

1 HAMILTON CANDEE (Cal. SBN 111376)
BARBARA JANE CHISHOLM (Cal. SBN 224656)
2 ELIZABETH VISSERS (Cal. SBN 321365)
ALTSHULER BERZON LLP
3 177 Post St., Suite 300
San Francisco, CA 94108
4 Telephone: (415) 421-7151
Facsimile: (415) 362-8064
5 Email: hcandee@altber.com; bchisholm@altber.com; evissers@altber.com
6 *Attorneys for Plaintiffs Golden State Salmon Association, Natural Resources
Defense Council, Inc., Defenders of Wildlife, and Bay.Org d/b/a The Bay Institute*

7
8 GLEN H. SPAIN (Cal. SBN 88097)
P.O. Box 11170
Eugene, OR 97440-3370
9 Telephone: (541) 689-2000
Email: fish1ifr@aol.com
10 *Attorney for Plaintiffs Pacific Coast Federation of Fishermen's Associations and
11 Institute for Fisheries Resources*

12 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

13
14 PACIFIC COAST FEDERATION OF FISHERMEN'S)
ASSOCIATIONS; INSTITUTE FOR FISHERIES) **FIRST AMENDED**
15 RESOURCES; GOLDEN STATE SALMON) **COMPLAINT FOR**
ASSOCIATION; NATURAL RESOURCES DEFENSE) **DECLARATORY AND**
16 COUNCIL, INC.; DEFENDERS OF WILDLIFE; and) **INJUNCTIVE RELIEF**
17 BAY.ORG d/b/a THE BAY INSTITUTE,)

18 Plaintiffs,)

19 v.)

20 WILBUR ROSS, in his official capacity as Secretary of)
21 Commerce; CHRIS OLIVER, in his official capacity as)
Assistant Administrator for Fisheries at the National)
22 Oceanic and Atmospheric Administration; NATIONAL)
23 MARINE FISHERIES SERVICE; DAVID)
BERNHARDT, in his official capacity as Secretary of the)
24 Interior; AURELIA SKIPWITH, in her official capacity)
as Director, U.S. Fish and Wildlife Service; U.S. FISH)
25 AND WILDLIFE SERVICE; BRENDA BURMAN, in)
26 her official capacity as Commissioner of Reclamation; and)
U.S. BUREAU OF RECLAMATION,)

27 Defendants.)
28)

Administrative Procedure
Act Case

Case No. 3:19-cv-7897-LB

INTRODUCTION

1
2 1. This is an environmental and administrative law action brought by Plaintiffs
3 Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, Golden
4 State Salmon Association, Natural Resources Defense Council, Inc., Defenders of Wildlife, and
5 Bay.org d/b/a The Bay Institute (“Plaintiffs”) against the National Marine Fisheries Service and
6 the U.S. Fish and Wildlife Service, and their official representatives, challenging final agency
7 actions—the adoption by each agency of a biological opinion regarding the long-term operation
8 of the Central Valley Project and State Water Project (collectively, “Water Projects”)—that are
9 arbitrary, capricious, and not in accordance with law in violation of the Administrative Procedure
10 Act, 5 U.S.C. §706. Contrary to the requirements of the Endangered Species Act, 16 U.S.C.
11 §1531, *et seq.*, the biological opinions at issue in this case were blatantly and improperly shaped
12 by political motivations and authorize Water Project operations that will cause grave harm to
13 species and their critical habitat, increasing the risk of extinction of endangered and threatened
14 salmon, steelhead, and Delta Smelt.

15 2. Plaintiffs also bring this action against the U.S. Bureau of Reclamation, and its
16 official representatives (collectively “Reclamation”) for violating its affirmative duty under the
17 Endangered Species Act to ensure, based on the best scientific and commercial data available,
18 that its operation of the Central Valley Project is not likely to jeopardize any threatened or
19 endangered species or destroy or adversely modify such species’ habitat. Reclamation is acting
20 arbitrarily and capriciously and contrary to law in relying on biological opinions that are
21 inadequate and legally flawed. Contrary to the requirements of the Endangered Species Act and
22 based on political motivations, Reclamation failed to use the best available science, adopted a
23 Water Project operations plan that is likely to jeopardize Delta Smelt, Sacramento River winter-
24 run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead
25 and destroy or adversely modify those species’ habitat.

