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CLERK, US DIST. COURT
EASTERN DIST. OF CALIF

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF CALIFORNIA

CLERK

WESTLANDS WATER DISTRICT, SAN)
LUIS & DELTA-MENDOTA WATER)
AUTHORITY, and SAN BENITO COUNTY)
WATER DISTRICT,)

Plaintiffs,

SACRAMENTO MUNICIPAL UTILITY
DISTRICT,)

Plaintiff-Intervenor,)

NORTHERN CALIFORNIA POWER
ASSOCIATION,)

Plaintiff-Intervenor)

v.)

UNITED STATES DEPARTMENT OF THE
INTERIOR, ET AL,)

Defendants,)

HOOPA VALLEY Tribe,)

Defendant-Intervenor,)

YUROK Tribe,)

Defendant-Intervenor.)

///

CIV F 00-7124 OWW DLB

MEMORANDUM DECISION AND
ORDER RE: MOTION TO MODIFY
INJUNCTION RE: SUPPLEMENTAL
EIS DEADLINE

1 I. INTRODUCTION

2
3 The Department of the Interior, et. al ("Interior" or
4 "Federal Defendants") moves to extend the deadline to complete
5 the required supplemental environmental impact statement ("SEIS")
6 from July 9, 2004 until November 23, 2004. Doc. 441 ("Federal
7 Defendants' Memo"), filed May 19, 2004. Westlands Water District
8 ("Westlands") and the Northern California Power Agency ("NCPA")
9 (collectively "Plaintiffs") filed statements of non-opposition.
10 See Doc. 450, filed June 4, 2004; Doc. 445, filed May 28, 2004.
11 The Hoopa Valley Tribe ("Hoopa" or "Defendant-Intervenor") agreed
12 that the present date should be moved, but alleged that the date
13 for completion should be extended to December 23, 2004. Doc. 448
14 ("Hoopa's Response"), filed June 4, 2004. Hoopa also moved (1)
15 to enjoin Interior "to fully implement the Trinity Basin
16 restoration work as provided in previous orders with respect to
17 the non-flow portions of the ROD [i.e., Record of Decision]" and
18 (2) for Defendants to be required "to show cause why they should
19 not be held in contempt for failure to comply with this Court's
20 orders with respect to non-flow restoration measures." *Id.* at
21 1:10-15. Interior replied and opposed Hoopa's proposed December
22 deadline and moved for Hoopa's cross motion to "be considered
23 independently of the pending motion for an extension of time to
24 complete the SEIS." Doc. 453 ("Federal Defendants' Reply") at
25 3:17-18, filed June 14, 2004. Westlands also moved ex parte for
26 a continuance on hearing Hoopa's cross motion. Doc. 451, filed
27 June 14, 2004.

28 Oral arguments were heard on June 21, 2004.

1
2 **II. FACTUAL AND PROCEDURAL BACKGROUND**
3

4 This suit involves the United States Department of
5 Interior's ("Interior") administration of the Trinity River
6 Division ("TRD")¹ of the Central Valley Project ("CVP") and
7 Interior's implementation of Section 3406(b)(23)² of the Central
8

9 ¹ The TRD consists of: the Trinity and Lewiston dams and their
10 reservoirs; Trinity and Lewiston powerplants; Clear Creek tunnel;
11 Judge Francis Carr powerhouse; Whiskeytown dam and lake; Spring Creek
12 tunnel and powerplant; Spring Creek debris dam and reservoir; and
13 related pumping and distribution facilities.

14 ² CVPIA §§ 3406(b) and (b)(23) read:

15 The Secretary, immediately upon the enactment of this title,
16 shall operate the Central Valley Project to meet all
17 obligations under State and Federal law, including but not
18 limited to the Federal Endangered Species Act, 16 U.S.C. §
19 1531, et seq., and all decisions of the California State
20 Water Resources Control Board establishing conditions on
21 applicable licenses and permits for the project. The
22 Secretary, in consultation with other State and Federal
23 agencies, Indian Tribes, and affected interests, is further
24 authorized and directed to:

25 (23) in order to meet Federal trust responsibilities to
26 protect the fishery resources of the Hoopa Valley Tribe, and
27 to meet the fishery restoration goals of the Act of October
28 24, 1984, Public Law 98-541, provide through the Trinity
River Division, for water years 1992 through 1996, an
instream release of water to the Trinity River of not less
than three hundred and forty thousand acre-feet per year for
the purposes of fishery restoration, propagation, and
maintenance and,

