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Associations/Institute for Fisheries Resources

18 IN THE UNITED STATES DISTRICT COURT  
19 FOR THE EASTERN DISTRICT OF CALIFORNIA

20 NATURAL RESOURCES DEFENSE  
21 COUNCIL, CALIFORNIA TROUT, SAN  
FRANCISCO BAYKEEPER, FRIENDS  
22 OF THE RIVER, THE BAY INSTITUTE  
OF SAN FRANCISCO, WINNEMEM  
23 WINTU TRIBE, and PACIFIC COAST  
FEDERATION OF FISHERMEN'S  
24 ASSOCIATIONS/INSTITUTE FOR  
FISHERIES RESOURCES,

25 Plaintiffs,

26 v.

27 SALLY JEWELL, in her official capacity  
28 as Secretary of the Interior, DAN ASHE, in

Case No. 1:05-cv-01207 LJO-EPG

**FOURTH SUPPLEMENTAL COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE  
RELIEF**

1 his official capacity as the Director of the  
2 U.S. Fish and Wildlife Service, and  
3 ESTEVAN LÓPEZ, in his official capacity  
4 as Commissioner of the Bureau of  
5 Reclamation,

6 Defendants.

7 SAN LUIS & DELTA MENDOTA  
8 WATER AUTHORITY, STATE WATER  
9 CONTRACTORS, WESTLANDS  
10 WATER DISTRICT, CALIFORNIA  
11 DEPARTMENT OF WATER  
12 RESOURCES, CALIFORNIA FARM  
13 BUREAU FEDERATION, GLENN-  
14 COLUSA IRRIGATION DISTRICT,  
15 NATOMAS CENTRAL MUTUAL  
16 WATER COMPANY, PELGER  
17 MUTUAL WATER COMPANY,  
18 PLEASANT GROVE-VERONA  
19 MUTUAL WATER COMPANY,  
20 PRINCETON-CODORA-GLENN  
21 IRRIGATION DISTRICT, PROVIDENT  
22 IRRIGATION DISTRICT,  
23 RECLAMATION DISTRICT 108, and  
24 RIVER GARDEN FARMS,

25 Defendants-Intervenors.

26 ANDERSON-COTTONWOOD  
27 IRRIGATION DISTRICT, BEVERLY F.  
28 ANDREOTTI *et al.*, BANTA-CARBONA  
IRRIGATION DISTRICT, CHRISTO D.  
BARDIS *et al.*, BYRON BETHANY  
IRRIGATION DISTRICT, CARTER  
MUTUAL WATER COMPANY,  
COEHLHO FAMILY TRUST,  
CONAWAY PRESERVATION GROUP,  
DEL PUERTO WATER DISTRICT,  
EAGLE FIELD WATER DISTRICT,  
FRESNO SLOUGH WATER DISTRICT,  
HOWALD FARMS, INC., JAMES  
IRRIGATION DISTRICT, LOMO COLD  
STORAGE, MAXWELL IRRIGATION  
DISTRICT, MERCY SPRINGS WATER  
DISTRICT, MERIDIAN FARMS WATER  
COMPANY, OJI BROTHERS FARM,  
INC., OJI FAMILY PARTERSHIP, ORO  
LOMA WATER DISTRICT, PACIFIC  
REALTY ASSOCIATES, L.P.,  
PATTERSON IRRIGATION DISTRICT,  
ABDUL AND TAHMINA RAUF,  
RECLAMATION DISTRICT NO. 1004,

1 CITY OF REDDING, HENRY D.  
2 RICHTER *et al.*, SACRAMENTO RIVER  
3 RANCH, LLC, SUTTER MUTUAL  
4 WATER COMPANY, KNIGHTS  
5 LANDING INVESTORS, LLC, TISDALE  
6 IRRIGATION DISTRICT AND  
7 DRAINAGE COMPANY,  
8 TRANQUILITY IRRIGATION  
9 DISTRICT, WEST SIDE IRRIGATION  
10 DISTRICT, WEST STANISLAUS  
11 IRRIGATION DISTRICT, and  
12 WINDSWEPT LAND AND LIVESTOCK  
13 COMPANY,

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## PREFACE TO FOURTH SUPPLEMENTAL COMPLAINT

1. Plaintiffs hereby supplement their complaint to add claims against the federal Bureau of Reclamation (“Bureau”) and the Sacramento River settlement contractors that are parties to this case for violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, that have occurred, and are occurring, subsequent to the filing of Plaintiffs’ Third Supplemental Complaint. This Fourth Supplemental Complaint incorporates the allegations and causes of actions set forth in the Third Supplemental Complaint and identifies additional bases for Plaintiffs’ newly alleged claims in separately identified sections.

## INTRODUCTION

2. This case centers on the long-term future operations of the massive Central Valley Project (“CVP”) and State Water Project (“SWP”), which are operated by the federal Bureau of Reclamation (“Bureau”) and the California Department of Water Resources (“DWR”), respectively, as set forth in a June 30, 2004 document known as the “Long-Term Central Valley Project Operations Criteria and Plan” (“OCAP”).

3. The CVP and SWP are among the largest water storage and diversion projects in the world. Together, the CVP and SWP annually manage more than 11 million acre-feet of water. That is roughly enough water to supply all of the water requirements for fifteen cities the size of Los Angeles. As part of their operations, the two projects run massive pumping facilities in the Delta, an estuary at the confluence of the Sacramento and San Joaquin Rivers in northern California, which

1 presently export an average of 1.6 to 2.0 *trillion* gallons of water annually out of the Delta for  
2 delivery to irrigation agencies and other water users further south. The existing operations of these  
3 pumps have altered natural flow patterns in the Delta and San Francisco Bay and even cause the San  
4 Joaquin River — one of the San Francisco Bay-Delta estuary’s two major tributaries — to flow  
5 backwards. Now, as set forth in the OCAP, the Bureau and DWR will significantly expand these  
6 existing operations of the CVP and SWP.

7 4. The delta smelt is a two- to three-inch-long fish endemic to the Delta. Unlike many  
8 fishes, the delta smelt typically lives just one year, making it particularly vulnerable to short-term  
9 environmental fluctuations and threats. Extinction of the delta smelt could result from just a single  
10 year of spawning failure or from just a few consecutive years of high fish kills or poor spawning or  
11 rearing conditions. The existing operations of the CVP and SWP have been major factors in the  
12 delta smelt’s decline and its listing under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et*  
13 *seq.*

14 5. The U.S. Fish and Wildlife Service (“FWS” or “the Service”) nevertheless bowed to  
15 intense political pressure and, in July 2004, rendered its original biological opinion that the  
16 intensification of CVP and SWP operations as set forth in the OCAP will not jeopardize the  
17 continued existence of the delta smelt or adversely modify its critical habitat. Plaintiffs initially filed  
18 a complaint on February 15, 2005, alleging that the original biological opinion was arbitrary,  
19 capricious, an abuse of discretion, and not in accordance with the law because its conclusion had no  
20 basis in the record and the Service failed to consider the cumulative effects of the action, failed to  
21 rely on the best available science, and improperly relied on uncertain mitigation measures.

22 6. At the Bureau’s request, the Service reinitiated consultation on this matter in order to  
23 reexamine “potential critical habitat issues” and issued a new biological opinion (“Biological  
24 Opinion”) on February 16, 2005. Despite, or perhaps because of, plaintiffs’ allegations of  
25 impropriety, this “no jeopardy” opinion contained only minor alterations and is substantially  
26 identical to the original.

27 7. Despite revisiting the impacts of the sweeping changes proposed to this project and  
28 issuing two separate, though almost identical, biological opinions, the Service’s analysis violated the

1 most basic standards of rational decision-making. The biological opinions concluded that  
2 implementation of the OCAP would neither jeopardize the survival of the delta smelt nor cause  
3 adverse modification of the delta smelt's critical habitat, even though the proposed operations would  
4 dramatically alter the Delta's hydrology and aggravate some of the very threats that led to the delta  
5 smelt's ESA listing in the first place. Plaintiffs renew their challenge to this politically expedient  
6 series of decisions because the second biological opinion, like the original biological opinion,  
7 violates the ESA's core purposes of preventing extinctions and recovering threatened species and, in  
8 addition, fails to add anything of substance to the Service's deficient analysis of whether the OCAP  
9 will impact delta smelt critical habitat in a manner that affects recovery of the species.

10 8. In rendering these biological opinions, the Service simply ignored factors that  
11 Congress required the Service to consider and reached a conclusion based on political expedience  
12 rather than sound science. In particular, the Service's decision ignored the recent decline of smelt  
13 abundance and the correspondence between periods of decline and increases in export.

14 9. Notwithstanding the patent inadequacy of the Service's biological opinions, the  
15 Bureau has taken and is taking agency action in reliance on those opinions' faulty analysis regarding  
16 the likely impacts of the OCAP on the delta smelt and its critical habitat.

17 10. By this action, plaintiffs Natural Resources Defense Council, Inc.; California Trout;  
18 Baykeeper; Friends of the River; and The Bay Institute (hereinafter collectively "plaintiffs")  
19 supplement their challenge to the Service's July 30, 2004 original biological opinion in order to  
20 challenge the superseding February 16, 2005 Biological Opinion and the Bureau's reliance thereon to  
21 implement the 2004 OCAP and related actions.

22 11. Plaintiffs allege, among other things, that the Biological Opinion is legally invalid  
23 because it failed to analyze the factors Congress required be considered (including, despite the  
24 intervening reinitiation of consultation on just this issue, whether the proposed CVP and SWP  
25 operations would cause adverse modification of delta smelt habitat in a manner that affects the  
26 recovery of the species) and reached its "no jeopardy" conclusion by relying on an undefined  
27 promise of "adaptive management" that provides no assurance of protection whatsoever.

28 12. Plaintiffs further supplement their challenge to the Bureau's ongoing violations of the

1 ESA and allege that, notwithstanding the patent inadequacy of the Service’s biological opinions, the  
2 Bureau has acted in reliance on those opinions, for example by implementing the 2004 OCAP and by  
3 executing long-term water supply renewal contracts based on the opinions’ faulty analysis regarding  
4 the likely impacts of the OCAP on the delta smelt and its critical habitat. In doing so, the Bureau has  
5 failed and is failing to fulfill its affirmative duty to insure that its actions are not likely to jeopardize  
6 the species’ continued existence or adversely modify its critical habitat.

7 **ADDITIONAL INTRODUCTION TO FOURTH SUPPLEMENTAL COMPLAINT**

8 13. In 2004, the Bureau initiated consultation with the National Marine Fisheries Service  
9 (“NMFS”) regarding the effects of the OCAP to listed anadromous fish species, including the  
10 endangered Sacramento River winter-run Chinook salmon (“winter-run Chinook”) and threatened  
11 Central Valley spring-run Chinook salmon (“spring-run Chinook”). On October 22, 2004, NMFS  
12 issued a biological opinion (“NMFS 2004 OCAP BiOp”) determining that the OCAP would not  
13 cause jeopardy to these species.

14 14. The Bureau also initiated consultation with NMFS in 2004 regarding the effects that its  
15 decision to renew approximately 145 long-term water contracts with Sacramento River settlement  
16 contractors, including the 28 parties that intervened or have been joined as defendants to this action  
17 (hereinafter “SRS Contractors”),<sup>1</sup> on specific negotiated terms would have on listed anadromous  
18 species, including the winter-run and spring-run Chinook salmon. On January 10, 2005, NMFS  
19 concurred with the Bureau’s finding that the decision to renew and implement the contracts with the  
20 Sacramento River settlement contractors would not cause jeopardy to these species. NMFS based its  
21 determination exclusively on the NMFS 2004 OCAP BiOp.

22 15. After a federal court invalidated the NMFS 2004 OCAP BiOp, NMFS issued a new  
23

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24 <sup>1</sup> The SRS Contractors that intervened or have been joined as defendants include: Carter Mutual,  
25 Meridian Farms, Natomas Central Mutual, Pelger Mutual, Pleasant Grove-Verona Mutual, and  
26 Sutter Mutual Water Companies; Anderson-Cottonwood, Glenn-Colusa, Maxwell, Princeton-  
27 Codora-Glenn, and Provident Irrigation Districts; Tisdale Irrigation and Drainage Company;  
28 Reclamation Districts 108 and 1004; Beverly Andreotti *et al*; Christo Bardis *et al*; Conaway  
Preservation Group; Howald Farms, Inc.; Oji Brothers Farm; Oji Family Partnership; Pacific Realty  
Associates, L.P.; Abdul and Tahmina Rauf; Henry Richter *et al*; River Garden Farms; Sacramento  
River Ranch, L.L.C.; Windswept Land and Livestock Company; the City of Redding; and Knights  
Landing Investors, LLC (formerly Fred Tehhunfeld *et al*).

1 biological opinion on June 4, 2009 (“NMFS OCAP BiOp”) that, unlike the prior BiOp, determined  
2 that the OCAP *would* cause jeopardy to the winter-run and spring-run Chinook salmon, and other  
3 anadromous species. The NMFS OCAP BiOp expressly stated that it did not analyze the impacts of  
4 the Bureau’s decision to renew and implement water contracts. On April 7, 2011, NMFS amended  
5 the NMFS OCAP BiOp to reflect the report of an independent review panel. NMFS also amended  
6 the NMFS OCAP BiOp in 2014 and 2015 when the Bureau petitioned the California State Water  
7 Resources Control Board (“SWRCB”) to modify the Bureau’s obligations to implement water  
8 quality standards in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality  
9 Control Plan (“Bay-Delta Plan”) and to modify provisions of the Bureau’s obligations under the  
10 NMFS OCAP BiOp. None of these amendments analyzed the impacts of the Bureau’s decision to  
11 renew and implement water contracts. The Bureau did not reinitiate consultation on the SRS  
12 contract renewals after the NMFS 2004 OCAP BiOp was invalidated, nor after the NMFS OCAP  
13 BiOp was issued, nor after the NMFS OCAP BiOp was subsequently amended.

14 16. In 2014, the Bureau delivered to the SRS Contractors, and the SRS Contractors diverted,  
15 excessive amounts of water from Shasta Reservoir to satisfy the terms of the renewed contracts with  
16 the SRS Contractors (“SRS Contracts”). These releases and diversions caused the Bureau to lose  
17 control of water temperatures in the upper Sacramento River during the “temperature management  
18 season” for threatened and endangered Chinook salmon, which generally lasts from June through  
19 October. As a result, almost the entire stock of winter-run Chinook that had hatched, or would have  
20 hatched, in the upper Sacramento River in 2014 (“2014 brood year”) was killed. There were similar  
21 devastating impacts to the 2014 spring-run Chinook brood year in the Sacramento River.