26 3. Plaintiffs also bring this action against Reclamation for violating its duties under
27 the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* (“NEPA”), and the
28 Administrative Procedures Act in relation to Reclamation’s Reinitiation of Consultation on the

1 Coordinated Long-term Operation of the Central Valley Project and State Water Project.
2 Contrary to the requirements of NEPA, in its Environmental Impact Statement (“EIS”) for the
3 Water Projects’ modified operations, Reclamation: defined the Purpose and Need for its
4 modification of the Water Projects’ operations in unreasonably narrow terms that prioritized
5 maximizing water supplies over species protection; failed to consider a reasonable range of
6 alternatives, including one or more alternatives that ensures species protection; and failed to
7 provide a full and fair analysis of and take the required “hard look” at the Water Project
8 operations’ environmental effects, including by failing to adequately model, analyze, and
9 disclose the significant negative impacts of Water Project operations on physical and biological
10 resources, including impacts on Delta Smelt, Sacramento River winter-run Chinook salmon,
11 Central Valley spring-run Chinook salmon, and Central Valley steelhead.

12 4. The Central Valley Project and the State Water Project, operated by Reclamation
13 and the state of California’s Department of Water Resources, respectively, are two of the largest
14 water projects in the country. These Water Projects operate a vast system of dams, reservoirs,
15 canals, and pumping facilities to divert massive amounts of water from the Sacramento and San
16 Joaquin River systems and the fragile San Francisco Bay/Sacramento-San Joaquin River Delta
17 (the “Delta”), primarily for agricultural and municipal uses in California’s Central Valley and
18 southern California.

19 5. The operations of the Water Projects have caused devastating environmental
20 impacts and have contributed to severe declines in California’s native fish species, several of
21 which are now listed as endangered or threatened species under the Endangered Species Act.
22 Specifically, Water Project operations have been major factors in the decline of the endangered
23 Sacramento River winter-run Chinook salmon (“winter-run Chinook salmon”), threatened
24 Central Valley spring-run Chinook salmon (“spring-run Chinook salmon”), threatened Central
25 Valley steelhead, and threatened Delta Smelt, and in the listing of these and other species under
26 the Endangered Species Act.

27 6. Pursuant to biological opinions issued in 2008 by the U.S. Fish and Wildlife
28 Service and in 2009 by the National Marine Fisheries Service, the Water Projects have been

1 authorized to kill, as incidental to their operations, a limited number of threatened and
2 endangered species. In August 2016, however, the National Marine Fisheries Service and the
3 U.S. Fish and Wildlife Service concluded that reinitiation of consultation was required under the
4 Endangered Species Act regarding the effects of Water Project operations on listed species, in
5 part because of data showing the increasingly imperiled state of the Delta Smelt and its
6 designated critical habitat and extremely low abundance levels of winter-run and spring-run
7 Chinook salmon. That same month, the Secretary of the Interior Department concluded that the
8 protections in those 2008 and 2009 biological opinions must be increased to avoid causing the
9 extinction of Delta Smelt and winter-run Chinook salmon, and that increased protections for
10 endangered and threatened species would likely result in reduced water diversions from the
11 Delta.

12 7. In January 2019, Reclamation issued a biological assessment outlining and
13 assessing a proposed new operating plan for the Water Projects. Reclamation's proposed Water
14 Project operations plan would substantially increase diversions from the Sacramento and San
15 Joaquin River watersheds, including significantly increasing pumping of water from the Delta
16 for export to the Central Valley and southern California, and would weaken or eliminate
17 operational requirements in the 2008 and 2009 biological opinions that were designed to protect
18 listed fish populations.

19 8. This new plan would have a significant impact on the Sacramento River and San
20 Joaquin River watersheds and Delta in general and, in particular, on the already endangered or
21 threatened winter-run and spring-run Chinook salmon, Central Valley steelhead, and Delta
22 Smelt. The proposed plan would significantly degrade environmental conditions in the Delta and
23 the Sacramento and San Joaquin River watersheds, harming fish and wildlife. These adverse
24 effects include reduced instream flows, reduced Delta outflow, increased salinity levels,
25 increased impingement and entrainment of fish in Delta pumps, habitat loss, reduced survival,
26 and increased mortality.