(A) by September 30, 1996, the Secretary, after consultation
with the Hoopa Valley Tribe, shall complete the Trinity
River Flow Evaluation Study currently being conducted by the
United States Fish and Wildlife Service under the mandate of

1 Valley Project Improvement Act ("CVPIA") to restore and
2 maintain the Trinity River fishery.

3 In October 1984, Congress enacted the Trinity River Basin
4 Fish and Wildlife Management Act' ("1984 Act") to restore fish

5
6 the Secretarial Decision of January 14, 1981, in a manner
7 which insures the development of recommendations, based on
8 the best available scientific data, regarding permanent
9 instream fishery flow requirements and Trinity River
10 Division operating criteria and procedures for the
11 restoration and maintenance of the Trinity River fishery;
12 and

13 (B) not later than December 31, 1996, the Secretary shall
14 forward the recommendations of the Trinity River Flow
15 Evaluation Study, referred to in subparagraph (A) of this
16 paragraph, to the Committee on Energy and Natural Resources
17 and the Select Committee on Indian Affairs of the Senate and
18 the Committee on Interior and Insular Affairs and the
19 Committee on Merchant Marine and Fisheries of the House of
20 Representatives. If the Secretary and the Hoopa Valley
21 Tribe concur in these recommendations, any increase to the
22 minimum Trinity River instream fishery releases established
under this paragraph and the operating criteria and
procedures referred to in subparagraph (A) shall be
implemented accordingly. If the Hoopa Valley Tribe and the
Secretary do not concur, the minimum Trinity River instream
fishery releases established under this paragraph shall
remain in effect unless increased by an Act of Congress,
appropriate judicial decree, or agreement between the
Secretary and the Hoopa Valley Tribe. Costs associated with
implementation of this paragraph shall be reimbursable as
operation and maintenance expenditures pursuant to existing
law.

23 Central Valley Project Improvement Act, Pub. L. No. 102-575, §
24 3406(b)(23), 106 Stat. 4600, at 4720-21.

25 Pub. L. No. 102-575, § 3401-12, 106 Stat. 4600, 4706 (Oct. 30,
26 1992).

27 ,

28 SECTION 1: The Congress finds that --

(1) the construction of the Trinity River division of the
Central Valley project in California, authorized by the Act

1
2
3 of August 12, 1955 (69 Stat. 719), has substantially reduced
4 the streamflow in the Trinity River Basin thereby
5 contributing to damage to pools, spawning gravels, and
6 rearing areas and to a drastic reduction in the anadromous
7 fish populations and a decline in the scenic and
8 recreational qualities of such river system;

9 (2) the loss of land areas inundated by two reservoirs
10 constructed in connection with such project has contributed
11 to reductions in the populations of deer and other wildlife
12 historically found in the Trinity River Basin;

13 (3) the Act referred to in paragraph (1) of this section
14 directed the Secretary of the Interior (hereinafter in this
15 Act referred to as the "Secretary") to take appropriate
16 actions to ensure the preservation and propagation of such
17 fish and wildlife and additional authority was conferred on
18 the Secretary under the Act approved September 4, 1980 (94
19 Stat. 1062), to take certain actions to mitigate the impact
20 on fish and wildlife of the construction and operation of
21 the Trinity River division;

22 (4) activities other than those related to the project
23 including, but not limited to, inadequate erosion control
24 and fishery harvest management practices, have also had
25 significant adverse effects on fish and wildlife populations
26 in the Trinity River Basin and are of such a nature that the
27 cause of any detrimental impact on such populations cannot
28 be attributed solely to such activities or to the project;

(5) a fish and wildlife management program has been
developed by an existing interagency advisory group called
the Trinity River Basin Fish and Wildlife Task Force; and

(6) the Secretary requires additional authority to
implement a basin-wide fish and wildlife management program
in order to achieve the long-term goal of restoring fish and
wildlife populations in the Trinity River Basin to a level
approximating that which existed immediately before the
start of the construction of the Trinity River division.

TRINITY RIVER BASIN FISH AND WILDLIFE MANAGEMENT PROGRAM

SEC. 2. (a) Subject to subsection (b), the Secretary shall
formulate and implement a fish and wildlife management
program for the Trinity River Basin designed to restore the
fish and wildlife populations in such basin to the levels
approximating those which existed immediately before the
start of the construction referred to in section 1(1) and to
maintain such levels. The program shall include the
following activities:

(1) The design, construction, operation, and maintenance of

1 and wildlife populations to pre-TRD levels. The 1984 Act
2 included a finding that the TRD had contributed to a "drastic
3 reduction in the anadromous fish populations." Public Law 98-
4 541, Section 1(1). It directed that the restoration program
5 include:

6 (1) The design, construction, operation, and
7 maintenance of facilities to --

8 (A) rehabilitate fish habitats in the Trinity River
9 between Lewiston Dam and Weitchpec;

10 (B) rehabilitate fish habitats in tributaries of such
11 river below Lewiston Dam and in the south fork of such
12 river; and

13 (C) modernize and otherwise increase the effectiveness
14 of the Trinity River Fish Hatchery.

