federal laws. Section 8 is not a broad license for the state to impose any condition it desires under the guise of deference to water law. ECF 54 at 16. *See Citizens Legal*

[12] In addition, the Supremacy Clause bars application of state law in any circumstance where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quotation omitted). Unless Congress has consented to California's regulating BOR under the CESA, the state statute would pose an obstacle to BOR's fulfillment of Congress's purposes and objectives in authorizing and funding the CVP for more than a century. .

Enforcement and Restoration v. Connor, 762 F.Supp.2d 1214 (S.D. Cal. 2011) ("The duty [under Section 8] only relates to a particular set of state laws, those "relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder"). CESA is indisputably not a water law, any more so than a range of other state laws only tangentially related to administration of water.

CNRA argues that CESA should apply to BOR because this Court and the Ninth Circuit have held that the Reclamation Act requires compliance with Section 5937 of the California Fish and Game Code. ECF 54 at 17. This is a tremendous overreach. In *NRDC v. Patterson*, 791 F. Supp. 1425, 1435 (E.D. Cal 1992), for example, the court simply found that the California Fish & Game Code applied to Reclamation's state water rights permits because § 5937 directly "affects the impoundment and distribution of water." Similarly, in *San Luis & Delta-Mendota Water Auth. v. Haugrud* ("SLDMWA"), 848 F.3d 1216, 1234 (9th Cir. 2017), the Ninth Circuit simply concluded that when a state statute modifies the requirement to obtain state board approval to modify a water right, that modification also applies to BOR. *Id.* at 1234-1235. These conclusions fit within the strictures of Section 8. The courts did not find that Section 8 broadly requires BOR to comply with state environmental laws. Even CNRA admits that "the CESA does not expressly regulate water use." ECF 54 at 10. CNRA nonetheless contends that the CESA has a "direct connection" to the use of water and thus fits within the scope of Section 8. *See id.* at 11.[13] Notably, however, CNRA does not cite any cases holding this and, as noted above, it is inconsistent with the case law.

CESA is a law of general applicability that applies to numerous and varied activities throughout the state, including the construction of roads and housing developments, the development of renewable energy resources, and water used for purposes other than irrigation. CESA is not a law related to the "control, appropriation, use, or distribution of water used in

[13] CNRA cites *Dep't of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal. App. 4th 1554, 1561 (1992), ECF 54 at 10. That case simply held that a diversion of water can constitute a take within the meaning of CESA. It says nothing about whether CESA is a State water law at all, much less within the meaning of Section 8.

irrigation," 43 U.S.C. 383, and thus is outside the scope of Section 8.

CNRA fares no better under the CVPIA, which Congress passed in 1992. CVPIA directed the Secretary of the Interior to "achieve a reasonable balance among competing demands for the use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." CVPIA § 3402(f). CNRA recognizes that the CVPIA was enacted "[f]ollowing the policy of 'purposeful and continued deference to *state water law*' and argues that the CVPIA should be interpreted to reflect the Reclamation Act's focus on *state water law*," yet it contorts the statute to try to find authorization that would include CESA. ECF 54 at 9, 10 (emphasis added). CNRA quotes the CVPIA's requirement that the Secretary "shall operate the CVP to meet all obligations under State and Federal law," but it then omits the rest of that sentence: "including but not limited to the *Federal* ESA, 16 U.S.C. Section 1531, et. seq., and all decisions of the California SWRCB establishing conditions on applicable licenses and permits for the project." ECF 54 at 9, citing CVPIA § 3406(b) (emphasis added). The omission of the *State* ESA from this list, while naming the *Federal* ESA, and the omission of the State Department of Fish and Wildlife from this list, while naming the SWRCB (California's water permitting authority) provide clear evidence that Congress intended to include neither. Next, CNRA quotes two phrases from CVPIA Section 3406(b)(1)(C) : "cooperate with the State" and "additional obligations of the CVP which may be imposed by the State of California." ECF 54 at 9. Cooperation does not require submission to inapplicable law, and read in context, the reference to additional obligations is to the "increased flow and reduced export obligations" imposed by the SWRCB under the CVP's water right permits. CNRA also cites CVPIA section 3411(a), yet that provision requires BOR only to comply with the terms of its "water rights permits and licenses" and to apply to the SWRCB for a change in purpose of use or place of use before it reallocates CVP water. These are not a clear and unambiguous authorization.

Finally, CNRA contends that the recent WIIN Act silently subjected the CVP to state CESA enforcement. ECF 54 at 11. This is equally unfounded. CNRA cites WIIN Act Section 4002(a) , which requires the Secretary to manage reverse OMR flows to maximize water supplies unless doing so would cause adverse effects to fish beyond the range of effects anticipated to occur

or would be "inconsistent with applicable state law requirements." ECF 54 at 11. The subsection then lists the applicable state law requirements: "including water quality, salinity control, and compliance with the SWRCB Order D-1641 or a successor order." The list notably does not include the CESA. Next, CNRA also cites Section 4005(b)(4), ECF 54 at 11, but that section says only "Nothing in the [Act] shall have any effect on the application of the [CESA]." Section 4005(b)(4). This does not speak whatsoever to Congress' intent to apply to the CVP or BOR, but recognizes that DWR is subject to CESA in its operation of the SWP, and ensures that nothing in WIIN was intended to affect DWR's obligations under CESA.