22 17. In spite of the Bureau’s repeated assurances to the SWRCB and NMFS that another loss  
23 of temperature control would not occur in 2015, the agency again made excessive releases to satisfy  
24 the terms of the SRS Contracts and again failed to provide adequate cold water below Shasta Dam to  
25 sustain Chinook spawning and rearing throughout the 2015 temperature management season.  
26 Although the full effects of the Bureau’s excessive releases and failure to control temperatures in  
27 2015 are not yet known, early data indicates that there is even higher mortality to winter-run Chinook  
28 in 2015 than there was in 2014.



1 18. Plaintiffs hereby supplement their challenge to the Bureau's ongoing violations of the  
2 ESA and allege that the Bureau violated, and is violating arbitrarily and capriciously, Section 7(a)(2)  
3 of the ESA and the ESA's implementing regulations by failing to reinitiate consultation on the SRS  
4 Contract renewals based on new information that reveals that the SRS Contracts may affect the  
5 winter-run and spring-run Chinook in a manner not previously considered.

6 19. Plaintiffs further supplement their challenge to the Bureau's ongoing violations of the  
7 ESA and allege that the Bureau and the SRS Contractors violated Section 9 of the ESA by taking  
8 winter-run and spring-run Chinook, and by impairing these species' critical habitat, unlawfully and  
9 without required authorization.

#### 10 **JURISDICTION AND VENUE**

11 20. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising  
12 under the laws of the United States); 16 U.S.C. § 1540(c), (g) (action arising under the ESA); and 5  
13 U.S.C. §§ 702, 703, and 706 (judicial review of federal agency actions).

14 21. The Secretary has issued a final Biological Opinion on the effects of the OCAP on delta  
15 smelt pursuant to 16 U.S.C. § 1536(b). Plaintiffs assert that the Biological Opinion is arbitrary and  
16 capricious, an abuse of discretion, and not in accordance with law within the meaning of 5 U.S.C. §  
17 706(2). An actual controversy therefore exists between the parties within the meaning of the  
18 Declaratory Judgment Act, 28 U.S.C. § 2201(a).

19 22. On February 7, 2008, more than 60 days prior to the filing of the Third Supplemental  
20 Complaint, plaintiffs provided defendants with written notice of the violations of the ESA alleged  
21 herein, as required by 16 U.S.C. § 1540(g)(2). A copy of this written notice is attached hereto as  
22 Exhibit 1.

23 23. This case was originally filed in the Northern District of California. The case was  
24 transferred to the Eastern District of California on September 28, 2005.

#### 25 **ADDITIONAL JURISDICTION FOR FOURTH SUPPLEMENTAL COMPLAINT**

26 24. A final letter of concurrence on the effects of the SRS Contracts on winter-run and  
27 spring-run Chinook was issued on January 10, 2005, pursuant to 16 U.S.C. § 1536(a)(2). Plaintiffs  
28 assert that the Bureau's decision not to reinitiate consultation with NMFS is arbitrary and capricious



1 and violates 16 U.S.C. § 1536(a)(2) and the ESA’s implementing regulations, 50 C.F.R. § 402.16.  
2 Plaintiffs further contend that the Secretary and SRS Contractors have taken, and are taking, winter-  
3 run and spring-run Chinook in violation of 16 U.S.C. § 1538(a). An actual controversy therefore  
4 exists between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201(a),  
5 as to the claims newly alleged in plaintiffs’ Fourth Supplemental Complaint.

6 25. On August 10, 2015, more than 60 days prior to the filing of this Fourth Supplemental  
7 Complaint, plaintiffs provided the Secretary of the Interior, the Bureau and the SRS Contractors with  
8 written notice of the additional violations of the ESA alleged in the Fourth Supplemental Complaint,  
9 as required by 16 U.S.C. § 1540(g)(2). A copy of this written notice is attached hereto as Exhibit 6.

#### 10 **PARTIES**

11 26. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL (“NRDC”) is a non-profit  
12 environmental organization with more than 294,000 members nationwide, including more than  
13 54,000 members in California. NRDC’s purpose is to safeguard the Earth: its people, its plants and  
14 animals and the natural systems on which all life depends. The organization works to restore the  
15 integrity of the elements that sustain life — air, land and water — and to defend endangered natural  
16 places. NRDC seeks to establish sustainability and good stewardship of the Earth as central ethical  
17 imperatives of human society and strives to protect nature in ways that advance the long-term  
18 welfare of present and future generations. For more than three decades, NRDC has advocated  
19 extensively for the protection of the nation’s waterways and wildlife, including the delta smelt and  
20 salmon species at issue here. In July 2003, NRDC submitted formal comments and scientific  
21 information to the Bureau raising concerns about the impacts of the Bureau’s then-proposed OCAP  
22 on delta smelt and salmonids, and in July 2004, NRDC submitted formal comments and scientific  
23 information to FWS regarding the impacts of the Bureau’s OCAP on delta smelt, during the  
24 pendency of the ESA consultation that resulted in the original FWS biological opinion. In February  
25 2005, NRDC submitted recent scientific data to FWS indicating that delta smelt are at the lowest  
26 levels ever measured in the history of monitoring. In addition, NRDC has long worked to protect the  
27 San Francisco Bay-Delta estuary and the fish for which it provides habitat, including the delta smelt,  
28 winter-run Chinook, and spring-run Chinook, in non-litigation settings. For example, NRDC was

1 involved in the development of, and actively supported the enactment of, the Central Valley Project  
2 Improvement Act and participated deeply in the negotiation of the record of decision for the  
3 CALFED Bay-Delta Program, a joint federal-state process the mission of which is to develop and  
4 implement a long-term comprehensive plan that will restore ecological health and improve water  
5 management for beneficial uses of the Bay-Delta estuary. NRDC has submitted formal comments  
6 and scientific information to NMFS regarding the impacts of the 2004 OCAP on the salmonid  
7 species at issue here during the ESA consultation that resulted in the NMFS 2004 OCAP BiOp.  
8 NRDC has urged the Bureau to reinitiate consultation with NMFS on the renewed Settlement  
9 Contracts.

10 27. Plaintiff CALIFORNIA TROUT (“CalTrout”) is a non-profit conservation corporation  
11 organized in 1971 under the laws of the State of California with its principal place of business in San  
12 Francisco, California. CalTrout’s mission is to protect and restore wild trout and steelhead and the  
13 waters they inhabit throughout California and other California native fish species such as the delta  
14 smelt. CalTrout fulfills its mission by protecting wild trout habitat throughout California, and the  
15 native biodiversity associated with this riparian habitat, including the delta smelt and other  
16 vulnerable species. In fulfilling its mission to protect freshwater habitat and its biodiversity,  
17 including native fish, CalTrout has participated in watershed protection and restoration efforts such  
18 as preserving and restoring the habitat of California’s unique state fish, the California golden trout,  
19 working with the California Department of Fish and Game and other key partners to establish a  
20 statewide steelhead trout and a northern California coho salmon recovery plan, restoring San  
21 Francisco’s Lake Merced and the Eastern Sierra’s Mono Lake, and mobilizing concerned anglers to  
22 protect and restore wild trout waters in the Mount Shasta and Mammoth Lakes regions of the state.  
23 CalTrout participates regularly in administrative processes and in the past two years has commented  
24 on the U.S. Forest Service’s proposed changes in Forest Practices, Roadless Rules, and Sierra  
25 Framework; Bureau of Land Management Grazing Regulations; California Department of Fish and  
26 Game Trout Strategic Plan; and amendments proposed for Clean Water Act. CalTrout members  
27 support the conservation of entire watersheds and all of their associated biodiversity, as well as the  
28 effective implementation and enforcement by government regulatory agencies of planning and

1 conservation laws, like the Endangered Species Act, that relate to the protection of these watersheds  
2 and their native biodiversity. CalTrout represents nearly 6,000 recreational anglers, of whom more  
3 than 2,000 live within a one-hour drive of the Delta and regularly utilize these riparian areas for  
4 fishing, photography, and hiking and to seek aesthetic relief from the urban environments of the Bay  
5 Area.

6 28. Plaintiff SAN FRANCISCO BAYKEEPER (“Baykeeper”) is a regional non-profit  
7 public benefit corporation organized under the laws of the State of California. Baykeeper’s mission  
8 is to protect and enhance the water quality of the San Francisco Bay-Delta estuary for the benefit of  
9 its ecosystems and human communities. Founded in 1989, Baykeeper is the premier legal and policy  
10 advocate for the San Francisco Bay-Delta estuary. Through its on-the-water presence, Baykeeper  
11 patrols hundreds of miles of waterways throughout the Bay-Delta, investigating pollution problems  
12 and bringing enforcement actions against polluters directly when necessary. Baykeeper also uses  
13 targeted administrative and legal advocacy before state and regional regulators, playing a lead role in  
14 developing sound and legal standards, permits, and regulations. A key area of the group’s focus is  
15 ensuring that state and federal environmental laws are implemented properly and enforced.  
16 Baykeeper’s office is located in Oakland, California. Baykeeper has approximately 3,000 members  
17 and supporters, most of whom reside in the San Francisco Bay-Delta watershed.

18 29. Plaintiff FRIENDS OF THE RIVER (“FOR”) was founded in 1973 and is incorporated  
19 under the non-profit laws of the State of California, with its principal place of business in  
20 Sacramento, California. FOR has more than 5,600 members dedicated to the protection,  
21 preservation, and restoration of California’s rivers, streams, watersheds and aquatic ecosystems.  
22 Half of FOR’s members live in the San Francisco bay area, near the Delta and river areas that  
23 provide delta smelt habitat. FOR has been involved in the protection and management of  
24 California’s rivers and estuaries for more than 30 years, with an emphasis on protecting free flowing  
25 rivers and streams, watersheds, water quality, aquatic habitat, and aquatic species. FOR was an  
26 original plaintiff in the lawsuits to list the delta smelt and challenge the FWS’s biological opinion for  
27 the species. Many members of FOR utilize California rivers and the Sacramento-San Joaquin Bay  
28 Delta Estuary for outdoor recreation and spiritual renewal.

1           30. Plaintiff THE BAY INSTITUTE OF SAN FRANCISCO (“TBI”) is a nonprofit  
2 conservation organization incorporated under the laws of California and dedicated to the  
3 preservation, protection, and restoration of the San Francisco Bay, its estuary, the accompanying  
4 watershed (including the Delta), and this region’s fish and wildlife resources, from the Sierra to the  
5 sea. TBI’s headquarters are located in San Francisco, California. TBI and its more than 1,600  
6 members have a direct interest in the survival and perpetuation of fish species and other aquatic  
7 resources that are dependent upon Central Valley Rivers, the Sacramento-San Joaquin Delta, the San  
8 Francisco Bay, and its estuary. Most of TBI’s members live in the San Francisco Bay’s watershed,  
9 and many rely on this region for their livelihood in the commercial and sports fishing and boating  
10 industries. In addition, many TBI members regularly visit and use the San Francisco Bay, its estuary,  
11 and the Central Valley rivers that flow into the Bay and its estuary for recreational experiences and  
12 aesthetic enjoyment. TBI regularly participates in administrative and judicial proceedings on behalf  
13 of its members to protect, enhance, and restore declining populations of native California fishes,  
14 including ESA-listed salmon, steelhead, and delta smelt, throughout the Bay’s watershed. Since its  
15 founding in 1981, TBI has pioneered a research, advocacy, and education approach to the San  
16 Francisco Bay Estuary’s issues that considers not just the Bay, but the entire ecosystem related to the  
17 Bay’s estuary as a single, interdependent watershed. TBI’s efforts therefore encompass a region  
18 extending from the headwaters of the Sacramento and San Joaquin River systems to the Golden  
19 Gate. In 1992, TBI and other environmental organizations sued the Service over its failure to list the  
20 delta smelt under the ESA, and since then TBI has carefully monitored the federal government’s  
21 efforts to protect this species. TBI was one of three environmental organizations that negotiated the  
22 historic 1994 Bay-Delta Accord, which forged a consensus among the state and federal governments,  
23 and environmental, agricultural, and urban interests to achieve improvements in the water quality of  
24 the Bay-Delta. The 1994 Bay-Delta Accord also set in motion CALFED, in which TBI has been  
25 heavily engaged. In July 2003, TBI submitted formal comments and scientific information to the  
26 Bureau regarding the impacts of its then-proposed OCAP on delta smelt. The Bay Institute works  
27 collaboratively with government agencies, independent academic experts, water users, and land  
28 owners to design and implement large-scale ecological restoration programs through the CALFED

1 Bay-Delta Program, the Central Valley Project Improvement Act (“CVPIA”) (Pub. L. No. 102-575,  
2 106 Stat. 4714 (1992)), and other initiatives. TBI commented on the original environmental impact  
3 statement and environmental impact report (“EIS/EIR”) for the 1986 CVP/SWP Coordinated  
4 Operating Agreement (“COA”). In July 2003, The Bay Institute submitted formal comments and  
5 scientific information to the Bureau regarding the impacts of its then-proposed OCAP on the five  
6 salmon and steelhead evolutionarily significant units present in the Central Valley.

7 31. Plaintiffs and their respective members have been and will continue to be actively  
8 involved in efforts to protect and restore delta smelt and the winter-run and spring-run Chinook in  
9 the Delta and Sacramento River watershed. Among other things, they have written to numerous  
10 federal, state, and local agencies and officials to urge increased protection for the delta smelt and  
11 winter-run and spring-run Chinook and their habitat.

12 32. Plaintiffs and their respective members live and/or work in communities near or on  
13 the Delta. In addition to advocating for protections for the delta smelt, members of the plaintiff  
14 organizations, all environmental, conservation, or fishing organizations, are active participants in the  
15 life of the Delta. Individual members of each organization frequently visit the Delta, critical habitat  
16 for the delta smelt, to use and appreciate the Delta ecosystem. The health and survival of the delta  
17 smelt species is considered indicative of the health of the Delta itself. *See* U.S. Fish and Wildlife  
18 Service, Recovery Plan for the Sacramento-San Joaquin Delta Native Fishes at 1 (Nov. 26, 1996).  
19 Plaintiffs’ use of the Delta for educational and recreational activities, such as hiking, boating, bird  
20 watching, swimming, and fishing, would be detrimentally affected by the decline of the delta smelt  
21 and the corresponding decline in the health of the Delta. Plaintiffs and their members regularly  
22 derive scientific, educational, and conservation benefit and enjoyment from the existence of the delta  
23 smelt and will continue to do so by regularly engaging in scientific, education, and conservation  
24 activities involving the delta smelt. These benefits and enjoyments would increase if the delta smelt  
25 were to recover from its precarious status of being threatened with extinction.