15 (2) The establishment of a procedure to monitor (A) the
16 fish and wildlife stock on a continuing basis, and (B)
17 the effectiveness of the rehabilitation work.

18 (3) Such other activities as the Secretary determines
19 to be necessary to achieve the long-term goal of the
20 program.

21 Public Law 98-541, Section 2(a).

22 In 1991, the Secretary of the Interior increased the minimum
23 flows in the Trinity River to 340,000 AF/year until the Trinity
24 River flow study was completed. The 340,000 AF number was the
25 third-lowest unregulated flow on record.

26 In 1992, Congress enacted the CVPIA to annually redirect

27 facilities to --

28 (A) rehabilitate fish habitats in the Trinity River between
Lewiston Dam and Weitchpec;

(B) rehabilitate fish habitats in tributaries of such river
below Lewiston Dam and in the south fork of such river; and

(C) modernize and otherwise increase the effectiveness of
the Trinity River Fish Hatchery.

(2) The establishment of a procedure to monitor (A) the
fish and wildlife stock on a continuing basis, and

(B) the effectiveness of the rehabilitation work.

(3) Such other activities as the Secretary determines to be
necessary to achieve the long-term goal of the program.

Public Law 98-541, 98 Stat. 2721.

1 part of the CVP's water to the environment. CVPIA § 3406(b)(23)
2 specifically requires Interior to restore the Trinity River. It
3 specifies that not less than 340,000 AF of water be released into
4 the Trinity River each year for water years 1992-1996 in order to
5 meet federal trust responsibilities to the Hoopa Valley Tribe and
6 to meet the restoration goals of the 1984 Act. CVPIA
7 § 3406(b)(23). It directs the Secretary of the Interior
8 ("Secretary") to complete the Trinity River Flow Evaluation Study
9 ("TRFES") no later than September 30, 1996. CVPIA
10 § 3406(b)(23)(A). The TRFES was to be performed "in a manner
11 which insures the development of recommendations, based on the
12 best available scientific data, regarding permanent instream
13 fishery flow requirements and Trinity River Division operating
14 criteria and procedures for the restoration and maintenance of
15 the Trinity River fishery." *Id.* Section 3406 then directs the
16 Secretary to forward the TRFES recommendations to several
17 congressional committees no later than December 31, 1996. CVPIA
18 § 3406(b)(23)(B). If the Secretary and the Hoopa Valley Tribe
19 concurred in the TRFES recommended increases for Trinity River
20 instream fishery flow releases established under CVPIA
21 § 3406(b)(23)(B), such restoration flows were to be implemented
22 accordingly. *Id.* If they did not concur, the 340,000 AF minimum
23 flows must remain in effect unless increased by an act of
24 Congress, appropriate judicial decree or agreement between the
25 Secretary and the Hoopa Valley Tribe. *Id.*

26 In 1996, Congress amended the 1984 Act by the Trinity River
27 Basin Fish and Wildlife Management Reauthorization Act of 1995,
28 Pub. L. No. 104-408, 110 Stat. 1338 (1996). The TRFES was not

1 timely completed. Congress directed that Trinity River
2 restoration be measured not only by returning adult anadromous
3 fish spawners, but also by the ability of dependant tribal,
4 commercial, and sport fisheries to participate fully, through in-
5 river and ocean harvest opportunities, in the benefits of the
6 restoration. Pub. L. No. 104-408. Congress also included
7 language amending the activities to be undertaken by the
8 Secretary. *Id.* The original language directed the Secretary to
9 "modernize and otherwise increase the effectiveness of the
10 Trinity River fish hatchery." The 1996 Act adds "so that it can
11 best service its purpose of mitigation of fish habitat loss above
12 Lewiston Dam while not impairing efforts to restore and maintain
13 naturally reproducing anadromous fish stocks within the basin."
14 *Id.*

15 In January 1998, the draft Trinity River Flow Evaluation
16 Report (TRFER) was released. In June 1999, Interior, in
17 consultation with the Hoopa Valley Tribe, published the Trinity
18 River Flow Evaluation Final Report ("TRFER"). The TRFER
19 recommends permanently increasing the Trinity River fish flows
20 from the statutorily mandated 340,000 AF/year to between 368,900
21 and 815,200 AF/year, as follows:
22
23
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Extremely Wet	815.2	0.12
Wet	701.0	0.28
Normal	646.9	0.20
Dry	452.6	0.28
Critically Dry	368.6	0.12
Weighted Average	594.5	

TRFER § 8.1, p. 241.