27 9. Pursuant to Section 7 of the Endangered Species Act, Reclamation consulted with
28 the National Marine Fisheries Service ("Fisheries Service") and the U.S. Fish and Wildlife

1 Service (“Fish and Wildlife Service”) about the effects of Reclamation’s proposed plan on listed
2 species.

3 10. After analyzing the effects of the proposed plan, on July 1, 2019, biologists at the
4 Fisheries Service prepared a 1,123-page biological opinion that concluded that Reclamation’s
5 proposed plan was likely to jeopardize listed salmon and steelhead, as well as Southern Resident
6 killer whales, and was likely to destroy or adversely modify critical habitat, in violation of the
7 Endangered Species Act. That biological opinion included a reasonable and prudent alternative
8 requiring additional protective measures and alterations in Reclamation’s proposed plan in order
9 to avoid such adverse impacts to listed species. But instead of adopting that biological opinion,
10 which had been signed by multiple staffers and cleared by Fisheries Service attorneys, political
11 appointees at the Fisheries Service and the Interior Department reportedly short-circuited
12 required procedures, removed most of the scientists working on the biological opinion, and
13 reversed the findings of staff biologists.

14 11. In a move contrary to sound science and apparently based on political expedience,
15 the Fisheries Service subsequently issued, on October 21, 2019, a biological opinion (“Fisheries
16 Service Biological Opinion”) concluding, in contrast to its July 1, 2019 biological opinion, that
17 Reclamation’s proposed plan was *not* likely to jeopardize the continued existence of winter-run
18 and spring-run Chinook salmon, Central Valley steelhead, or Southern Resident killer whales, or
19 destroy or adversely modify their critical habitats. The Fisheries Service Biological Opinion
20 therefore authorized Reclamation’s proposed plan without requiring additional protective
21 measures for species, and gave permission for the Water Projects to kill or harm more winter-run
22 and spring-run Chinook salmon and Central Valley steelhead than was permitted under the 2009
23 Fisheries Service biological opinion or than would have been permitted under the July 1, 2019
24 biological opinion.

25 12. Also on October 21, 2019 and contrary to sound science, the Fish and Wildlife
26 Service issued a biological opinion (“Fish and Wildlife Service Biological Opinion”) concluding
27 that Reclamation’s proposed plan was not likely to jeopardize the continued existence of Delta
28 Smelt or destroy or adversely modify the Delta Smelt’s critical habitat. The Fish and Wildlife

1 Service Biological Opinion therefore authorized Reclamation’s proposed plan without requiring
2 additional protective measures for species, and gave permission for the Water Projects to kill or
3 harm more Delta Smelt than was permitted under the 2008 Fish and Wildlife Service biological
4 opinion.

5 13. The October 2019 “no jeopardy”¹ conclusions contradict the information in the
6 records on which they are supposedly based, rely on unlawful and unsupported assumptions, and
7 do not comply with the requirements of the Endangered Species Act to protect and restore listed
8 species. The biological opinions are arbitrary, capricious, and not in accordance with law in
9 violation of the Administrative Procedure Act, 5 U.S.C. §706.

10 14. Nonetheless, on February 18, 2020, Reclamation adopted its proposed plan and
11 began implementing the altered operations of the Central Valley Project, in arbitrary and
12 capricious and unlawful reliance on the inadequate and legally flawed Fisheries Service
13 Biological Opinion and Fish and Wildlife Service Biological Opinion, thereby violating its
14 affirmative duty under the Endangered Species Act, 16 U.S.C. §1536(a)(2), to ensure, based on
15 the best scientific and commercial data available, that its operation of the Central Valley Project
16 is not likely to jeopardize any threatened or endangered species or destroy or adversely modify
17 such species’ habitat.

18 15. Defendants Secretary of Commerce Wilbur Ross and National Oceanic and
19 Atmospheric Administration Assistant Administrator for Fisheries Chris Oliver acted arbitrarily
20 and capriciously and contrary to law when they concluded in the Fisheries Service Biological
21 Opinion that Reclamation’s proposed plan would not jeopardize the continued existence of
22 winter-run and spring-run Chinook salmon and Central Valley steelhead, or destroy or adversely
23 modify their critical habitats, particularly given evidence that the proposed operations would
24 dramatically alter the hydrology of the Delta and the Sacramento and San Joaquin Rivers and
25

26
27 ¹ “No jeopardy” is used in this First Amended Complaint as shorthand for the
28 conclusion that the plan is not likely to jeopardize the continued existence of, or destroy or
adversely modify the critical habitat of, the threatened and endangered species assessed in the
biological opinions.