26 33. Delta smelt populations will continue to decline, and the fish may soon become  
27 extinct, unless the utmost care is taken in protecting the fish’s limited critical habitat in the Delta.  
28 The health of the delta smelt population is one indicator of the overall health of the Delta. Therefore,

1 while the extirpation of the delta smelt from any portion of the Delta would constitute an irreparable  
2 environmental loss in and of itself, it would also indicate more generally that the health and diversity  
3 of the fish's Delta habitat had been severely degraded. These events, and the threat of these events,  
4 would deprive plaintiffs and their members of the recreational, spiritual, professional, aesthetic,  
5 educational, and other benefits they presently derive from the Delta ecosystems.

6 34. The above-described aesthetic, conservation, recreational, scientific, educational,  
7 wildlife and fisheries preservation, and other interests of plaintiffs and their respective members,  
8 have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely  
9 affected and irreparably injured by the defendants' arbitrary and capricious issuance of a Biological  
10 Opinion that found that the implementation of intensified CVP and SWP operations, as set forth in  
11 the OCAP and in the Biological Opinion's project description, would not jeopardize the survival of  
12 the delta smelt or adversely modify its critical habitat. These injuries are actual and concrete and  
13 would be redressed by the relief sought herein. Plaintiffs have no adequate remedy at law.

14 35. The Defendants in this action are:

15 a. SALLY JEWELL: Ms. Jewell is sued in her official capacity as Secretary of  
16 the Interior, the Bureau's parent agency. She is ultimately responsible for implementing the ESA  
17 and for ensuring that the consultations required by Section 7 of the ESA regarding impacts to the  
18 delta smelt and winter-run and spring-run Chinook from the OCAP and contract renewals are  
19 completed in accordance with the letter and intent of the law. She is also ultimately responsible for  
20 ensuring that the Bureau's operation of the CVP does not violate the ESA.

21 b. DAN ASHE: Mr. Ashe is sued in his official capacity as Director of the  
22 Service. He has been delegated the responsibilities of the Secretary of the Interior described in the  
23 preceding paragraph. He is responsible for administering the ESA, including reviewing and  
24 approving the findings of the delta smelt final Biological Opinion.

25 c. ESTEVAN LÓPEZ: Mr. López is sued in his official capacity as  
26 Commissioner of the Bureau of Reclamation. Under the supervision and direction of the Secretary  
27 of the Interior, he is responsible for insuring that the operations of the CVP are consistent with ESA  
28 requirements.

1           36.     The following Defendant-Intervenors voluntarily intervened in this action, thereby  
2 submitting themselves to the jurisdiction of this Court:

- 3           a.     CALIFORNIA DEPARTMENT OF WATER RESOURCES (“DWR”).
- 4           b.     CALIFORNIA FARM BUREAU FEDERATION.
- 5           c.     GLENN-COLUSA IRRIGATION DISTRICT.
- 6           d.     NATOMAS CENTRAL MUTUAL WATER COMPANY (“NCMWC”).
- 7           e.     PELGER MUTUAL WATER COMPANY.
- 8           f.     PLEASANT GROVE-VERONA MUTUAL WATER COMPANY.
- 9           g.     PRINCETON-CODORA-GLENN IRRIGATION DISTRICT.
- 10          h.     PROVIDENT IRRIGATION DISTRICT.
- 11          i.     RECLAMATION DISTRICT 108.
- 12          j.     RIVER GARDEN FARMS.
- 13          k.     SAN LUIS & DELTA-MENDOTA WATER AUTHORITY (“SLDMWA”).
- 14          l.     STATE WATER CONTRACTORS (“SWC”).
- 15          m.     WESTLANDS WATER DISTRICT.

16           37.     The following parties were joined as defendants pursuant to Federal Rule of Civil  
17 Procedure 19 in the Third Supplemental Complaint:

- 18          a.     ANDERSON-COTTONWOOD IRRIGATION DISTRICT (“ACID”).
- 19          b.     BEVERLY F., ARNOLD A., MICHAEL D., AND MARK C. ANDREOTTI.
- 20          c.     BANTA-CARBONA IRRIGATION DISTRICT.
- 21          d.     CHRISTO D. BARDIS, JOHN D. REYNEN, AND JUDITH REYNEN.
- 22          e.     BYRON BETHANY IRRIGATION DISTRICT.
- 23          f.     CARTER MUTUAL WATER COMPANY.
- 24          g.     COELHO FAMILY TRUST.
- 25          h.     CONAWAY PRESERVATION GROUP.
- 26          i.     DEL PUERTO WATER DISTRICT.
- 27          j.     EAGLE FIELD WATER DISTRICT.
- 28          k.     FRESNO SLOUGH WATER DISTRICT.



- 1 l. HOWALD FARMS, INC.
- 2 m. JAMES IRRIGATION DISTRICT.
- 3 n. LOMO COLD STORAGE.
- 4 o. MAXWELL IRRIGATION DISTRICT.
- 5 p. MERCY SPRINGS WATER DISTRICT.
- 6 q. MERIDIAN FARMS WATER COMPANY.
- 7 r. OJI BROTHERS FARM, INC.
- 8 s. OJI FAMILY PARTNERSHIP.
- 9 t. ORO LOMA WATER DISTRICT.
- 10 u. PACIFIC REALTY ASSOCIATES, L.P.
- 11 v. PATTERSON IRRIGATION DISTRICT.
- 12 w. ABDUL AND TAHMINA RAUF.
- 13 x. RECLAMATION DISTRICT NO. 1004.
- 14 y. CITY OF REDDING.
- 15 z. HENRY D. RICHTER et al.
- 16 aa. SACRAMENTO RIVER RANCH, LLC.
- 17 bb. SUTTER MUTUAL WATER COMPANY.
- 18 cc. KNIGHTS LANDING INVESTORS, LLC (FORMERLY FRED
- 19 TENHUNFELD et al.)<sup>2</sup>
- 20 dd. TISDALE IRRIGATION AND DRAINAGE COMPANY.
- 21 ee. TRANQUILITY IRRIGATION DISTRICT.
- 22 ff. WEST SIDE IRRIGATION DISTRICT.
- 23 gg. WEST STANISLAUS IRRIGATION DISTRICT.
- 24 hh. WINDSWEPT LAND AND LIVESTOCK COMPANY.

25 **ADDITIONAL PLAINTIFFS FOR FOURTH SUPPLEMENTAL COMPLAINT**

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<sup>2</sup> On October 7, 2015, counsel for Mr. Tenhunfeld sent a letter to Plaintiffs stating that Mr.  
28 Tenhunfeld's contract had been assumed by Knights Landing Investors, LLC.

1 38. Plaintiff WINNEMEM WINTU TRIBE (the “Winnemem”) is a historic California  
2 Native Tribe recognized by the California Native American Heritage Commission. The  
3 Winnemem’s historical territory included the east side of the upper Sacramento River watershed, the  
4 McCloud River watershed from origin to termination, the Squaw Creek watershed from origin to  
5 termination, and approximately 20 miles of the Pit River from the confluence of the McCloud River,  
6 Squaw Creek, and Pit River up to Big Bend. The Winnemem has tribal members living, and tribal  
7 concerns, in areas including Clear Creek from Whiskeytown Dam to the Sacramento River, the  
8 Sacramento River from Shasta Dam to the Delta, and Spring Creek from the Debris Dam to Keswick  
9 Dam. For centuries, the Winnemem has had a deep cultural and spiritual relationship with the  
10 salmon that use these rivers. Prior to the advent of the CVP and throughout implementation of the  
11 CVP and the CVPIA, the Winnemem have been voicing their concerns for the salmon. In 1872, for  
12 example, the United States Fish Commission (now the FWS) sought to build a Salmon Fish  
13 Hatchery on the McCloud River, which the Winnemem opposed due to the serious threat it would  
14 pose to the salmon. Similarly, in 1937, the Bureau began construction of Shasta Dam, which the  
15 Winnemem also opposed because it blocked salmon migration. At these and all other opportunities  
16 of which they were aware, the Winnemem have voiced concern and advocated for the salmon. The  
17 Winnemem have testified in numerous hearings before the Bureau, the United States Senate, and the  
18 CALFED Bay Delta Authority, in attempts to achieve protection for Sacramento River salmon and  
19 steelhead.

20 39. PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS/  
21 INSTITUTE FOR FISHERIES RESOURCES. Pacific Coast Federation of Fisherman’s  
22 Associations (“PCFFA”) is the largest trade organization of commercial fishing men and women on  
23 the West Coast. PCFFA is a federation of port associations and marketing associations in California,  
24 Oregon and Washington. PCFFA’s Southwest Regional Office is located in San Francisco,  
25 California. Collectively, PCFFA’s members represent more than 1,000 commercial fishing families,  
26 most of whom are small and mid-sized commercial fishing boat owners and operators. Most of  
27 PCFFA’s members derive all or part of their income from the harvesting of salmonids, a valuable  
28 business enterprise for the West Coast and California economies. The decline of California’s salmon

1 species has severely impacted PCFFA members in California by limiting commercial harvest  
2 opportunities, both through lost production of impaired stocks and because of restrictions imposed  
3 on the fishing fleet to protect impaired salmon populations. Habitat losses to date already have cost  
4 the West Coast salmon fishing industry (including both commercial and recreational components)  
5 tens of thousands of jobs in the last thirty years. These losses are directly related to widespread  
6 inland habitat destruction resulting from the construction of dams and diversions of water as part of  
7 the CVP and SWP. PCFFA has been active for over 30 years in efforts to rebuild salmon  
8 populations in Central Valley streams and rivers as well as watersheds connected naturally and  
9 unnaturally to the Central Valley rivers. The SRS contract renewals have an adverse effect on  
10 salmonid species that are critical to PCFFA's members' livelihoods. PCFFA has presented written  
11 comments and/or testimony to the Bureau and CALFED on numerous CVP contract renewals.

12       The INSTITUTE FOR FISHERIES RESOURCES ("IFR") is a sister organization of PCFFA.  
13 IFR is a nonprofit organization with headquarters in San Francisco, California. Established in 1993  
14 by PCFFA, IFR is responsible for meeting the fishery research and conservation needs of working  
15 men and women in the fishing industry by executing PCFFA's expanding habitat protection  
16 program. From its inception, IFR has helped fishing men and women in California and the Pacific  
17 Northwest address salmon protection and restoration issues, with particular focus on dam, water  
18 diversion, and forestry concerns. IFR is an active leader in several restoration programs affecting  
19 winter-run and spring-run Chinook, including removal of antiquated storage and hydroelectric dams.  
20 PCFFA and IFR both operate ongoing programs aimed at addressing recovery of salmonids affected  
21 by the OCAP and the SRS contracts, including winter-run Chinook. PCFFA and IFR have actively  
22 advocated for the protection and restoration of flows critical to the health of the Bay and Delta.

23       40.       NRDC, Baykeeper, TBI, the Winnemem Wintu Tribe, and PCFFA/IFR, and their  
24 respective members, live, work, recreate, research, and worship in the Sacramento River watershed.  
25 They depend on the winter-run and spring-run Chinook for professional, recreational, and spiritual  
26 sustenance, and the health of these runs impacts the availability of the commercially and  
27 recreationally fished fall-run Chinook, on which PCFFA members rely for a substantial portion of  
28 their economic well-being and livelihood. In addition to advocating for protections for the winter-

1 run and spring-run Chinook, members of these plaintiff organizations, all environmental,  
2 conservation, tribal, or fishing organizations, are active participants in the life of the Sacramento  
3 River watershed. Individual members of each organization either live in, work in, or frequently  
4 travel to the Sacramento River watershed, critical habitat for the winter-run and spring-run Chinook.  
5 Plaintiffs' use of the Sacramento River watershed for educational, professional, spiritual, and  
6 recreational activities, such as hiking, boating, bird watching, swimming, and fishing, would be  
7 detrimentally affected by the decline of the winter-run and spring-run Chinook. Plaintiffs and their  
8 members regularly derive scientific, educational, spiritual, professional, economic, and conservation  
9 benefit and enjoyment from the existence of the winter-run and spring-run Chinook and will  
10 continue to do so by regularly engaging in activities involving these species. These benefits and  
11 enjoyments would increase if necessary measures were taken to provide for the recovery of these  
12 species.

13 41. Winter-run and spring-run Chinook populations will continue to decline, and the  
14 species may soon become extinct, unless the utmost care is taken in protecting their limited  
15 remaining critical habitat. The winter-run and spring-run Chinook are important to the natural  
16 balance of the Sacramento River watershed, and their extinction would adversely affect the entire  
17 ecosystem. These events, and the threat of these events, would deprive plaintiffs and their members  
18 of the recreational, spiritual, professional, aesthetic, educational, economic, and other benefits they  
19 presently derive from the Sacramento River watershed.

20 42. The above-described aesthetic, conservation, recreational, scientific, educational,  
21 economic, wildlife and fisheries preservation, and other interests of plaintiffs and their respective  
22 members, have been, are being, and, unless the relief prayed for herein is granted, will continue to be  
23 adversely affected and irreparably injured by the defendants' failure to comply with the provisions of  
24 the Endangered Species Act discussed herein. These injuries are actual and concrete and would be  
25 redressed by the relief sought herein. Plaintiffs have no adequate remedy at law.

## 26 **FACTUAL BACKGROUND**

### 27 **The Delta Smelt**

28 43. The delta smelt (*Hypomesus transpacificus*) is a slender-bodied fish typically reaching

1 just over 2 inches in length. The delta smelt is the only native estuarine species found in the Delta  
2 that spends its entire life span in the Delta.

3 44. Historically, delta smelt could be found throughout the Delta. However, during the  
4 past 30 years, the population has declined by 85 percent; in 2004, delta smelt abundance was just 8  
5 percent of the average abundance measured from 1967-1973.

6 45. Delta smelt typically live for only one year, and, therefore, they are particularly  
7 vulnerable to extinction resulting from atypically harsh conditions. One year in which the population  
8 fails to spawn or in which a high proportion of juveniles are killed could result in the extinction of  
9 the species. Similarly, increased abundance from a good year will not serve to mitigate damage to  
10 population caused by a subsequent bad year. As a result, delta smelt are affected greatly by any  
11 disturbance to their reproductive habitat or larval nursery areas.