On October 19, 1999, the United States Bureau of Reclamation ("Bureau") and the USFWS released the draft "Trinity River Mainstem Fishery Restoration Environmental Impact Statement/Report" ("DEIS"), which described alternate approaches for restoring and maintaining the Trinity River fishery. Interior published the availability of the draft EIS/EIR and the commencement of a public comment period scheduled to end on December 8, 1999. 64 Fed. Reg. 56364, 1999 WL 827447 (Oct. 19, 1999). The public comment period was extended until January 20, 2000. 64 Fed. Reg. 67584, 1999 WL 1078497 (Dec. 2, 1999); 64 Fed. Reg. 72357, 1999 WL 1247501 (Dec. 27, 1999).

On January 20, 2000, San Luis & Delta-Mendota Water Authority ("San Luis") submitted written comments⁵ criticizing

⁵ "Comments of the San Luis & Delta-Mendota Water Authority on the Trinity River Mainstem Fishery Restoration Environmental Impact Statement/Environmental Impact Report," dated January 19, 2000.

1 the DEIS, noting, inter alia, that the DEIS failed to analyze the
2 preferred alternative's potential adverse environmental impacts
3 on federally listed endangered or threatened fish species within
4 the Sacramento River system and the Sacramento-San Joaquin Delta
5 ("Delta"), and also failed to analyze how these adverse impacts,
6 if any, could be minimized or avoided. Doc. 35 at ¶¶ 39-40 & Ex.
7 A.

8 On March 10, 2000, Westlands Water District ("Westlands")
9 and San Luis sent a sixty-day notice of intent to sue to
10 Interior, threatening suit if Interior did not undertake a formal
11 ESA consultation on the TRFER. On March 29, 2000, Interior
12 forwarded the TRFER to Congress, pursuant to CVPIA § 3406(b)(23)
13 ("the Secretary shall forward the recommendations of the Trinity
14 River Flow Evaluation Study . . . to the Committee on Energy and
15 Natural Resources and the Select Committee on Indian Affairs of
16 the Senate and the Committee on Interior and Insular Affairs and
17 the Committee on Merchant Marine and Fisheries of the House of
18 Representatives. If the Secretary and the Hoopa Valley Tribe
19 concur in these recommendations, any increase to the minimum
20 Trinity River instream fishery releases established under this
21 paragraph and the operating criteria and procedures referred to
22 in subparagraph (A) shall be implemented accordingly.").

23 On May 8, 2000, Interior responded to San Luis' letter,
24 acknowledging that ESA "§ 7 consultation over potential effects
25 to species listed as either threatened or endangered under the
26 ESA . . . must be accomplished as part of the process of making a
27 decision on the Program." It reassured that "no final decision
28 on the Program will be made until both the USFWS and NMFS have

1 issued biological opinions regarding implementation of the
2 Program, and that these opinions will be taken into consideration
3 in making such decisions."

4 On October 12, 2000, the National Marine Fishery Service
5 ("NMFS") formally issued the "Biological Opinion for the Trinity
6 River Mainstem Fishery Restoration EIS and Its Effects on
7 Southern Oregon/Northern California Coast Coho Salmon, Sacramento
8 River Winter-run Chinook Salmon, Central Valley Spring-run
9 Chinook Salmon, and Central Valley Steelhead" ("BioOp."). This
10 BioOp recognizes that implementation of the report will effect
11 many aspects of the river, including decreased water flows, and
12 discusses reasonable and prudent measures ("RPMs") to minimize or
13 avoid the preferred alternative's impacts on "federally listed"
14 fish.

15 Also on October 12, 2000, the USFWS issued "Re[-]initiation
16 of Formal Consultation: Biological Opinion of the Effects of
17 Long-term Operation of the Central Valley Project and State Water
18 Project as Modified by Implementing the Preferred Alternative in
19 the Draft Environmental Impact Statement/Environmental Impact
20 Report for the Trinity River Mainstem Fishery Restoration
21 Program" ("USFWS BioOp"). On November 17, 2000, Interior
22 published notice of the availability of the final EIS/EIR
23 ("FEIS"). 65 Fed. Reg. 69512, 2000 WL 1711646 (Nov. 17, 2000).