In sum, CNRA has not cited to any clear and unambiguous congressional authorization subjecting BOR to CESA. *See Hancock*, 426 U.S. at 179-180; see also *Columbia Basin Land Protection Assoc. v. Schlesinger*, 643 F.2d 585, 603 (9th Cir. 1981) (requiring "much stronger language" than "compliance with state standards" before the court would conclude that Congress delegated "veto power over the federal project" to the states). [14]

2. The CESA Claim Is Also Barred By Sovereign Immunity

States, "like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block v. N. Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 280 (1983). CNRA's attempts to enforce the CESA against BOR apparently by relying on the waiver of sovereign immunity in the APA. 5 U.S.C. § 702; ECF 51 ¶ 146. But, given the general principle that waivers of sovereign immunity must be read narrowly, *Lane v. Pena*, 518 U.S. 187,195 (1996), the waiver can only be read to extend to claims alleging violations of *federal* law. To hold otherwise and suggest that APA section 702 was intended to subject Federal agencies to all non-monetary suits for alleged violations of the multitude of State laws that exist would significantly broaden the scope of that

[14] The ESA likewise provides no clear, unequivocal statement that Congress intended the federal government to comply with CESA. The ESA savings clause simply provides that the ESA does not invalidate state conservation laws and allows for stricter take regimes. This says nothing about applicability to Federal agencies. 16 U.S.C. § 1535(f). In contrast, ESA section 7, the ESA provision that speaks directly to the obligations of Federal agencies, makes no mention of the need to comply with state laws.

waiver in derogation of the established principle.[15]

Finally, even assuming *arguendo* that APA §702 constitutes a waiver of sovereign immunity, it does not itself confer subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). Rather, there must be an independent basis for Federal court jurisdiction. Here, CNRA cites to Federal Question Jurisdiction, 28 U.S.C. §1331. However, BOR's compliance with CESA does not arise under the laws of the United States. Accordingly, the Court lacks jurisdiction over the claim for this reason as well.

3. BOR Has Not Violated CESA Because CESA By Definition Does Not Apply To Federal Agencies.

Finally, BOR has not violated CESA because by CESA's own terms BOR is not a regulated entity. CESA's take prohibitions are limited to a "person" or "public agency." Cal Fish & Game Code Sec. 2080. While CNRA alleges BOR is a person or public agency under the statute, it does not provide any cite for that proposition. Neither the term "person" nor "public agency" is defined in CESA itself. The definitions generally applicable to the entire California Fish and Game Code (which includes CESA) defines "person" as "any natural person or any partnership, corporation, limited liability company, trust, or other type of association." California Fish and Game Code sec. 67. Under a straightforward reading, this clearly does not include a Federal agency.[16]

The term "public agency" is not defined by the California Fish and Game Code. In contrast, the California Environmental Quality Act defines "public agency" as "any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." CA Pub Res. Code sec. 21063. Federal agencies are

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[15] While the Ninth Circuit has held that the APA section 702 waiver extends to other claims seeking non-monetary relief beyond those under the APA, it generally has done so in the context of non-statutory review involving claims under Federal law. *Navajo Nation v. DOI*, 878 F.3d 1144, 1172-73 (9th Cir. 2017) (Federal tribal breach of trust claims); *The Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) (First and Fourth Amendments of U.S. Constitution).

[16] Although one court determined that at least one water agency was a person under CESA, *see Kern County Water Agency v. Watershed Enforcers*, 185 Cal. App. 4th 969 (2010), that holding involved only state agencies and was grounded in other Code provisions addressing state agencies. There is no indication that holding could be extended to Federal agencies. *Wills v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) ("in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it.").

conspicuously omitted from the definition of "public agency." It would be impermissible to read CESA as covering Federal agencies. This is especially true given that there has been no history of CESA ever being applied in any context to Federal agencies in the law's history. As stated above, it is only Congress that can subject the Federal government to State law, not the states. *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991) (citing *Hancock v. Train*, 426 U.S. 167, 178-80 (1976)). Accordingly, CESA by its own terms does not apply to Federal agencies.

III. THE BALANCING OF HARMS AND PUBLIC INTEREST DO NOT FAVOR AN INJUNCTION.

Federal Defendants have previously established that the balance of harms and public interest weigh against imposition of a preliminary injunction that would require reversion to operations under the 2009 NMFS BiOp. ECF 119, *PCFFA*, at 28-29. CNRA focuses its arguments to the contrary on unsuccessful attempts to downplay the economic harms that imposing their requested injunction will impart. These allegations are addressed by Intervenor-Defendants, and we do not duplicate their arguments here.

CONCLUSION

For all these reasons, CNRA's Motion should be denied.

Respectfully submitted this April 30, 2020, by:

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CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will send notification to the attorneys of record in this case.

/s/ Eve W. McDonald
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