12 46. Delta smelt live for most of their year-long life spans in the low-salinity zone at the  
13 saltwater-freshwater interface, but they migrate upstream to spawn. However, the amount and the  
14 quality of suitable habitat has declined dramatically due to Delta water diversions and exports. As  
15 freshwater is exported, the low-salinity zone shifts upstream from large-area, shallow habitats, such  
16 as Suisun Bay, to narrow, deep river channels, which are less productive and have less habitat area.  
17 This impact to the critical rearing habitat of the smelt is compounded by the disastrous levels of  
18 direct mortality that occur at the Projects' pumps: Both pre-spawning adult fish moving upstream to  
19 spawn and their larval and juvenile progeny moving downstream to low-salinity rearing habitat are  
20 killed in large numbers at the Projects' fish salvage facilities and pumps.

21 47. In response to a lawsuit brought against the Service by TBI, FOR, and other  
22 conservation groups to compel such listing, the Service listed the delta smelt as a threatened species  
23 under the ESA on March 5, 1993. These same groups were forced to bring litigation to compel  
24 designation of critical habitat for delta smelt, which the Service designated on December 19, 1994.  
25 The critical habitat includes all waters and submerged lands within the Delta, including those at the  
26 pumping plants for the CVP and the SWP.

27 48. The California Department of Fish and Game has confirmed that data from the 2004  
28 abundance measurements for the delta smelt indicate that the species abundance is at the lowest level

1 ever measured in over 30 years of monitoring. Population viability analysis conducted for the  
2 species indicates that the risk for extinction within the next 20 years is high. *See, e.g.,* Bennett,  
3 W.W. and K.T. Honey, *Modeling the Canary: How Do We Assess Population Viability for the*  
4 *Threatened Delta Smelt?*, Proceedings of the 2004 CALFED Bay-Delta Program Science  
5 Conference.

6 **ADDITIONAL FACTUAL BACKGROUND FOR FOURTH SUPPLEMENTAL**  
7 **COMPLAINT**

8 **The Sacramento River Winter-Run Chinook Salmon**

9 49. The winter-run Chinook's population has declined precipitously since the early 1980s,  
10 from an estimated historic high of 117,808 in 1969 to as few as 191 adult individuals returning to  
11 spawn in 1991. The winter-run Chinook was declared threatened on November 5, 1990 (55 Fed.  
12 Reg. 46515) and reclassified as endangered on January 4, 1994 (59 Fed. Reg. 440). NMFS re-  
13 affirmed the listing of the winter-run Chinook as an endangered species on June 28, 2005. 70 Fed.  
14 Reg. 37160, 37191.

15 50. Critical habitat for the winter-run Chinook was first designated on August 4, 1989 (54  
16 Fed. Reg. 32085) to include the portion of the Sacramento River from Red Bluff Diversion Dam in  
17 Tehama County (River Mile 243) to Keswick Dam in Shasta County (River Mile 302), including  
18 adjacent riparian areas as well as the river water and river bottom. On June 16, 1993, critical habitat  
19 was extended downstream to Chipps Island (River Mile 0) at the westward margin of the  
20 Sacramento-San Joaquin Delta. Critical habitat now includes all waters from Chipps Island  
21 westward to Carquinez Bridge, including Honker Bay, Suisun Bay, and Carquinez Strait, all waters  
22 of San Pablo Bay westward of the Carquinez Bridge, and all waters of San Francisco Bay (north of  
23 the San Francisco-Oakland Bay Bridge) from San Pablo Bay to the Golden Gate Bridge. 58 Fed.  
24 Reg. 33212.

25 51. The NMFS OCAP BiOp stated that the winter-run Chinook is "at high risk of  
26 extinction" and warned that a prolonged drought could have devastating effects on the species.  
27 NMFS OCAP BiOp at 672, 674. Winter-run Chinook inhabit the upper Sacramento River and its  
28 tributaries, where the flow of cold water throughout the summer allows for successful spawning, egg

1 incubation, and rearing. Historically, winter-run Chinook relied on the McCloud, Pit, and Little  
2 Sacramento rivers, as well as Hat and Battle creeks, for habitat conducive to egg and fry  
3 development and survival and juvenile rearing. The construction of Shasta Dam blocked access to  
4 almost all of these rearing waters. Today, the upper Sacramento River below Keswick Dam is the  
5 only remaining spawning area used by winter-run Chinook. The survival of the winter-run Chinook  
6 is therefore completely dependent on the Bureau's management of the temperature and flow  
7 conditions below Keswick dam.

8 52. Winter-run Chinook are particularly vulnerable during the "temperature management  
9 season," which generally lasts from June through October. Adult winter-run Chinook migrate up the  
10 Sacramento River in the winter and spring and then hold below the Keswick Dam for several months  
11 before spawning. During these critical months, the salmon require cold water for the maturation of  
12 their gonads and the development of fertilized eggs and embryos. The optimal temperature for egg  
13 incubation is at maximum daily water temperatures of between 41 and 54.5 degrees Fahrenheit. Egg  
14 viability is reduced when maximum daily water temperatures exceed this optimal temperature range.  
15 Additionally, the adverse effects of high incubation temperatures extend beyond the egg stage,  
16 causing higher rates of mortality in later salmonid life stages. As a result, the 2009 NMFS OCAP  
17 BiOp requires the Bureau to manage releases from Keswick Dam such that there is sufficient volume  
18 in Shasta Reservoir's cold water pool to enable the Bureau to maintain daily average water  
19 temperatures that do not exceed 56 degrees at compliance locations between Balls Ferry and Bend  
20 Bridge from May 15 through September 30 of each year.

### 21 **The Central Valley Spring-Run Chinook Salmon**

22 53. The spring-run Chinook was historically the second largest salmon run in the Central  
23 Valley watershed and supported the bulk of the commercial fishery. Only remnant independent  
24 natural spring-run Chinook populations survive. These remnant populations represent the last  
25 vestige of the once robust populations in the Sacramento-San Joaquin River system.

26 54. The Central Valley spring-run Chinook salmon was listed as threatened on September  
27 16, 1999. 64 Fed. Reg. 50394. NMFS reaffirmed its threatened status on June 28, 2005. 70 Fed.  
28 Reg. 37160, 37191.



1           55.     On September 2, 2005, NMFS published the final designation of critical habitat for  
2 the spring-run Chinook, which is described and illustrated in detail in the Federal Register at 70 Fed.  
3 Reg. 52488, 52518, and 52590-52603.

4           56.     Spring-run Chinook enter the Sacramento River between March and September,  
5 primarily between May and June, and spawn in the river's tributaries in September and October.  
6 Historically, the mainstem of the Sacramento River has sustained a substantial portion of the spring-  
7 run Chinook population. Between 1969 and 1986, an average of over 10,000 spring-run Chinook  
8 used the upper mainstem to spawn, incubate, and rear. Since the early 1990s, however, only a few  
9 hundred fish have successfully returned, and in recent years, surveys have indicated that no spring-  
10 run Chinook have returned to spawn in this reach of the river. The remaining remnant populations of  
11 the spring-run Chinook rely principally upon small tributaries of the Sacramento River below Shasta  
12 Dam.

13           57.     Spring-run Chinook require similar cold water temperatures as winter-run Chinook  
14 for successful spawning, egg incubation and rearing.

15 **Loss of Sacramento River Temperature Control in 2014 and 2015**

16           58.     The Bureau is responsible for conducting temperature modeling to determine how  
17 much water stored in Shasta Reservoir can be released to the contractors in the spring and summer  
18 months. The Bureau must retain sufficient cold water reserves in Shasta Reservoir so that it can  
19 make timed releases from Keswick Dam throughout the temperature management season to maintain  
20 temperatures conducive to salmonid spawning, egg incubation, and rearing. The Bureau's ability to  
21 meet the needs of salmonids and their habitat throughout the temperature management season is  
22 affected by the SRS contracts. In 2014, in order to meet the demands of the SRS Contracts, the  
23 Bureau made releases from Keswick Dam in April, May, and early June that depleted the cold water  
24 pool behind Shasta Dam and ultimately led to the loss of temperature control. State and federal  
25 agencies estimate that the Bureau's failure to maintain temperature control led to 95% mortality of  
26 the 2014 brood year of winter-run Chinook. Additionally, high temperatures in September led to  
27 virtually complete mortality of spring-run Chinook eggs in the Sacramento River.

28           59.     In February 2015, in reviewing the Bureau's forecast and water supply allocation for

1 water year 2015, NMFS stated that, “in light of the high mortality (95%) associated with water  
2 temperatures observed in 2014 for juvenile winter-run Chinook salmon that spawned in upper  
3 Sacramento River, it is critically important to improve the accuracy of water temperature forecasting,  
4 and specifically the Bureau’s temperature model.” Letter from Maria Rea, Assistant Regional  
5 Administrator, NMFS, to Ron Milligan, Operations Manager, Bureau of Reclamation 2 (Feb. 27,  
6 2015). NMFS specified that “it is . . . important to conserve storage in Shasta Reservoir, and  
7 specifically the cold water pool, in order to provide for the needs of winter-run eggs and alevin  
8 throughout the temperature management season.” *Id.*

9         60. In spite of NMFS’s clear warnings, the Bureau again made excessive releases in April  
10 and May of 2015 to satisfy its contractual obligations to the SRS Contractors. These releases again  
11 depleted the cold water pool and severely compromised the spawning, egg incubation, and rearing  
12 habitat for the annual brood of winter-run Chinook. By the end of May of 2015, the Bureau’s  
13 updated forecasting showed that daily average water temperatures of 56 degrees at the Clear Creek  
14 compliance point *could not* be met for the duration of the temperature management season. Since  
15 June 2, 2015, the daily average water temperature at the Clear Creek compliance point has been  
16 above 56 degrees almost every day of the temperature management season. Specifically,  
17 temperatures at Clear Creek were above 56 degrees for 29 days in June, 30 days in July, 28 days in  
18 August, and 28 days in September of 2015.

19         61. In June of 2015, at NMFS’s request, the Bureau issued a revised Temperature  
20 Management Plan. Reviewing that plan, NMFS stated that, “It is now very clear through evaluating  
21 operations in both 2014 and 2015 that the volume of cold water available for real-time management  
22 in June through October is highly dependent on Keswick releases in April through early June. In  
23 2016, should drought conditions persist, these releases in April through early June will need to be  
24 held to minimal levels to achieve adequate temperatures only.” Letter from William Stelle, Jr.,  
25 Regional Administrator, NMFS, to David Murillo, Regional Director, Bureau of Reclamation 9 (July  
26 1, 2015). Mr. Stelle explained that due to the Bureau’s April and May releases, “the quantity and  
27 quality of the cold water pool[] will not provide for suitable winter-run [Chinook] habitat needs  
28 throughout their egg and alevin incubation and fry rearing periods” and that the “conditions. . . could

1 have been largely prevented through upgrades in monitoring and modeling, and reduced Keswick  
2 releases in April and May.” *Id.*

3 62. These releases to satisfy the terms of the SRS Contracts are the primary reason why  
4 devastating mortality of winter run is occurring again in 2015. NMFS has forecast that, based on its  
5 intervention and the Bureau’s revised temperature model and contingency plan, there is a  
6 “reasonable possibility that there will be *some* juvenile winter-run survival” in 2015. *Id.* (emphasis  
7 added). In a subsequent memorandum for the CVP-SWP operations administrative record, NMFS  
8 reported that the Bureau’s model estimates that cumulative egg and egg-to-fry survival of winter-run  
9 Chinook in 2015 to Bend Bridge is likely to be only approximately 6.89%. Memorandum from  
10 Brycen Swart to CVP-SWP operations administrative record, number 151422SWR2006SA00268, at  
11 100. As of October 22, 2015, preliminary data on winter run passage at Red Bluff Diversion Dam—  
12 an indicator of brood year survival—was even lower for the 2015 winter-run brood year than for the  
13 2014 winter-run brood year.

## 14 PROCEDURAL BACKGROUND

### 15 **Operational Changes to the Central Valley Project and the State Water Project and the** 16 **Biological Opinion**

17  
18 63. The CVP is a federal water storage and diversion project. It is one of the largest water  
19 projects in the world, annually managing an average of approximately 9 million acre-feet of water  
20 and annually delivering an average of approximately 6.8 million acre-feet of water. The CVP is  
21 comprised of approximately 20 dams and reservoirs (including some of the largest storage facilities  
22 in the State, such as Shasta Dam on the Sacramento River, the Trinity and Whiskeytown Dams,  
23 which divert water from the Trinity River to the Sacramento River for export through the Delta, and  
24 Folsom Dam on the American River), the Tracy Pumping Plant (which draws hundreds of billions of  
25 gallons of water per year out of the Delta and into the Delta-Mendota Canal), and some 500 miles of  
26 major canals, as well as conduits, tunnels, power plants, and related facilities. The SWP is a major  
27 water storage and diversion project of the State of California that coordinates operations with the  
28 CVP and shares the use of the San Luis Reservoir, among other facilities, with the CVP. As set forth

1 in the OCAP, the Bureau proposes to further coordinate operations of the CVP and the SWP and to  
2 expand and intensify existing CVP and SWP operations in a manner that would significantly affect  
3 the hydrology of the Delta, including the hydrology of areas designated as critical habitat for the  
4 delta smelt. The implementation of these and other changes to and expansions of CVP-SWP  
5 operations, as set forth in the OCAP and the Biological Opinion, significantly increase water exports  
6 from the Delta.

7         64. As part of its CVP operations, the Bureau contracts with approximately 253 long-term  
8 water contractors to deliver CVP water. A central goal of the OCAP was the execution of many of  
9 these long-term CVP water supply renewal contracts. Upon completion of its OCAP consultation  
10 with the Service, between February 2005 and April 2006 the Bureau executed at least 144 long-term  
11 water supply renewal contracts that collectively provide for the export and diversion of CVP water  
12 totaling approximately 2.5 million acre-feet per year.

13         65. The Biological Opinion purports to provide “early consultation” for operational  
14 changes that are a part of the South Delta Improvement Program (“SDIP”). These changes would  
15 include those listed above, as well as permanent barriers placed in the South Delta and further water  
16 diversions. The Biological Opinion expressly states that it does not consider the impacts of  
17 construction activities associated with the SDIP or the effects of other interrelated and  
18 interdependent activities. This Biological Opinion indicates that its “early consultation” will be  
19 formalized as a final consultation when the specific implementation plan for the South Delta is  
20 completed, assuming that the project description does not change.