1 their tributaries, and would aggravate several of the very threats that led to the listing of these
2 species under the Endangered Species Act in the first place.

3 16. Similarly, Defendants Secretary of the Interior David Bernhardt and Fish and
4 Wildlife Service Acting Director Margaret Everson acted arbitrarily and capriciously and
5 contrary to law when they concluded in the Fish and Wildlife Service Biological Opinion that
6 Reclamation's proposed plan would not jeopardize the continued existence of Delta Smelt or
7 destroy or adversely modify its critical habitat, particularly given evidence that the proposed
8 operations would dramatically alter the hydrology of the Delta and the Sacramento and San
9 Joaquin Rivers and their tributaries, and would aggravate some of the very threats that led to the
10 listing of the Delta Smelt under the Endangered Species Act in the first place.

11 17. In addition, Defendants Secretary of the Interior David Bernhardt and
12 Commissioner of Reclamation Brenda Burman are violating the Endangered Species Act and
13 acting arbitrarily and capriciously by relying on the flawed and inadequate Biological Opinions
14 and by implementing the proposed operations despite evidence of their negative impacts on
15 Delta Smelt, winter-run and spring-run Chinook salmon, and Central Valley steelhead and those
16 species' critical habitats.

17 18. Along with reinitiating consultation under the Endangered Species Act, in 2016
18 Reclamation began the process of developing alternatives to Central Valley Project operations
19 under NEPA that would meet its Endangered Species Act obligations. According to
20 Reclamation, the process for identifying alternatives for operations of the Water Projects "began
21 in 2016 with the reinitiation of section 7 consultation." Final EIS, Appendix D at 2-1.

22 19. Under NEPA, Reclamation is required to prepare an EIS that includes a "purpose
23 and need" for the action it proposes to take, presents and evaluates a reasonable range of
24 alternatives to the proposed action, and includes a full and fair analysis that takes a "hard look"
25 at the environmental effects of the proposed action and its alternatives. 40 C.F.R. §§1502.13,
26 1508.9(b) (1978). Reclamation, including Defendants Secretary of the Interior David Bernhardt
27 and Commissioner of Reclamation Brenda Burman, however, acted arbitrarily and capriciously
28 and contrary to law in identifying an overly narrow and unreasonable project purpose; failing to

1 include a reasonable range of alternatives; failing to take the requisite “hard look” at the
 2 environmental effects of the proposed action and the alternatives; and failing to take account of
 3 the full scope of the proposed action.

4 PARTIES

5 20. Plaintiffs PACIFIC COAST FEDERATION OF FISHERMEN’S
 6 ASSOCIATIONS and INSTITUTE FOR FISHERIES RESOURCES are two sister organizations
 7 involved in commercial fishing and fisheries conservation and research. The Pacific Coast
 8 Federation of Fishermen’s Associations (“PCFFA”) is the largest trade organization of
 9 commercial fishing men and women on the West Coast. PCFFA is a California-incorporated
 10 federation of many different port associations, boat owners’ associations and marketing
 11 associations in California, Oregon, and Washington. PCFFA’s Southwest Regional and National
 12 Office is located in San Francisco, California. Collectively, PCFFA’s members represent more
 13 than 750 commercial fishing families and their commercial fishing business operations, most of
 14 whom are small and mid-sized commercial fishing boat owners and operators. Most of PCFFA’s
 15 members derive all or part of their income from the harvesting of salmonids.² The decline of
 16 California’s once-abundant Chinook and coho salmon species particularly has impacted PCFFA
 17 members in California by limiting commercial harvest opportunities, both through lost
 18 production of impaired stocks and because of “weak stock management” restrictions imposed on
 19 the fishing fleet generally to protect impaired salmon populations that intermingle with otherwise
 20 healthy stocks. Habitat losses to date already have cost the West Coast salmon fishing industry