24 On December 14, 2000, Westlands filed suit against
25 defendants, alleging three claims:

- 26 (1) "maladministration" of the Endangered Species Act
27 ("ESA") by the USFWS;
- 28 (2) maladministration of the ESA by NMFS; and,
- (3) violation of NEPA by all defendants.

1 Doc. 1 at 15-24. That same day, Westlands sought an emergency
2 court order to enjoin the defendant, Bruce Babbitt (as Secretary
3 of the Interior), from executing a Record of Decision ("ROD")
4 with the Hoopa Valley Tribe, scheduled to be signed on Tuesday,
5 December 19, 2000. On December 15, the Hoopa Valley Tribe
6 intervened as a defendant in the case.

7 The motion for a Temporary Restraining Order ("TRO") was
8 denied in open court on the afternoon of December 15, 2000, and
9 the confirming written order was entered on January 30, 2001.

10 Doc. 85. The application for a TRO was denied because at the
11 time of the December 15 hearing, Secretary Babbitt had not yet
12 signed the ROD. The signing was scheduled for December 19, 2000.
13 Until the ROD was signed, there was no "final agency action" that
14 Westlands could challenge and no authority existed to enjoin the
15 Executive from implementing the statutory function of reaching
16 agreement with the Indian Tribes on the Trinity River Restoration
17 Plan. *Id.* at 4-5.

18 On December 18, 2000, the Hoopa Valley Tribe concurred in
19 the TRFES recommendations. On December 19, 2000, Secretary
20 Babbitt and the Senior Chairman of the Hoopa Valley Tribal
21 Council signed the ROD. The ROD directs Interior's agencies "to
22 implement the Preferred Alternative as described in the FEIS/EIR
23 and as provided below," and "to implement the reasonable and
24 prudent measures described in the NMFS and [USFWS] Biological
25 Opinions."

26 The ROD's stated purpose is: restoration and perpetual
27 maintenance of Trinity River's fishery resources by
28 rehabilitating the river and restoring attributes of a healthy,

1 functioning alluvial river system. AR 17694-95. The essential
2 components are:

- 3 1. Permanently increase variable annual flows
4 for the Trinity River;
- 5 2. Rehabilitate physical channels, remove
6 riparian berms and establish side channel
7 habitat;
- 8 3. Sediment management to increase spawning
9 gravels and reduce fine sediments;
- 10 4. Restore the watershed damage by land use
11 practices;
- 12 5. Improve infrastructure, including bridges and
13 other structures affected by peak flows.

14 On January 5, 2001, Westlands and two new plaintiffs, the
15 San Luis and Delta-Mendota Water Authority, and the San Benito
16 County Water District (collectively "water districts"), filed a
17 first amended complaint against the federal defendants, alleging
18 four causes of action:

- 19 (1) maladministration of the ESA by the USFWS,
20 claiming that by "issuing a non-jeopardy
21 biological opinion that requires a major change in
22 CVP operations [i.e., preventing any upstream
23 movement of 0.5 km or more of the X2 water quality
24 standard], the USFWS has exceeded its authority
25 under the Endangered Species Act;"
- 26 (2) maladministration of the ESA by NMFS, claiming
27 that NMFS acted arbitrarily and capriciously and
28 in excess of its authority under the ESA by
issuing a biological opinion that internally
conflicts, because it states on one hand that
"NMFS does not anticipate that implementation of
the proposed flow schedules will incidentally take
any SONCC coho salmon," and on the other hand,
prescribes RPMs to deal with incidental take;
- (3) violation of NEPA by all defendants, claiming
that: (a) the draft and final EIS/EIRs do not
analyze the impacts of implementing the
requirements of the USFWS and NMFS biological
opinions; (b) the final EIS/EIR does not
adequately describe what CVP operational changes
will occur to protect or mitigate the adverse
effect upon listed fish, upon which the draft
EIS/EIR acknowledges implementation of the
preferred alternative may have a significant
adverse impact, and simply defers mitigation
consideration until later; (c) because the
biological opinions modified the proposed action