21         66. Despite the Bureau’s request that the Service reinstate consultation more completely  
22 to address the impacts of the OCAP on delta smelt critical habitat, the Biological Opinion does not  
23 consider or reach any conclusion as to how changes to the critical habitat of delta smelt caused by the  
24 proposed CVP and SWP operations would adversely affect recovery of the delta smelt. This  
25 reinstitution of consultation was necessary because courts have found that the Service’s definition of  
26 adverse modification to critical habitat is an impermissible interpretation of the ESA because it reads  
27 the goal of “recovery” out of the inquiry by holding that a proposed action “adversely modifies”  
28 critical habitat only if the value of the critical habitat for *survival* is also appreciably diminished.

1 *See, e.g., Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069 (9th Cir.  
2 2004).

3 67. The Biological Opinion states baldly that the Service relied on the statutory  
4 provisions of the ESA and not the regulatory definition of adverse modification when reaching its  
5 conclusions. However, this statement is not supported by any new analysis or by the few changes  
6 made to the original biological opinion, and no new definition of adverse modification is provided or  
7 applied.

8 68. In reaching a “no jeopardy” conclusion, the Biological Opinion relies heavily on  
9 certain existing or potential future protective measures, the adequacy of which has not been  
10 demonstrated, and several of which may not be implemented in the form assumed by the Biological  
11 Opinion or at all. The Bureau has a long history of disregarding or violating such protective  
12 measures. For example, the Bureau failed to consistently meet the conservation obligations agreed  
13 upon in the biological opinions for the Friant Unit long- and short-term renewal contracts. In  
14 addition, in multiple years since the endangered Sacramento River winter-run Chinook salmon and  
15 the threatened delta smelt were listed under the ESA, the Bureau and the DWR have operated the  
16 CVP and SWP in such a way that the ESA-mandated incidental take limits for both species have  
17 been exceeded.

18 69. Among other defects, the Biological Opinion assumes benefits to the delta smelt from  
19 future, long-term implementation of an Environmental Water Account (“EWA”). The EWA as it  
20 presently exists is a water redistribution program that maintains exports to entities with contracts for  
21 water from the Delta when protections for delta smelt or certain other species are put into effect. At  
22 the time the original biological opinion was signed, however, the then-existing EWA was scheduled  
23 to expire by September 2004.<sup>3</sup> Although both the original and the revised Biological Opinion  
24 assume a future EWA, the Biological Opinion also states that “inclusion of the EWA in this  
25 description does not constitute a decision on future implementation of the EWA.” *See* Biological  
26 Opinion at 84. Any benefits to delta smelt from any long-term EWA are, at best, speculative.  
27  
28

1 Moreover, the Biological Opinion’s characterization of the EWA does not agree with the description  
2 provided by the Bureau in the June 30, 2004, OCAP when consultation with the Service was  
3 requested.

4 70. Recognizing that assumed protective measures may be inadequate and, indeed, may  
5 not even be fully carried out, the Biological Opinion provides for an “adaptive management” process  
6 under which the Bureau and certain fisheries management agencies would discuss and *potentially*  
7 agree to *further* changes in the CVP operations that affect delta smelt through an “adaptive  
8 management” process. However, the Biological Opinion does not provide any assurance of any  
9 particular level of protection for the delta smelt as a result of this promise of future “adaptive  
10 management.”

11 71. The Opinion’s adaptive management process involves the use of a so-called “Delta  
12 Smelt Risk Assessment Matrix” as a decision-making tool intended to be used by a Working Group  
13 to monitor the effects of the CVP and SWP on the delta smelt. The Matrix is a tool to identify when  
14 delta smelt may be negatively affected by a project and to suggest possible management strategies.  
15 The Biological Opinion generally requires that the Working Group be informed should the triggering  
16 conditions be met. However, the Biological Opinion does not require that the Working Group, or the  
17 Bureau, take any particular action if a triggering condition occurs. No particular level of protection  
18 for delta smelt or its critical habitat is insured.

19 72. The day before the Service issued its revised OCAP Biological Opinion, it issued a  
20 concurrence letter in response to the Bureau’s July 15, 2003, request for consultation on its proposed  
21 renewals of water service contracts with twenty water districts in the Delta Mendota Canal Unit  
22 (“DMCU”). Pursuant to these twenty contracts, the Bureau has committed to annual exports of  
23 342,865 acre-feet of CVP water from the Delta, via the Tracy Pumping Plant and the Delta-Mendota  
24 Canal. Combined with other existing demands on CVP water, these exports will further deteriorate  
25 water quality in the Delta; shift the delta smelt’s preferred habitat to less optimal upstream locations;  
26

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27 <sup>3</sup> CALFED temporarily extended the EWA through December 2007. The EWA has not been  
28 reauthorized since that time.

1 and increase the risk of entrainment at the Tracy Pumping Plant, which has a diversion capacity of  
2 4,600 cubic feet per second (“cfs”).

3 73. Despite the clear threat to the delta smelt and its critical habitat posed by the renewal  
4 of these twenty long-term water service contracts, and notwithstanding its own recognition in the  
5 2004 Biological Opinion that water exports from the Delta pose a serious threat to the delta smelt’s  
6 survival, the FWS concluded in its February 15, 2005, concurrence letter that the proposed renewals  
7 were not likely to jeopardize the continued existence of the delta smelt or any other listed species, or  
8 to adversely modify any species’ critical habitat. The FWS expressly based this conclusion on its  
9 2004 Biological Opinion.

10 74. Just three days later, on February 18, 2005, the FWS issued the first of three  
11 concurrence letters responding to the Bureau’s April 14, 2004, request for consultation on the  
12 proposed renewals of 145 Sacramento River settlement contracts. Sacramento River settlement  
13 contractors own and maintain their own water diversion and conveyance facilities on the banks of the  
14 Sacramento River.<sup>4</sup> Delta smelt, which may currently be found as far north as Verona, are at risk of  
15 being entrained at diversion points located at or south of Verona. The delta smelt and its critical  
16 habitat are further imperiled by substantial upstream diversions by north-of-Verona settlement  
17 contractors. Among other impacts, these upstream diversions increase the risk of entrainment by  
18 shifting delta smelt closer to the site of diversion points, decrease outflows, and cause a shift in the  
19 location of delta smelt’s preferred habitat to non-optimal areas. Sacramento River diversions from  
20 January through June pose a particular threat because they reduce outflows into the Delta and alter  
21 Delta flow patterns during critical pre-spawning and spawning months.

22 75. Nonetheless, the FWS concluded that the Bureau’s proposed renewals of 138  
23 settlement contracts, which collectively provide for yearly diversions of 1,830,188 acre-feet of CVP  
24 water, were not likely to jeopardize the delta smelt’s continued existence or adversely modify its  
25 critical habitat. On March 9, 2005, the FWS issued a second concurrence letter in which it  
26 concluded that the proposed renewal of the NCMWC settlement contract, which provides for yearly  
27  
28



1 diversions totaling 120,000 acre-feet of CVP water, was not likely to jeopardize the delta smelt's  
2 continued existence or adversely modify its critical habitat. On May 12, 2005, the FWS issued a  
3 third concurrence letter in which it concluded that the proposed renewals of the ACID and City of  
4 Redding settlement contracts were not likely to jeopardize the delta smelt's continued existence or  
5 adversely modify its critical habitat. The FWS expressly based each of these no jeopardy  
6 conclusions on the OCAP Biological Opinion.

7 76. Together, these water-service and settlement renewal contracts provide for the  
8 maximum delivery of far more water from the CVP than the CVP has, in recent years, been able to  
9 deliver. In fact, the Bureau intends to increase water deliveries substantially during the life of these  
10 renewed contracts. For example, in the Bureau's projections of water deliveries dated January 20,  
11 2004, and attached as Exhibit 2 hereto, annual deliveries to the south-of-Delta Westlands Water  
12 District are anticipated to increase steadily to an average of 1.127 million acre-feet from 2026 to  
13 2030 — a full 98 percent of the 1.15 million acre-foot total in the current Westlands contract. These  
14 planned delivery increases are inconsistent with previous statements regarding the quantity of water  
15 to be exported from the Delta. The Bureau's OCAP Biological Assessment suggests that long-term  
16 deliveries to south-of-Delta agricultural contractors will only average 58 to 61 percent of the full  
17 contract amount. The Environmental Protection Agency highlighted this discrepancy in a letter  
18 dated December 15, 2004, and attached hereto as Exhibit 3, where it noted that the Bureau is  
19 contractually authorizing much higher future water deliveries than it is analyzing in environmental  
20 impact documents or has delivered in recent years. If the Bureau is to deliver the maximum  
21 quantities of water provided for in the contracts, it will need significantly to intensify CVP  
22 operations and increase its deliveries north of the Delta and its water exports out of the Delta, as  
23 compared to the operations assumed and analyzed in the Biological Opinion. Neither the Biological  
24 Opinion nor the subsequently issued concurrence letters adequately consider or address the effects of  
25 these long-term water service contracts on the delta smelt or its critical habitat.

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27 <sup>4</sup> Four Sacramento River settlement contractors divert from Sutter Bypass or the Natomas Cross  
28 Channel.

1 **Recent Developments in This Litigation and Regarding the Condition of the Delta Smelt<sup>5</sup>**

2 77. On May 25, 2007, the Court granted in part and denied in part plaintiffs' motion for  
3 summary judgment herein. The Court summarized its holdings as follows:

4 The Delta smelt is undisputedly in jeopardy as to its survival and recovery. The 2005  
5 BiOp's no jeopardy finding is arbitrary, capricious, and contrary to law. For all the  
6 reasons set forth above, the 2005 OCAP BiOp is unlawful and inadequate on the  
7 following grounds:

8 (1) The DSRAM, as currently structured, does not provide a reasonable  
9 degree of certainty that mitigation actions will take place, even if the agency retains  
10 the discretion to draw upon numerous sources of water, not just the EWA,  
11 CVPIA(b)(2), and VAMP programs, to support fish protection.

12 (2) The agency failed to utilize the best available scientific information by not  
13 addressing the 2004 FMWT data and the issue of climate change.

14 (3) The BiOp's historical approach to setting take limits fails to consider take  
15 in the context of most recent overall species abundance and jeopardy.

16 (4) The BiOp did not adequately consider impacts to critical habitat by (a)  
17 failing to analyze how project operations will impact the value of critical habitat for  
18 the recovery of the smelt and (b) failing to consider impacts upon the entire extent of  
19 known smelt critical habitat.

20 Order at 119 (Doc. 323).

21 78. Current and ongoing operations of the CVP and SWP under the existing OCAP—  
22 including but not limited to pumping and water conveyance and export operations from the Delta—  
23 jeopardize the continued existence of the delta smelt and adversely modify its designated critical  
24 habitat.

25 79. Data from 2007 showed serious threat to the delta smelt's continued existence. The  
26 2007 spring larval survey located only 98 smelt in the entire Delta, a number representing only 9% of  
27 the number of smelt found by that time in 2006, a year in which smelt abundance was already  
28 extremely low. The Delta Smelt Working Group ("DSWG"), a group of agency biologists  
responsible for evaluating the current status of the delta smelt and recommending operational  
measures to protect the smelt, explained that this data indicated cause for alarm: "For an annual  
species such as delta smelt, failure to recruit a new year-class is an urgent indicator that the species  
has become critically imperiled and an emergency response is warranted."

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<sup>5</sup> This section contains "recent developments" as of the filing of the Third Supplemental Complaint.

1           80.     In light of the spring larval survey and increasing take of delta smelt at SWP and CVP  
2 pumps during early summer 2007, throughout June and July the DSWG recommended that the  
3 Bureau and DWR operate the CVP and SWP so as to achieve non-negative flows in Old and Middle  
4 Rivers (“OMR”) and to prevent any entrainment of delta smelt at the Project pumps; to alter Project  
5 operations to maintain average Delta temperatures of 25°C until delta smelt left the south and central  
6 Delta; and to pump at reduced rates during periods of take.

7           81.     The Bureau and DWR reduced pumping at CVP and SWP export facilities for  
8 approximately 10 days in June 2007, during which time no delta smelt were taken at the CVP and  
9 SWP pumps. But, over the DSWG’s objections, starting on or about June 10, 2007, the Bureau and  
10 DWR rapidly increased pumping at their respective facilities, and by July 9, 2007, combined daily  
11 pumping had risen to 10,160 cfs. As the pumping increased, so too did take of delta smelt. From the  
12 beginning of May 2007 through July 9, 2007, 2,588 delta smelt were killed at CVP and SWP  
13 pumping plants. However, until the Court’s December 14, 2007 remedial order, neither the SWP nor  
14 the CVP decreased pumping or otherwise made any effort to follow DSWG recommendations for  
15 protecting the delta smelt.

16           82.     In light of these data and the Court’s May 25, 2007 summary judgment order, on  
17 December 14, 2007, the Court entered a remedial order (Doc. 560) requiring that:

18           a.     The federal defendants complete a new biological opinion regarding the  
19 combined effects of CVP and SWP operations on the delta smelt.

20           b.     The Bureau meet a 25% minimum frequency for sampling delta smelt  
21 entrained at the Jones Pumping Plant.

22           c.     The Bureau and DWR conduct larval delta smelt monitoring at the Jones and  
23 Banks Pumping Plants, respectively, pursuant to the Court’s specifications for frequency and  
24 timing of such monitoring.

25           d.     The Bureau and DWR meet the Court’s specifications for limiting net  
26 upstream flow in Old and Middle Rivers.

27           e.     The Bureau and DWR continue to implement the Vernalis Adaptive  
28 Management Plan (“VAMP”), San Joaquin River flow enhancement, and CVP and SWP

1 export curtailment.

2 f. Until the end of the VAMP action implementation, the Bureau and DWR  
3 minimize the tidal effects to the south Delta agricultural barriers and not install the spring  
4 Head of Old River Barrier.

5 g. That the federal defendants implement any and all measures that are necessary  
6 to prevent an irreversible or irretrievable commitment of resources pending completion of the  
7 reinitiated OCAP consultation and the issuance of a valid Biological Opinion.

8 83. These interim remedies, while necessary, may not be sufficient to protect the delta  
9 smelt and its critical habitat. The species' 20 mm index for 2007 was 1.0, an approximately 90%  
10 drop from 2006 and the lowest on record. The species' 2007 FMWT index was 28, an  
11 approximately 30% drop from 2006 and the second lowest on record. The most recent salvage data  
12 show that during March 2008, 83 delta smelt were taken at SWP and CVP facilities, for a total of  
13 more than 350 adult delta smelt salvaged at the pumps since January 1, 2008.