21 ² The term “salmonids” (sometimes just “salmon”) are a fish biologists’ shorthand term
 22 that refers to several species of anadromous fish from the genus *Oncorhynchus*, including:
 23 Chinook or king salmon (*Oncorhynchus tshawtscha*); coho or silver salmon (*Oncorhynchus*
 24 *kisutch*); coastal searun cutthroat (*Oncorhynchus clarki clarki*); steelhead (*Oncorhynchus mykiss*
 25 *gairdneri*); chum salmon (*Oncorhynchus keta*); pink salmon (*Oncorhynchus gorbuscha*); and
 26 sockeye salmon (*Oncorhynchus nerka*). Only Chinook, however, remain a significant part of
 27 California’s ocean commercial fisheries, because direct take of all coho salmon is now expressly
 28 prohibited for conservation reasons. Steelhead and searun cutthroat can comprise significant
 portions of California recreational fisheries. Chum salmon, pink salmon, and sockeye salmon
 are ocean commercially fished in other states in the Pacific Northwest or Alaska, but are virtually
 extinct in California. For purposes of this Complaint, the terms “salmon” and “salmonids” refer
 only to California-origin Chinook, coho salmon, and/or steelhead unless otherwise specified, and
 common names (e.g., Chinook, coho or steelhead) will be used as appropriate to refer to specific
 salmon species.

1 (including both commercial and recreational components) tens of thousands of jobs in the last
2 thirty years. In California, these losses are directly related to widespread inland habitat
3 destruction resulting from the construction and operation of the Water Projects, which continue
4 to have adverse effects on the salmonid species that are critical to PCFFA's members'
5 livelihoods. Declining California Central Valley populations of winter-run Chinook salmon in
6 particular have greatly restricted fishing opportunities for fall-run Chinook salmon, which is the
7 backbone of the State's ocean salmon fishery, harming the livelihoods of many PCFFA
8 members. The recovery of winter-run Chinook salmon and spring-run Chinook salmon is likely
9 to increase fishing opportunities for PCFFA's members, resulting in benefits to them. PCFFA
10 has been active for more than 35 years in efforts to rebuild salmon populations in Central Valley
11 streams and rivers as well as watersheds connected naturally and unnaturally to the Central
12 Valley rivers. The Water Project operations authorized by the Fisheries Service Biological
13 Opinion and the Fish and Wildlife Service Biological Opinion (collectively, the "Biological
14 Opinions") will have an adverse effect on salmon in the rivers, as well as on the health of the
15 Sacramento-San Joaquin Delta and San Francisco Bay estuary, which play a critical role in the
16 development of juvenile salmon prior to going to sea. PCFFA has actively sought to prevent the
17 ill effects of intensified Water Project operations, including by joining in prior litigation against
18 such intensified operations and by presenting written comments and/or testimony to Reclamation
19 on numerous Central Valley Project contract renewals and many other relevant Central Valley
20 water issues.

21 21. The Institute for Fisheries Resources is a sister organization of PCFFA. Institute
22 for Fisheries Resources is a California-incorporated nonprofit organization with headquarters in
23 San Francisco, California. Established in 1993 by PCFFA, Institute for Fisheries Resources is
24 responsible for meeting the fishery research and conservation needs of working men and women
25 in the fishing industry by executing PCFFA's expanding fish habitat protection program. From
26 its inception, Institute for Fisheries Resources has helped fishing men and women in California
27 and the Pacific Northwest address salmon protection and restoration issues, with particular focus
28 on dam, water diversion, water pollution and forestry concerns. Institute for Fisheries Resources

1 is an active leader in several restoration programs affecting California’s winter-run and spring-
2 run Chinook salmon, including removal of antiquated storage and hydroelectric dams.

3 22. PCFFA and Institute for Fisheries Resources both operate ongoing programs
4 aimed at addressing salmonid recovery for three of the major Chinook and steelhead populations
5 most affected by the proposed Water Project operations: Sacramento River winter-run Chinook,
6 Central Valley spring-run Chinook, and Central Valley steelhead. PCFFA and Institute for
7 Fisheries Resources have both been actively working to restore salmon habitat throughout the
8 west coast for nearly two decades, with a particular focus on salmon habitat in California inland
9 river systems directly affected by the Water Projects. PCFFA and Institute for Fisheries
10 Resources have actively advocated for the protection and restoration of flows critical to the
11 health of the Bay and Delta, flows that would be imperiled as a result of the Water Project
12 operations proposed by Reclamation and authorized by the Biological Opinions.