1 by creating new environmental impacts (or new
2 circumstances and information), the defendants
3 failed to supplement the EIS/EIRs to analyze these
4 impacts and publish the analysis for public
5 comment; (d) the draft and final EIS/EIR do not
6 fairly evaluate alternatives, and are in essence a
7 "post hoc rationalization to justify a course of
8 action decided upon before NEPA review even
9 began;" (e) the EIS/EIRs utilize improper
10 definitions of proper purpose by using the
11 "healthy river" standard rather than an objective
12 standard; and, (f) the final EIS/EIR, or a
13 supplement thereto, does not analyze the impact of
14 implementation of the preferred alternative on
15 California's current energy crisis; and,
16 (4) violation of the Administrative Procedure Act
17 ("APA"), claiming that the TRFER's recommendations
18 adopted by the ROD are not based on the best
19 available scientific data in violation of CVPIA §
20 3406(b)(23)(A), and its conclusions are arbitrary
21 and capricious.

22 Doc. 35. The Yurok Tribe intervened as a defendant on January
23 19, 2001. On February 8, 2001, the Northern California Power
24 Agency ("NCPA") and the Sacramento Municipal Utility District
25 ("SMUD") intervened as plaintiffs over the opposition of the
26 Hoopa Valley and Yurok Tribes.⁶

27 The water districts filed a motion for preliminary
28 injunction on January 5, 2001 and NCPA and SMUD moved for a
preliminary injunction on February 6, 2001. A preliminary
injunction issued on March 22, 2001 limiting the amount of water
releases under the ROD to a total of 368,600 AF. All other
aspects of the ROD's Trinity River restoration plan were not
enjoined. The decision, made without a complete administrative
record, found plaintiffs were likely to succeed on the merits of

⁶ NCPA's complaint-in-intervention, previously lodged on
January 5, 2001, was filed on February 6, 2001. Doc. 105.
SMUD's complaint-in-intervention, previously lodged on January 5,
2001, was filed on February 6, 2001. Doc. 109.

1 their claim because the two BioOps imposed significant
2 environmental impacts that were not analyzed in a supplemental
3 EIS/EIR ("SEIS") and the California energy crisis was a changed
4 circumstance that should have been evaluated, but was not.

5 On September 7, 2001, the United States, the water
6 districts, NCPA, and SMUD, but not the Tribes, entered into and
7 filed a stipulation to stay the proceedings in this case until
8 Interior issued a revised ROD following completion of an SEIS.
9 The federal defendants and plaintiffs agreed that the preliminary
10 injunction would remain in place unless otherwise ordered by the
11 court. The defendant-intervenor Tribes did not oppose the stay
12 order, but did not join the stipulation because of paragraphs
13 eight⁷ and nine⁸ which they believed demanded actions not
14

15 ⁷ Paragraph eight states:

16 The SEIS will address, among other topics, the issues
17 identified by this Court as requiring further analysis,
18 including impacts from the ROD or changes to Trinity
19 River flows on the provision of electrical power to the
20 Central Valley Project and the power grid serving the
21 State of California, along with the effects of the
22 Endangered Species Act § 7 biological opinions issued
23 by the U.S. Fish and Wildlife Service (FWS) and the
24 National Marine Fisheries Service (NMFS).

25 ⁸ Paragraph Nine states:

26 The federal defendants have advised the parties to this
27 litigation that, through the SEIS scoping process, any
28 person or party will have the opportunity to present
other issues that they believe should be included in
the SEIS and that the federal defendants will carefully
consider all such presentations. In addition to the
formal scoping and public comment processes under NEPA
and the CEQ regulations, the federal defendants will
use the available legal procedures to invite and
consider technical information and expert advice from
all sources. These procedures will allow scientific

1 required by law. However, they found the proposed order
2 "unobjectionable." On October 8, 2001, the court signed the stay
3 order.

4 On March 14, 2002, the Tribes moved to modify the
5 preliminary injunction for water year 2002 alleging changed
6 circumstances. On April 19, 2002, the preliminary injunction was
7 modified to authorize the release of 468,600 AF of water into the
8 Trinity River for the purposes of fishery protection and
9 restoration for water year 2002. See Doc. 222. All other
10 aspects of the Trinity River restoration plan were not subject to
11 the injunction. The order modifying the preliminary injunction
12 also vacated the stay and set a schedule for disposition of the
13 case on the merits. Work on the SEIS slowed.