14 84. In recent flow recommendations, attached as Exhibit 4 hereto, the Smelt Working  
15 Group<sup>6</sup> has identified several current active risk factors for the delta smelt, including the low 2007  
16 delta smelt FMWT index and early results from the Spring Kodiak Trawl, water temperatures  
17 exceeding 12° Celsius for a five-week period and other indications that spawning has begun in  
18 earnest, a corresponding increase in the number of larval delta smelt that are being transported to the  
19 south Delta and thus more susceptible to entrainment at export facilities, higher than normal recent  
20 adult smelt salvage, and adult distribution in the Delta. The Smelt Working Group described these  
21 risk factors as grounds for a March 31, 2008, recommendation that the Bureau and DWR maintain a  
22 combined OMR flow more positive than -2,000 cfs. The Bureau and DWR, however, have  
23 determined to allow more negative flows than the Smelt Working Group recommended and operate  
24 to a combined OMR flow level of -2,500 cfs, as explained in Exhibit 5 attached hereto.

25 **ADDITIONAL PROCEDURAL BACKGROUND FOR FOURTH SUPPLEMENTAL**  
26 **COMPLAINT**

27 \_\_\_\_\_  
28 <sup>6</sup> The DSWG has been renamed the Smelt Working Group.

1 **The Bureau's consultations with NMFS as relevant to the Fourth Supplemental Complaint**

2 85. On October 22, 2004, NMFS issued the NMFS 2004 OCAP BiOp on the impacts of  
3 the OCAP to listed anadromous species. It concluded that the OCAP would not jeopardize the  
4 survival of the winter-run or spring-run Chinook or adversely modify their critical habitat.

5 86. On January 10, 2005, NMFS issued a letter of concurrence concluding that 145 SRS  
6 contract renewals, including the contract renewals with the SRS Contractors, would not jeopardize  
7 the winter-run and spring-run Chinook and other listed species. NMFS's analysis relied expressly  
8 and exclusively on the NMFS 2004 OCAP BiOp. NMFS's concurrence letter stated, "we find that  
9 the effects of the Valley [sic] spring-run Chinook salmon . . . and the designated critical habitat of  
10 winter-run Chinook salmon were previously considered as part of the OCAP action and fully  
11 analyzed in the [NMFS 2004 BiOp]." The concurrence letter stated that "no additional incidental  
12 take is authorized for these contract specific actions beyond the amount or extent of incidental take  
13 authorized in the October 22, 2004 OCAP BiOp" and that reinitiation of consultation on the  
14 renewals of the Sacramento River settlement contracts may be necessary if new information revealed  
15 an effect to listed species or their critical habitat that was not considered in NMFS's concurrence  
16 letter.

17 87. In 2008, a federal district court invalidated the NMFS 2004 OCAP BiOp because it  
18 contained "inexplicabl[e] inconsisten[cies] as to the species' survival and recovery," was "unlawfully  
19 silent on critical habitat effects," did not analyze the impact of global warming, and failed to analyze  
20 species recovery. *Pacific Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1122,  
21 1193 (E.D. Cal. 2008). The court further ruled that the Bureau violated Section 7 of the ESA by  
22 relying on a biological opinion "with such obvious flaws," and "obviously contradictory evidence."  
23 *Id.* at 1188-91.

24 88. On June 4, 2009, NMFS issued the NMFS OCAP BiOp. Unlike the NMFS 2004  
25 OCAP BiOp, the new BiOp concluded that the OCAP *would* cause jeopardy to listed anadromous  
26 species, including the winter-run and spring-run Chinook, and adversely modify critical habitat.

27 89. The NMFS OCAP BiOp affirmatively states that it *did not* analyze the effects of  
28 water contracts, such as the SRS contract renewals: "[T]his consultation does not address ESA

1 section 7(a)(2) compliance for individual water supply contracts. Reclamation and DWR should  
2 consult with NMFS separately on their issuance of individual water supply contracts.” NMFS  
3 OCAP BiOp at 35.

4 90. The NMFS OCAP BiOp also clarifies that the Bureau *does not have ESA*  
5 *authorization* to take listed salmonid species to satisfy terms of the SRS contract renewals it deems  
6 nondiscretionary: “In the event that Reclamation determines that delivery of quantities of water to  
7 any contractor is nondiscretionary for purposes of the ESA, any incidental take due to delivery of  
8 water to that contractor would not be exempted from the ESA section 9 take prohibition in this  
9 Opinion.” *Id.* At the time of the 2009 NMFS OCAP BiOp, the Bureau had deemed deliveries of  
10 water to the SRS Contractors non-discretionary.

11 91. NMFS has amended the NMFS OCAP BiOp several times. In 2011, NMFS amended  
12 the BiOp in response to a report by an independent review panel (“IRP”). Specifically, NMFS  
13 amended the reasonable and prudent alternative (“RPA”) so that the actions and implementation  
14 procedures were consistent with the recommendations of the IRP. NMFS also revised the BiOp to  
15 correct errors and provide clarification. NMFS again amended the NMFS OCAP BiOp in 2014 and  
16 2015, when it responded to the Bureau’s request for reinitiation to analyze the impacts of the  
17 Bureau’s Drought Operations Plan and the impacts of the temporary urgency change petitions  
18 (TUCPs) it jointly filed with DWR to modify the water quality standards in D-1641, Bay-Delta water  
19 quality standards, and provisions of the NMFS OCAP BiOp. Although the Bureau sought  
20 modifications to the NMFS OCAP BiOp, D-1641, and the Bay-Delta water quality standards to  
21 provide more water to the SRS Contractors, the Bureau did not reinitiate consultation on the renewed  
22 SRS contracts themselves when it filed the TUCPs. Nor has the Bureau reinitiated consultation to  
23 address the take of winter-run and spring-run Chinook caused by the loss of temperature control in  
24 the Sacramento River during the 2014 and 2015 temperature management seasons.

25 **Subsequent Developments in This Litigation Leading to the Fourth Supplemental Complaint**

26 92. On July 16, 2008, Plaintiffs moved for summary judgment on their claim that the  
27 Bureau violated Section 7 of the ESA by executing long-term water contracts based on FWS’s  
28 invalid consultation. Doc. 680-81. Federal Defendants cross-moved for summary judgment, arguing

1 that the Bureau had properly consulted with FWS. Doc. 678-79. The DMC and SRS Contractors  
2 also moved for summary judgment, challenging Plaintiffs’ standing and arguing that the Bureau had  
3 adequately consulted or, alternatively, had no duty to consult regarding the renewals. Docs. 689-90;  
4 Docs. 696-97. On November 19, 2008, the Court held Plaintiffs had standing to challenge the SRS  
5 contracts, but not the DMC contracts. Doc. 761. Although the Court eventually held (in a ruling  
6 later reversed by the Ninth Circuit) that threshold issues precluded a ruling in Plaintiffs’ favor, it  
7 found that the Bureau’s consultations with FWS on the SRS contracts violated the ESA because  
8 FWS had relied exclusively on the “legally flawed [FWS 2005] OCAP BiOp which failed to  
9 competently and completely evaluate the impacts of water deliveries under the [SRS] Contracts on  
10 the Delta smelt.” *Id.* at 94. The Court further found that the Bureau’s reliance on the FWS 2005  
11 OCAP BiOp was arbitrary and capricious given the numerous “serious” and “obvious” flaws in the  
12 document. *Id.* at 77.

13 93. The Court, however, asked for further briefing on the Bureau’s discretion to modify  
14 SRS contract terms, *id.* at 94, and subsequently held that the ESA did not apply to the Bureau’s  
15 renewal of the SRS contracts because the original contracts left the Bureau without sufficient  
16 discretion to negotiate new terms that would benefit the delta smelt, Doc. 834. After entering two  
17 clarifying orders on June 3 and August 6, 2009, the Court entered final judgment on September 23,  
18 2009. Doc. 851, 862, 873.

19 94. In a unanimous en banc decision, the Ninth Circuit reversed. *Natural Res. Def.*  
20 *Council v. Jewell*, 749 F.3d 776 (9th Cir. 2014) (en banc). The panel rejected the district court’s  
21 holding that the “shortage provision”—a term in the DMC contracts that shields the Bureau from  
22 liability if it adjusts water deliveries to comply with the ESA—stripped Plaintiffs of standing,  
23 holding that “[b]ecause adequate consultation and renegotiation could lead to . . . revisions [that  
24 would benefit the delta smelt], plaintiffs have standing to assert a procedural challenge to the DMC  
25 contracts.” The Ninth Circuit also rejected the Court’s conclusion that the ESA does not apply to the  
26 SRS contracts because the Bureau lacks sufficient discretion to renegotiate terms more protective of  
27 the delta smelt. *Id.* at 784-85. The panel explained that there is “nothing in the original Settlement  
28 contracts [that] requires the Bureau to renew the Settlement contracts” and, because “Delta water



1 diversions’ are the most significant ‘synergistic cause[]’ of the decline in delta smelt,” a decision not  
2 to renew the SRS contracts could benefit the delta smelt. *Id.* (quoting 58 Fed. Reg. 12854-01,  
3 12,859). Although the en banc panel held that the original SRS contracts do not require renewal, it  
4 declined to decide “whether other legal obligations may compel the Bureau to execute renewal  
5 contracts.” *Id.* at 785 n.1. Instead, it explained that, even if the Bureau were obligated to renew the  
6 SRS contracts, the Bureau retained discretion that required ESA consultation on the renewals  
7 because “the Bureau could benefit the delta smelt by renegotiating the Settlement contracts’ terms  
8 with regard to, *inter alia*, their pricing scheme or the timing of water distribution.” *Id.* at 785.

9 95. On remand, the Defendants moved to stay the litigation to allow the Bureau to  
10 reinstate consultation with FWS on the contract renewals’ impacts to the delta smelt. Doc. 955, 962.  
11 The Court granted the motion and stayed litigation until December 15, 2015. Doc. 979 at 21. The  
12 Court required that Federal Defendants file a formal motion one month prior to the expiration of the  
13 stay if requesting an extension. *Id.*

14 96. On July 30, 2015, the Bureau requested reinitiation of consultation with the Service  
15 on the SRS and DMC contract renewals. In the Biological Assessment submitted with the request  
16 for reinitiation, the Bureau claimed that it does not have discretion to “alter the quantities,  
17 allocations, or timing of SRS diversions from those set forth in the initial SRS contracts.” The  
18 Bureau also claimed that it “lacks discretion to set pricing terms in the SRS contracts for the sole  
19 purpose of protecting delta smelt.”

20 97. The Bureau has not requested reinitiation of consultation with NMFS on the effects of  
21 the SRS contract renewals on listed anadromous species.

## 22 LEGAL BACKGROUND

### 23 Consultation under the ESA

24 98. Section 7(a)(2) of the ESA requires that each Federal agency, in consultation with the  
25 Secretary,<sup>7</sup> insure that any activity which it authorizes, funds, or carries out is not likely to jeopardize

26 \_\_\_\_\_  
27 <sup>7</sup> The Secretaries of the Interior and Commerce share responsibilities under the ESA according to the  
28 type of species involved. 16 U.S.C. § 1532(15). For the delta smelt, the Secretary of the Interior is  
the responsible official.

1 the continued existence of any threatened or endangered species or destroy or adversely modify any  
2 listed species' critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14 (1986).

3 99. An action would jeopardize a species if it reasonably would be expected to reduce  
4 appreciably the likelihood of both the survival and recovery of the species in the wild. 50 C.F.R. §  
5 402.02 (1986).

6 100. Following consultation, the Secretary must issue a "biological opinion" in which he  
7 determines whether the activity is likely to jeopardize a listed species or adversely affect its critical  
8 habitat and provides a summary of the reasons for this conclusion. 16 U.S.C. § 1536(b)(3)(A). In  
9 formulating his opinion, the Secretary must use the best scientific and commercial data available. 16  
10 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8) (1986).

11 101. The Secretary has delegated his duties under the ESA to the Service. 50 C.F.R. §  
12 402.01(b) (1986).

### 13 **Adverse Modification of Critical Habitat under the ESA**

14 102. The Service has defined the phrase "destruction or adverse modification" of critical  
15 habitat in Section 7(a)(2) as:

16 [A] direct or indirect alteration that appreciably diminishes the value of  
17 critical habitat for both survival and recovery of a listed species. Such  
18 alterations include, but are not limited to, alterations adversely modifying any  
of those physical or biological features that were the basis for determining the  
habitat to be critical.

19 50 C.F.R. § 402.02.

20 103. As discussed above, courts have found that the Service's definition of adverse  
21 modification to critical habitat is an impermissible interpretation of the ESA because it reads the goal  
22 of "recovery" out of the inquiry by holding that a proposed action "adversely modifies" critical  
23 habitat only if the value of the critical habitat for *survival* is also appreciably diminished. *See, e.g.,*  
24 *Gifford Pinchot*, 378 F.3d at 1069. Established case law demands that the agency be afforded a  
25 presumption of regularity, meaning a presumption that the Service relied upon its own regulations.  
26 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The Service can rebut this  
27 presumption and, therefore, establish that its presumed reliance on the flawed regulation was  
28

1 harmless error if it can establish that it considered recovery in its analysis despite the existence of the  
2 regulatory definition. *Gifford Pinchot*, 378 F.3d at 1072.

3 104. The Service states that it did not rely on this definition but rather on “statutory  
4 provisions of the ESA” to complete the analysis in the Biological Opinion. This unsupported  
5 statement does not alleviate the problem unless there is sufficient evidence in the record to support  
6 that claim. *Gifford Pinchot*, 378 F.3d at 1071. There is no such evidence in the Biological Opinion.  
7 In fact, the Biological Opinion lacks any discussion of how the OCAP will impact the recovery of  
8 the species through changes to critical habitat. The Biological Opinion only adds the word  
9 “recovery” to the discussion three times, and each of those instances merely involved renaming a  
10 variable, previously termed the “Midwinter trawl index,” to the “recovery index”; no changes were  
11 made to the accompanying graphs or discussion of those graphs or that variable. *See* Reinitiation of  
12 Formal and Early Section 7 Endangered Species Consultation on the Coordinated Operations of the  
13 Central Valley Project and State Water Project and the Operational Criteria and Plan to Address  
14 Potential Critical Habitat Issues (Feb. 16, 2005) (*i.e.*, the Biological Opinion) at 110, 113.