13 23. Plaintiff GOLDEN STATE SALMON ASSOCIATION (“Golden State Salmon”)
14 is a non-profit organization that works to protect and restore California’s largest salmon
15 producing habitat in the Central Valley for the communities that rely on salmon as a long-term,
16 sustainable commercial, recreational, and cultural resource. Golden State Salmon’s members
17 include commercial and recreational salmon fishermen, businesses, restaurants, a Native
18 American tribe, environmentalists, elected officials, and community members that rely on
19 salmon. Golden State Salmon’s headquarters are in San Francisco, California. Golden State
20 Salmon and its more than 3,500 members have a direct interest in the survival and perpetuation
21 of salmon and other aquatic resources that depend upon Central Valley Rivers, the Delta, the
22 Bay, and its estuary. Most of Golden State Salmon’s members live in the Bay’s watershed, and
23 many rely on this region for their livelihood in the commercial fishing, sportfishing, and boating
24 industries. In addition, many Golden State Salmon members regularly visit and use the Bay, its
25 estuary, and the Central Valley rivers that flow into the Bay and its estuary for recreational
26 experiences and aesthetic enjoyment. Golden State Salmon regularly participates in
27 administrative proceedings on behalf of its members to protect, enhance, and restore declining
28 populations of Central Valley salmon that depend on Central Valley rivers and the Delta.

1 Golden State Salmon has worked collaboratively with government agencies, independent
2 academic experts, water users, and land owners on large-scale ecological restoration programs
3 through the Central Valley Project Improvement Act and other initiatives. Golden State Salmon
4 has submitted protests and petitions for reconsideration of revisions to the water quality
5 standards in the Bay-Delta Plan. Since its founding in 2011, Golden State Salmon has also
6 submitted written comments to, and testified at, public workshops regarding the need to
7 implement water quality standards for the Bay and Delta, and to update and improve those
8 standards.

9 24. Plaintiff BAY.ORG d/b/a THE BAY INSTITUTE (“The Bay Institute”) is a non-
10 profit conservation organization, located in San Francisco, dedicated to protecting, restoring, and
11 inspiring conservation of the ecosystems of the Bay and its watershed. The majority of the Bay
12 Institute’s supporters live around the Bay and its watershed, regularly visit and use the Bay, the
13 Delta, and Central Valley rivers for recreational experience, aesthetic enjoyment, and/or
14 livelihood in the commercial fishing, sportfishing, and boating industries, and have a direct
15 interest in the survival and perpetuation of fish species and other aquatic resources. The Bay
16 Institute regularly participates in administrative and judicial proceedings on behalf of its
17 supporters to protect, enhance, and restore declining populations of native California fishes,
18 including successful efforts to adopt and implement the historic settlement to restore Chinook
19 salmon to the San Joaquin River below Friant Dam; to list Delta Smelt under the federal
20 Endangered Species Act and spring-run Chinook salmon under the California Endangered
21 Species Act; and to invalidate and replace insufficiently protective biological opinions for
22 Chinook salmon, steelhead, and Delta Smelt under the Endangered Species Act. The Bay
23 Institute has also submitted extensive expert testimony and technical exhibits regarding the needs
24 of Chinook salmon, Delta Smelt, and other species to the State Water Resources Control Board
25 for its update of the Bay-Delta Water Quality Control Plan and other regulatory proceedings.
26 The Bay Institute has also worked collaboratively with government agencies, independent
27 academic experts, water users, and landowners to design and implement large-scale ecological
28 restoration programs through the CALFED Bay-Delta Program, the Central Valley Project

1 Improvement Act, the Delta Vision Task Force, the Bay-Delta Conservation Plan, the Central
2 Valley Salmon Habitat Partnership, and other processes.