14 On January 11, 2002 the water districts, NCPA, SMUD, the
15 federal defendants, and the Hoopa Valley Tribe filed cross-
16 motions for summary judgment. The Yurok Tribe did not file a
17 cross-motion for summary judgment but opposed the water
18

19 and technical discussion among the scientists and
20 technical experts of the federal defendants,
21 plaintiffs, plaintiff-intervenors, and defendant-
22 intervenors, and others having such expertise, so as to
23 maximize the value of the scientific and technical
24 input from non-federal sources. The goal of these
25 procedures is to make the SEIS a thorough,
26 comprehensive, and scientifically sound document, as
27 required by NEPA and the CEQ regulations. When
28 completed, the federal defendants will prepare a
revised ROD. In conjunction with the SEIS and revised
ROD, the federal defendants will consult with FWS and
NMFS under ESA § 7, as appropriate. The SEIS, revised
ROD, and any biological opinions will be subject to
legal challenge on any legally cognizable grounds in
this or independent litigation by any party.

1 districts', NCPA's, and SMUD's motions.

2 A December 10, 2002 a Memorandum Decision and Order was
3 issued resolving the cross-motions for summary judgment in favor
4 of plaintiffs and plaintiff-intervenors. Doc. 305. On January
5 24, 2003, defendants-intervenors Hoopa Valley Tribe filed a
6 notice of appeal to the Ninth Circuit. Doc. 323. On February
7 10, 2003 federal defendants filed a notice of appeal. Doc. 336.

8 Federal defendants moved to modify the December 10, 2002,
9 injunction on January 22, 2003, to extend the period for
10 completion of the SEIS. The Hoopa Valley Tribe moved for partial
11 stay pending appeal and for modification of injunctive relief on
12 January 24, 2003.

13 Federal defendants' evidence is sufficient to warrant a
14 modified injunction to extend the SEIS completion deadline to
15 July 2004.

16 The Tribe did show the errors of law necessary to justify a
17 stay of the injunction. The Tribe's evidence concerning the 2003
18 water year, when balanced against hardships to all, justified a
19 limited modification of the injunction for 2003, pending appeal,
20 to permit the Bureau to use up to 50,000 additional acre feet of
21 CVP water for Trinity River restoration, only if such water is
22 not made available to the lower Klamath River in the Northern
23 District cases.

24 Federal defendants' motion to modify the December 20, 2002
25 injunction was granted. They were ordered to complete the SEIS
26 on or before July 9, 2004, and to provide progress reports to the
27 Court and parties, by fax and U.S. Mail, on June 20, 2003, and
28 January 20, 2004. Doc. 407 at 73-74, filed April 7, 2003. The

1 Hoopa Tribe's motion to stay the December injunction, which
2 requires federal defendants to revise the SEIS was denied. *Id.*
3 The Hoopa Tribe's motion to modify the injunction to allow for
4 full-flow releases commensurate with the applicable ROD water
5 year-type, pending appeal, was, however, granted to a limited
6 extent. *Id.*

7 Federal Defendants filed a status report on June 20, 2003, a
8 supplemental report on December 29, 2003, and a second status
9 report on January 20, 2004. Docs. 434, 439, and 440. Federal
10 Defendants allege that the supplemental filing in December
11 "informed the Court that a delay had arisen as a result of the
12 need to coordinate Endangered Species Act (ESA) consultation for
13 the Trinity River fishery restoration with the development and
14 the implementation of the Bureau of Reclamation's Central Valley
15 Project (CVP) Operations Criteria and Plan (OCAP) "
16 Federal Defendant's Motion at 2:19-23. Federal Defendants also
17 allege that in their January report they "advised the Court that
18 they would seek an extension of the July 9, 2004, deadline and
19 request a new deadline, then estimated to be on or around
20 November 29, 2004. *Id.* at 2:26-3:2.

21 Interior completed the draft SEIS and published it April 23,
22 2004. The required sixty-day public comment period, which
23 includes two public hearing, ends June 22, 2004. *Id.* at 2:15-21.
24 Federal Defendants' revised schedule estimates a publication date
25 for the final SEIS of November 23, 2004. Doc. 442 ("Shockey's
26 Declaration"), Exh. 2, filed May 19, 2004.

27 In an order filed on April 23, 2004, the Ninth Circuit
28 granted Hoopa's motion "to allow a water release appropriate for

1 a 'normal' water-type year." *Westlands Water District, et al. v.*
2 *U.S. Dep't of Interior*, No. 03-15194; see also Shockey's
3 Declaration, Exh. 5 at 7. Following the issuance of this order,
4 Reclamation allegedly stated "that the Ninth Circuit's ruling
5 increased the available volume of water to the Trinity River to
6 647,000 acre-feet (the normal year volume) from 453,00 acre-feet,
7 the dry year volume authorized by this Court's injunction as
8 modified in the April 7, 2003 Order." Federal Defendant's Memo
9 at 4:17-24.