15 105. The Biological Opinion fails adequately to consider or to render any conclusion as to  
16 whether the action on which consultation was conducted would adversely impact delta smelt critical  
17 habitat in a manner that would adversely impact recovery of that species. The action in question  
18 would have such an adverse impact to delta smelt critical habitat.

### 19 **Reliance on Uncertain Measures as Basis for No Jeopardy Opinion**

20 106. According to Section 7(a)(2) of the ESA, the Service must “insure that any action  
21 authorized . . . is not likely to jeopardize the continued existence of any endangered or threatened  
22 species or result in the destruction or adverse modification of [critical] habitat of such species.” 16  
23 U.S.C § 1536(a)(2).

24 107. A biological opinion must include a discussion “as to whether the action, taken  
25 together with its cumulative effects, is likely to jeopardize [the species].” 50 C.F.R. §402.14(g)(4).  
26 The Service has defined the “effects of the action” as “the direct and indirect effects on the species or  
27 the critical habitat.” 50 C.F.R. §402.02. The definition goes on to define indirect effects as “those  
28

1 that are caused by the proposed action and are later in time, but still are reasonably certain to occur.”

2 *Id.*

3 108. “Mitigation measures must be reasonably specific, certain to occur, and capable of  
4 implementation; they must be subject to deadlines or otherwise enforceable obligations; and most  
5 important, they must address the threats to the species in a way that satisfies the jeopardy and  
6 adverse modification standards.” *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139,  
7 1152 (D. Ariz. 2002); *Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987).

8 109. Reliance on the uncertain “adaptive management” and unproven future mitigation  
9 measures to conclude that the project will not put the species in jeopardy or adversely modify its  
10 critical habitat violates Section 7(a)(2) the ESA. Such reliance allows take of and potential jeopardy  
11 to smelt, and destruction or adverse modification of smelt habitat, without first insuring that the  
12 species will not be jeopardized and recovery will not be delayed or impaired.

### 13 **Failure to Consider the Entire Effects of the Action**

14 110. Section 7(a)(2) of the ESA and its implementing regulations require the Service to  
15 “[e]valuate the effects of the action and cumulative effects” and to render its biological opinion “as  
16 to whether the action, taken together with cumulative effects, is likely to jeopardize the continued  
17 existence of listed species or result in the destruction or adverse modification of critical habitat.” 50  
18 C.F.R. § 402.14(g)(3), (4). The Service’s regulations specify that the “actions” on which ESA § 7  
19 consultation is required include “all activities or programs of any kind *authorized*, funded or carried  
20 out” by any federal agency, including “the granting of . . . contracts.” 50 C.F.R. §§ 402.02, 402.14  
21 (emphasis added). The Service’s regulations further define the phrase “effects of the action” to  
22 include “the direct and indirect effects of an action . . . , together with the effects of other activities  
23 that are interrelated or independent.” 50 C.F.R. § 402.02 (emphasis added). “Indirect effects” are  
24 those effects “caused by the proposed action and later in time, but still reasonably certain to occur.”  
25 *Id.* “Interrelated actions” are actions that are “part of a larger action and depend on the larger action  
26 for their justification.” *Id.* “Interdependent actions” are actions that “have no independent utility  
27 apart from the action under consideration.” *Id.* In short, the ESA requires a biological opinion to  
28

1 analyze the effects of the entire action authorized by the agency, without piecemealing the  
2 consultation into incremental steps.

3 111. FWS did not comply with this mandate in issuing the challenged Biological Opinion.  
4 Among other inadequacies, the FWS failed to consider the full effects of the action authorized in  
5 impending long-term water supply contracts, which were the chief motivating force behind the  
6 Bureau's and FWS' rush to complete the Biological Opinion, and did not consider the effects of  
7 construction activities associated with the SDIP.

### 8 **Failure to Consider the Best Available Science**

9 112. Section 7(a)(2) of the ESA requires consultations to be based on the best available  
10 scientific information. FWS did not adhere to that mandate in rendering the challenged Biological  
11 Opinion. Among other deficiencies, the Service failed to consider current population viability  
12 analyses indicating that the species has a high risk of extinction within the next 20 years. In addition,  
13 the Service wholly failed to consider the effects of global climate change. Scientific data available  
14 today predict warming in the western United States of several degrees centigrade over the next 100  
15 years and indicate that this temperature change will dramatically change western hydrology. The  
16 Biological Opinion did not consider these changes in evaluating the effects of future CVP and SWP  
17 operations on delta smelt.

### 18 **Failure to Insure that Project Operations Are Not Likely to Jeopardize Delta Smelt or** 19 **Adversely Modify Its Critical Habitat**

20 113. As the action agency, the Bureau has an independent obligation under ESA § 7(a)(2)  
21 to insure that its actions are not likely to jeopardize the continued existence of the delta smelt or  
22 adversely modify its critical habitat.

23 114. Agency action that is based on what the action agency knows to be an inaccurate or  
24 incomplete jeopardy analysis by the consulting agency violates ESA § 7(a)(2). *See, e.g., Resources*  
25 *Ltd. v. Robinson*, 35 F.3d 1300, 1305-06 (9th Cir. 1994). The Bureau knew or had reason to know  
26 that the Biological Opinion was inadequate and, consequently, that the four contract consultations  
27 that tiered off the analysis in the Biological Opinion were also inadequate. For example, the Bureau  
28 knew that the FWS failed to consider the best available science prior to issuing the Biological

1 Opinion; that the Biological Opinion did not analyze the impact of full water delivery under the  
2 proposed renewal contracts; and that the FWS's DMCU concurrence letter was based on the  
3 withdrawn 2004 Biological Opinion.

4 115. Despite this, the Bureau has taken and is taking actions in reliance on the faulty  
5 jeopardy analysis set forth in the Biological Opinion and four concurrence letters, even in the face of  
6 significant take of delta smelt by the export facilities and adverse modification of critical habitat  
7 caused by water exports and diversions. These actions include the Bureau's continued  
8 implementation of expanded Project operations, as set forth the 2004 OCAP, and the execution and  
9 continuing performance of the long-term water supply renewal contracts described above. The  
10 Bureau has thus failed to insure that its actions are not likely to jeopardize the continued existence of  
11 the delta smelt or adversely modify its critical habitat.

## 12 **LEGAL BACKGROUND FOR FOURTH SUPPLEMENTAL COMPLAINT**

### 13 **Reinitiation of Consultation Under the ESA**

14 116. Even when a valid consultation is completed, and the action that was the subject of  
15 that consultation is being implemented, federal agencies have a duty to reinitiate consultation  
16 pursuant to Section 7 of the ESA under specified circumstances. The ESA's implementing  
17 regulations provide that:

18 Reinitiation of formal consultation is required and shall be requested by the Federal  
19 agency or by the Service, where discretionary Federal involvement or control over the  
20 action has been retained or is authorized by law and: (a) If the amount or extent of  
21 taking specified in the incidental take statement is exceeded; (b) If new information  
22 reveals effects of the action that may affect listed species or critical habitat in a  
23 manner or to an extent not previously considered; (c) If the identified action is  
subsequently modified in a manner that causes an effect to the listed species or critical  
habitat that was not considered in the biological opinion; or (d) If a new species is  
listed or critical habitat designated that may be affected by the identified action.

24 50 C.F.R. §402.16.

25 117. The Ninth Circuit has clarified that "an agency's responsibility to reinitiate  
26 consultation does not terminate when the underlying action is complete." *Cottonwood Envtl. Law*  
27 *Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1086 (9th Cir. 2015). An agency's duty to reinitiate can be  
28

1 triggered so long as the agency retains some modicum of “involvement or control” over the  
2 implementation of the action. *Id.*

3 118. The Bureau violated, and is violating, 50 C.F.R. § 402.16 by failing to reinitiate  
4 consultation on the SRS contracts to determine how the NMFS OCAP BiOp and its subsequent  
5 amendments affect the winter-run and spring-run Chinook. NMFS’s letter of concurrence on the  
6 SRS contracts did not include independent analysis of the effects of the SRS contract renewals but  
7 instead came to its conclusion because it determined that the effects of the renewals were fully  
8 analyzed in the NMFS 2004 OCAP BiOp. The NMFS 2004 OCAP BiOp thus provided the sole  
9 basis for NMFS’s letter of concurrence. When a federal court ruled that the NMFS 2004 OCAP  
10 BiOp was invalid and illegal, it undermined the basis for the letter of concurrence. The NMFS  
11 OCAP BiOp (which, unlike the prior BiOp, found that the OCAP *would* cause jeopardy) and  
12 NMFS’s subsequent amendments constitute “new information [that] reveals effects of the action that  
13 may affect listed species or critical habitat in a manner or to an extent not previously considered,”  
14 triggering the Bureau’s mandatory duty to reinitiate consultation under 50 C.F.R. § 402.16(b). The  
15 Bureau is engaged in an ongoing agency violation by implementing the SRS contract renewals  
16 without reinitiating consultation.

17 119. The Bureau also violated, and is violating, 50 C.F.R. § 402.16 by failing to reinitiate  
18 consultation based on the information regarding the massive mortality of the 2014 and 2015  
19 generations of winter-run and spring-run Chinook. The Bureau’s excessive releases from Shasta  
20 Reservoir in 2014 and 2015 to satisfy the terms of the SRS contracts relied on faulty temperature  
21 modeling that led to a fatal increase in temperatures throughout the temperature management season.  
22 The Bureau is engaged in an ongoing agency violation by implementing the SRS contract renewals  
23 without reinitiating consultation.

24 120. The Bureau’s “discretionary Federal involvement or control over” the SRS contract  
25 renewals has been established multiple times during this litigation. The Ninth Circuit en banc panel  
26 unanimously ruled that the Bureau retained discretion to take species-protective measures with  
27 regards to the SRS contracts. The Bureau itself obtained a stay on the premise that it would reinitiate  
28



1 consultation with FWS under 50 C.F.R. § 402.16 to evaluate the impacts of the contract renewals on  
2 the threatened delta smelt. Doc. 979.

3 121. There is also ongoing “Federal involvement” in the SRS contract renewals’  
4 implementation. The contracts require that the Bureau implement the contracts in compliance with  
5 the ESA. Further, the Bureau is involved in the ongoing implementation of the SRS contracts. For  
6 instance, the Bureau makes real-time determinations regarding the timing and volume of releases that  
7 allow the SRS Contractors to make diversions of water. And the Bureau has sought and received  
8 approval to modify requirements under D-1641 and the Bay-Delta water quality standards to increase  
9 the amount of water it can provide to the SRS Contractors.

#### 10 **Unlawful Take Under ESA Section 9**

11 122. Section 9 of the ESA prohibits the “take” of any endangered or threatened species of  
12 fish or wildlife within the United States, 16 U.S.C. § 1538(a)(1)(B). No person may directly take a  
13 protected species nor “cause to be committed” any take. *Id.* § 1538(g).

14 123. Congress defined take broadly to mean “to harass, harm, pursue, hunt, shoot, wound,  
15 kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). The  
16 ESA’s implementing regulations further define “harass” and “harm.” “Harass . . . means an  
17 intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying  
18 it to such an extent as to significantly disrupt normal behavior patterns which include, but are not  
19 limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” includes “significant habitat  
20 modification or degradation where it actually kills or injures wildlife by significantly impairing  
21 essential behavioral patterns, including breeding, feeding, or sheltering.” *Id.*

22 124. The ESA’s legislative history supports “the broadest possible” reading of take.  
23 *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704-05 (1995). The  
24 Supreme Court has explained that “Congress intended ‘take’ to apply broadly to cover indirect as  
25 well as purposeful actions.” *Id.* at 704. For instance, “harming a species may be indirect, in that the  
26 harm may be caused by habitat modification.” *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25  
27 (9th Cir. 1999).

1           125. Any “person” under the jurisdiction of the United States can be liable for violating  
2 ESA section 9. 16 U.S.C. § 1538(a)(1). The ESA defines “person” to include “any officer,  
3 employee, agent, department, or instrumentality of the Federal Government, of any State,  
4 municipality, or political subdivision of a State” and “any State, municipality, or political  
5 subdivision of a State.” *Id.* §1532(13). Government actions authorizing third parties to engage in  
6 harmful activities can constitute illegal take under Section 9 of the ESA. *See, e.g., Strahan v. Coxe*,  
7 127 F.3d 155, 164 (1st Cir. 1997).

8           126. Pursuant to Section 7(b)(4) of the ESA, a consulting agency may issue an “incidental  
9 take statement” if the agency concludes both that the federal action in question will not jeopardize a  
10 listed species, or can be carried out pursuant to a RPA without jeopardizing a species, and that the  
11 taking of the species is incidental to the action and will not cause jeopardy. 16 U.S.C. §  
12 1536(b)(4)(A)-(B). The consulting agency must “specif[y] the impact” of the incidental taking,  
13 “specif[y] those reasonable and prudent measures . . . necessary or appropriate to minimize such  
14 impact,” and “set forth the terms and conditions (including, but not limited to, reporting  
15 requirements) that must be complied with by the Federal agency or applicant . . . to implement the  
16 measures specified” under the incidental take statement. 16 U.S.C. § 1536(b)(4)(i)-(ii), (iv). “If the  
17 terms and conditions of the Incidental Take Statement are disregarded and a taking does occur, the  
18 action agency or the applicant may be subject to potentially severe civil and criminal penalties under  
19 Section 9.” *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at 1239.

20           127. The Bureau’s excessive releases, and the SRS Contractors’ diversions, of water from  
21 Shasta Reservoir in 2014 and 2015 violated Section 9 of the ESA. The Bureau’s releases depleted  
22 the cold water reserves behind Shasta Dam, causing the Bureau to lose temperature control in the  
23 upper Sacramento River throughout the temperature management season. The Bureau’s excessive  
24 releases and the SRS Contractors’ diversions were the predominant and direct cause of the loss, or  
25 “take,” of an estimated 95% of the winter-run brood for that year, and the almost complete loss, or  
26 “take,” of spring-run Chinook eggs in the Sacramento River in 2014. The Bureau’s excessive  
27 releases, and the SRS Contractors diversions, are causing similar take in 2015. The Bureau’s actions  
28 in 2014 and 2015 not only killed endangered winter-run and spring-run Chinook, they also harmed

1 the species by causing “significant habitat modification or degradation where it actually kills or  
2 injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding,  
3 or sheltering.” 50 C.F.R. § 17.3.