10 On June 14, 2004, Interior moved to extend the deadline to
11 complete the SEIS until November 23, 2004. See Interior's Motion
12 to Modify. While approving of an extension, Hoopa proposed
13 December 23, 2004 as an alternative date. Hoopa also filed a
14 cross motion (1) to enjoin Interior and (2) to hold Defendants in
15 contempt. Hoopa's Response at 1:10-15. Motions were filed to
16 sever this cross motion from the motion for a deadline extension
17 and to establish a separate briefing schedule for the cross
18 motion. The parties agreed to postpone hearing on Hoopa's cross
19 motion until a later date. Only oral arguments on the motion to
20 extend the deadline were heard on June 21, 2004.

21 22 III. DISCUSSION 23

24 The April 7, 2003 Memorandum Decision and Order granted
25 Federal Defendants a fifteen month extension from their previous
26 deadline, until July 9, 2004, to complete the SEIS. Federal
27 Defendants now request another extension, this time of more than
28 four months, until November 23, 2004.

1 Federal Defendants allege that they "have advised the Court
2 on several occasions [that] Interior requires additional time to
3 comply with the Court's Order, due to a series of intervening and
4 complicating factors . " Federal Defendants' Memo at 1:5-7.
5 The SEIS was filed on January 20, 2004 and was published on April
6 23, 2004 for public comment, which is underway. Id. at 1:8-10.
7 Two public hearings are scheduled for June 2004. Id. at 1:10-11.
8 Following its receipt and analysis of these public comments,
9 "Interior will prepare and publish a Final SEIS." Id. at 12-13.
10 Federal Defendants note that "Interior published the Draft SEIS
11 later than previously planned, but remains on track and committed
12 to completing the Final SEIS in advance of the start of the
13 increased flows scheduled for Spring 2005." Id. at 1:19-21.

14 Defendant-Intervenor Hoopa does not contest extending the
15 July 9, 2004 date for submission. Hoopa does, however, argue
16 that December 23, 2004 "would be a more prudent target." Hoopa's
17 Response at 1:5-6. Hoopa cites no authority to support its
18 contention that an extension of an additional month is necessary.
19 The Tribe has consistently resisted delay. As Federal Defendants
20 have noted, "if a further adjustment to the SEIS schedule becomes
21 necessary, Interior will notify the Court and timely request
22 additional relief." Federal Defendants' Reply at 2:25-26. No
23 reason has been provided for adopting the December 23, 2004 date,
24 as opposed to the November 23, 2004 date submitted by Federal
25 Defendants and unopposed by the other parties. Westlands and
26 NCPA do not oppose an extension or the proposed November 23, 2004
27 date.

28 During oral arguments, all parties agreed that an extension

1 until December 23, 2004 would be a more "prudent" course of
2 action, in light of the time it has taken Interior to respond to
3 comments in the past and the fact that biological opinions have
4 not yet been submitted to Interior. All parties also agreed that
5 this delay should not distract them from the moving as
6 expeditiously as possible and continuing to adhere to the court's
7 previous admonition, particularly given demands and requirements
8 that will be posed by the upcoming 2005 water year.

9
10 IV. CONCLUSION
11

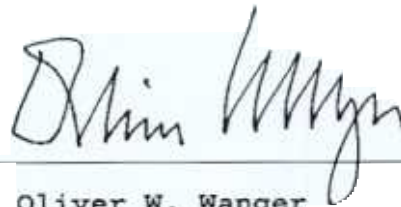
12 No reason has been provided why the extension, or the
13 proposed date of December 23, 2004, should not be granted. No
14 opposition to this extension or proposed date has been filed.
15 For these reasons:

16
17 Federal Defendants' motion to extend the date for submission
18 of the final SEIS is GRANTED and the date shall be extended
19 until December 23, 2004. Federal Defendants' counsel shall
20 lodge a prepared order on this extension within five (5)
21 days following date of service of this decision.
22

23 As the parties agreed, the following schedule is adopted for
24 the Hoopa Tribe's cross motion for injunction and contempt:
25 Federal Defendants have until July 16, 2004 to file
26 opposition; the Hoopa Tribe has until July 27, 2004 to file
27 a reply; oral arguments will be held on August 9, 2004.
28 Westlands' motion for continuance is GRANTED.

SO ORDERED

DATED June

A handwritten signature in black ink, appearing to read "Oliver W. Wanger", is written over a light blue rectangular background. The signature is fluid and cursive.

Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

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