4 128. The NMFS OCAP BiOp, as amended, states that the Bureau does not have  
5 authorization to take winter-run or spring-run Chinook in the course of delivering quantities of water  
6 it deems non-discretionary under a water contract. During the relevant time period, the Bureau has  
7 taken the position that it has no discretion to alter the quantities of water to SRS Contractors. If, as it  
8 has claimed, the Bureau lacks discretion as to the quantities of water it delivers to satisfy the terms of  
9 the SRS contracts, the NMFS OCAP BiOp makes clear that the Bureau did not have authorization  
10 for the take of winter-run and spring-run Chinook in 2014 and 2015.

11 129. In 2014, the Bureau and DWR reinitiated consultation with NMFS on the Bureau and  
12 DWR’s Drought Operations Plan. The Drought Operations Plan included further modifications to  
13 the NMFS OCAP BiOp. NMFS approved the Drought Operations Plan and modifications to the  
14 NMFS OCAP BiOp on the condition that it “[c]onserv[e] storage in Shasta Reservoir by limiting  
15 releases from Keswick Dam to no greater than 3,250 cfs ... unless necessary to meet  
16 nondiscretionary obligations or legal requirements.” Letter from William Stelle, NMFS Regional  
17 Administrator, to David Murillo, the Bureau’s Regional Director, at 4 (undated, but posted on April  
18 8, 2014:

19 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/tucp/031814order\\_](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/031814order_urgchg_swcv/20140408_nmfs_to_usbr_dop.pdf)  
20 [urgchg\\_swcv/20140408\\_nmfs\\_to\\_usbr\\_dop.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/031814order_urgchg_swcv/20140408_nmfs_to_usbr_dop.pdf)). The Bureau made releases during that time period  
21 far in excess of 3,250 cfs, including for deliveries to the SRS Contractors. If the Bureau has  
22 discretion as to the quantities of water it delivers to the SRS Contractors, it violated the conditions of  
23 NMFS’s reinitiated consultation and therefore did not have take authorization under the NMFS  
24 OCAP BiOp.

25 130. In 2015, the Bureau and DWR reinitiated consultation with NMFS on the Bureau and  
26 DWR’s 2015 Drought Contingency Plan. Given the disastrous outcomes in 2014, NMFS directed  
27 the Bureau to plan its operations throughout the summer and fall to maintain temperatures below 56  
28 degrees at the Clear Creek compliance point. The Bureau, however, again made releases well in

1 excess of what was required to maintain temperature control. In doing so, the Bureau violated the  
2 conditions of NMFS's reinitiated consultation for a second consecutive year.

3 131. Because the NMFS OCAP BiOp did not include analysis of the impacts of water  
4 contracts, it does not provide the SRS Contractors with take authority.

5 **FIRST CLAIM FOR RELIEF**

6 **(By Plaintiffs NRDC, California Trout, Baykeeper, FOR and TBI)**

7 **Violation of the Administrative Procedure Act**  
8 **(5 U.S.C. § 706)**

9 132. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in  
10 the preceding paragraphs.

11 133. The Secretary's conclusion, in the Biological Opinion for the Coordinated Operations  
12 of the CVP/SWP, that the changes, including operational changes and future operations, will not  
13 jeopardize the continued existence of the delta smelt and will not result in the destruction or adverse  
14 modification of the critical habitat of delta smelt is arbitrary, capricious, an abuse of discretion, and  
15 not in accordance with law.

16 134. The Biological Opinion unlawfully failed adequately to consider or to render a  
17 biological opinion on how the actions on which consultation was undertaken would affect delta smelt  
18 critical habitat's value for recovery of the species.

19 135. The Secretary's conclusion, in the Biological Opinion, that the planned operational  
20 and other changes to the CVP and SWP, and their future operations, will not jeopardize the  
21 continued existence of the delta smelt or cause adverse modification to the delta smelt's critical  
22 habitat has no basis in the Biological Opinion or elsewhere in the record. The Biological Opinion  
23 improperly relies on uncertain future mitigation measures and a promise of adaptive management  
24 without adequate evidence that the mitigation measures will be undertaken and will be effective and  
25 without identifying concrete actions sufficient to insure protection of the delta smelt and its critical  
26 habitat as a result of any future "adaptive management."

27 136. The Biological Opinion failed properly to define the agency action or to consider the  
28 "effects of the action," thereby significantly underestimating and/or ignoring the effects of the entire

1 agency action.

2 137. The Biological Opinion failed to consider the best available scientific information.

3 138. The analysis, reasoning, and conclusion of the Biological Opinion, and the Secretary's  
4 actions described herein, are arbitrary, capricious, an abuse of discretion, not in accordance with law,  
5 in excess of statutory authority, and without observance of procedure required by law, in violation of  
6 ESA § 7 and its implementing regulations and the standards of the Administrative Procedure Act, 5  
7 U.S.C. § 706.

8 **SECOND CLAIM FOR RELIEF**

9 **(By Plaintiffs NRDC, California Trout, Baykeeper, FOR and TBI)**

10 **Violations Of ESA And APA:**

11 **Bureau's Failure To Insure That Its Actions Are Not Likely To Jeopardize**  
12 **The Continued Existence Of The Species Or Adversely Modify**  
13 **Its Critical Habitat**  
14 **(16 U.S.C. § 1536(a)(2); 5 U.S.C. § 706)**

15 139. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in  
16 the preceding paragraphs.

17 140. The Bureau has an independent duty to insure that its actions avoid jeopardy. The  
18 Bureau cannot satisfy this duty by relying on what it knows or should know to be an inadequate  
19 consultation with the FWS.

20 141. As alleged above, the Biological Opinion incorrectly concludes that the 2004 OCAP  
21 will not jeopardize the delta smelt or adversely modify its critical habitat, as the Bureau knew or  
22 should have known. Implementation of the 2004 OCAP operations, including its direct, indirect, and  
23 cumulative effects, has both short-term and long-term adverse impacts on the delta smelt that  
24 jeopardize its continued existence and that adversely modify its critical habitat. Accordingly,  
25 notwithstanding the Biological Opinion, by implementing the 2004 OCAP and related actions, the  
26 Bureau has failed and is failing to perform its affirmative obligation to insure that its actions will not  
27 jeopardize the continued existence of the delta smelt, in violation of ESA § 7(a)(2), 16 U.S.C. §  
28 1536(a)(2).

1 142. For the same reasons, the Bureau also has failed and is failing to insure that its actions  
2 are not likely to adversely modify the designated critical habitat of the delta smelt. The final rules  
3 designating critical habitat for the delta smelt describe many features of critical habitat essential for  
4 these species' recovery, including, among other things, adequate water quality and quantity, water  
5 temperature, and safe passage conditions. Implementation of the 2004 OCAP is adversely impacting  
6 these features of designated critical habitat and will adversely modify the ability of the critical habitat  
7 to contribute to the recovery of the species, in violation of ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

8 143. Furthermore, the Bureau has failed and is failing to comply with ESA § 7(a)(2), 16  
9 U.S.C. § 1536(a)(2), by executing and implementing the long-term water supply renewal contracts  
10 described above, in reliance on what it knew or should have known to be faulty analysis by the FWS.  
11 The execution and continued performance of these renewal contracts has short- and long-term  
12 adverse impacts on the threatened delta smelt that jeopardize the species' continued existence and  
13 adversely modify its critical habitat.

14 144. The Bureau's failure to insure that its actions do not jeopardize the continued  
15 existence of the delta smelt or adversely modify its critical habitat is arbitrary, capricious, an abuse  
16 of discretion, and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2).

17 **THIRD CLAIM FOR RELIEF**

18 **(By Plaintiffs NRDC, California Trout, Baykeeper, FOR and TBI)**

19 **Violations Of ESA And APA:**  
20 **Irretrievable And Irreversible Commitments Of Resources**  
21 **That Foreclose Reasonable And Prudent Alternatives**  
**(16 U.S.C. § 1536(d); 5 U.S.C. § 706)**

22 [Dismissed pursuant to the Court's order of January 23, 2008 (Doc. 567).]<sup>8</sup>

23 **FOURTH CLAIM FOR RELIEF**

24 **(By Plaintiffs NRDC, TBI, Baykeeper, Winnemem and PCFFA/IFR)**

25 **Violations of ESA And APA:**  
26 **Bureau's Failure To Reinitiate Consultation Pursuant to Section 7(a)(2) of the ESA**  
**(16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16; 16 U.S.C. § 1540(g); 5 U.S.C. § 706)**

27 <sup>8</sup> Plaintiffs in the Third Supplemental Complaint preserved all rights to challenge the Court's  
28 dismissal order on appeal.

1 145. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in  
2 the preceding paragraphs.

3 146. The ESA's implementing regulations, 50 C.F.R. § 402.16, require the Bureau to  
4 reinitiate ESA section 7(a)(2) consultation when the Bureau retains discretionary involvement or  
5 control over a federal action that was the subject of a prior consultation and new information reveals  
6 effects of that action that were not previously considered.

7 147. The ESA citizen suit provision authorizes suits to enforce the ESA and its  
8 implementing regulations against any person who is alleged to be in violation of any provision of the  
9 ESA or regulations implementing the ESA. 16 U.S.C. § 1540(g).

10 148. As alleged above, the Bureau arbitrarily and capriciously violated, and continues to  
11 violate, Section 7(a)(2) of the ESA and the ESA's implementing regulations, 50 U.S.C. § 402.16, by  
12 failing to reinitiate consultation on the SRS contract renewals based on the issuance of the NMFS  
13 OCAP BiOp and subsequent amendments. The Bureau retains discretionary federal involvement and  
14 control over the implementation of the SRS contracts. The NMFS OCAP BiOp constituted new  
15 information that undermined the January 10, 2005 letters of concurrence and revealed effects of the  
16 SRS contract renewals that were not previously considered.

17 149. Furthermore, and also alleged above, the Bureau arbitrarily and capriciously violated,  
18 and continues to violate, Section 7(a)(2) of the ESA and the ESA's implementing regulations, 50  
19 U.S.C. § 402.16, by failing to reinitiate consultation based on information relating to the massive  
20 mortality to the 2014 and 2015 generations of winter-run and spring-run Chinook that occurred when  
21 it made excessive releases to satisfy the renewed SRS contracts. Additionally, the Bureau's excessive  
22 deliveries to the SRS Contractors triggered a mandatory obligation to reinitiate consultation because  
23 the deliveries caused effects to the winter-run and spring-run Chinook that were not considered in the  
24 January 10, 2005 letter of concurrence.

25 150. The Bureau's ongoing failure to ensure that its actions do not jeopardize the  
26 continued existence of the winter-run and spring-run Chinook or adversely modify the species'  
27 critical habitat is arbitrary, capricious, an abuse of discretion, and not in accordance with law,  
28 contrary to the APA, 5 U.S.C. § 706(2).



**FIFTH CLAIM FOR RELIEF**

**(By Plaintiffs NRDC, TBI, Baykeeper, Winnemem and PCFFA/IFR)**

**Violations Of ESA:  
Bureau's and SRS Contractors' Violation of Section 9 of the ESA  
(16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1540(g))**

151. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

152. Section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), prohibits the Bureau and the SRS Contractors from taking any endangered or threatened fish or wildlife within the United States without authorization.

153. The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person who is alleged to be in violation of any provision of the ESA or regulations implementing the ESA. 16 U.S.C. § 1540(g).

154. As alleged above, the Bureau's excessive releases, and the SRS Contractors' diversions, of water during the temperature management season in 2014 and 2015 caused massive take of winter-run and spring-run Chinook. The Bureau's excessive releases depleted the cold water pool in Shasta Reservoir, causing the Bureau to lose control of temperatures in the upper Sacramento River, which is critical habitat for winter-run and spring-run Chinook. The Bureau's excessive releases caused fatal increases in water temperatures that led to the near total loss of the 2014 and 2015 generations of winter-run and spring-run Chinook. The Bureau's releases and the SRS Contractors' diversions were the predominant and direct cause of the loss, or "take," of winter-run and spring-run Chinook in 2014 and 2015.

155. Neither the Bureau nor the SRS Contractors had authorization to take winter-run or spring-run Chinook to meet the terms of the renewed SRS contracts.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

1           A. Find and declare that the Secretary's issuance of the Biological Opinion, and the  
2 Biological Opinion itself, are arbitrary and capricious, an abuse of discretion, and not in accordance  
3 with law, in violation of the APA, 5 U.S.C. § 706(2).<sup>9</sup>

4           B. Order the Secretary to comply with the law forthwith by withdrawing the Biological  
5 Opinion and reinitiating consultation with respect to the proposed changes to and future operation of  
6 the CVP-SWP.<sup>10</sup>

7           C. Enjoin the defendants and defendant-intervenors from taking any action in reliance on  
8 the invalid Biological Opinion.

9           D. Enjoin the defendants and defendant-intervenors from taking any action that would  
10 jeopardize the continued existence of the delta smelt or adversely modify its critical habitat.

11           E. Order the Secretary to comply with the law forthwith by reinitiating consultation with  
12 NMFS on the effects of the SRS contract renewals on winter-run and spring-run Chinook.

13           F. Enjoin the Secretary from continuing to make releases of water from Shasta  
14 Reservoir, and the SRS Contractors from diverting such water, to satisfy the terms of the SRS  
15 contracts where such releases and diversions will cause the unauthorized take of winter-run and  
16 spring-run Chinook.

17           G. Enjoin the defendants and defendant-intervenors from continuing to perform the  
18 unlawfully executed long-term water supply contracts identified herein and order them to renegotiate  
19 and re-execute these renewal contracts only upon completion of a valid ESA § 7(a)(2) consultation.

20           H. Retain jurisdiction over this matter until such time as the Secretary and DWR have  
21 fully complied with the Court's order.

22           I. Award Plaintiffs their costs of litigation, including reasonable attorney and expert  
23 witness fees.

24           J. Grant Plaintiffs such further and additional relief as the Court may deem just and  
25 proper.

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27 \_\_\_\_\_  
28 <sup>9</sup> This paragraph pertains to Plaintiffs' challenge to FWS's 2005 Biological Opinion on the OCAP,  
which has been resolved in Plaintiffs' favor.

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DATED: November 9, 2015

/s/ Trent W. Orr  
Trent W. Orr

Attorney for Plaintiffs

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<sup>10</sup> This paragraph pertains to Plaintiffs' challenge to FWS's 2005 Biological Opinion on the OCAP, which has been resolved in Plaintiffs' favor.