3 25. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL, INC. (“NRDC”) is a
4 non-profit environmental organization with more than 375,000 members nationwide, including
5 more than 66,000 members in California. NRDC has thousands of members in the counties that
6 surround the Delta, including more than 1,700 members in Contra Costa County, more than
7 2,400 members in San Francisco, more than 3,300 members in Alameda County, and close to
8 2,000 members in Marin and Napa Counties. NRDC maintains an office in San Francisco,
9 California. NRDC’s purpose is to safeguard the Earth: its people, its plants, and animals and the
10 natural systems on which all life depends. The organization works to restore the integrity of the
11 elements that sustain life—air, land, and water—and to defend endangered natural places. For
12 decades, NRDC has advocated extensively for the protection of the nation’s waterways and
13 wildlife, including the winter-run and spring-run Chinook salmon and Delta Smelt. NRDC has
14 brought and intervened in lawsuits designed to ensure that Water Project operations do not
15 jeopardize the continued existence of threatened and endangered fish species or adversely
16 modify those species’ critical habitat. NRDC has also long worked in non-litigation settings to
17 protect the Sacramento and San Joaquin Rivers, the Bay-Delta estuary, and the native fish for
18 which those waterways provide habitat. NRDC submitted substantial written comments to the
19 Fisheries Service and the Fish and Wildlife Service regarding the major flaws in the Bureau of
20 Reclamation’s proposed action, the draft biological opinions, and the reinitiation of consultation
21 process.

22 26. Plaintiff DEFENDERS OF WILDLIFE (“Defenders”) is a non-profit corporation
23 with hundreds of thousands of members across the nation, including tens of thousands of
24 members in California. Defenders is dedicated to the protection of all native animals and plants
25 in their natural communities. Through education, advocacy, litigation, and other efforts,
26 Defenders works to preserve species and the habitats upon which they depend. Defenders has
27 been closely involved in policy and litigation matters associated with water quality and species
28 habitat in the Sacramento River, San Joaquin River, and Delta region for many years, including

1 litigation and regulatory actions intended to benefit winter-run and spring-run Chinook salmon,
2 Delta Smelt, and their habitats. Defenders has submitted written comments in support of more
3 protective water quality standards for the Delta and its tributary rivers, filed litigation to oppose
4 infrastructure projects that would impact these imperiled fish and their habitats, and worked to
5 secure funding for habitat restoration projects in the Sacramento River, San Joaquin River, and
6 Delta. In addition to Delta Smelt and salmonids, Defenders strives to protect a broad range of
7 species that depend upon the health of the Sacramento and San Joaquin River watersheds and the
8 Delta, including giant garter snakes, migratory waterfowl and shorebirds, and Southern Resident
9 orcas.

10 27. Plaintiffs and members of Plaintiffs have been and will continue to be actively
11 involved in efforts to protect and restore the Sacramento and San Joaquin River watersheds and
12 the Delta, and the species that rely upon those areas for habitat. Among other actions, Plaintiffs
13 and members of Plaintiffs have written to numerous federal, state, and local agencies and
14 officials to urge increased protection for the species that rely upon the Delta and the rivers that
15 flow into it for habitat.

16 28. Plaintiffs and many of their members live and/or work in communities near the
17 water resources affected by the Water Projects, including in the Delta and the Sacramento and
18 San Joaquin River watersheds. In addition to advocating for protections for these ecosystems
19 and the endangered and threatened species that inhabit them, members of the Plaintiff
20 organizations are active participants in the life of the Delta and the Sacramento River and San
21 Joaquin River watersheds. Individual members of Plaintiff organizations frequently visit the
22 Delta and the Sacramento River and San Joaquin River watersheds, which provide critical habitat
23 for winter-run and spring-run Chinook salmon, Central Valley steelhead, and Delta Smelt, to use
24 and appreciate the Delta and river ecosystems.

25 29. Individual members of Plaintiff organizations regularly derive recreational,
26 aesthetic, spiritual, cultural, scientific, educational, and conservation benefits and enjoyment
27 from the existence of winter-run and spring-run Chinook salmon, Central Valley steelhead, and
28 Delta Smelt, whose populations are harmed by the operations of the Water Projects. They use,

1 on a continuing and ongoing basis, the water resources in the Delta and the Sacramento and San
2 Joaquin River watersheds for many educational, recreational, aesthetic, spiritual, cultural, and
3 commercial purposes such as hiking, boating, bird watching, photography, swimming, fishing,
4 and scientific study.

5 30. Winter-run and spring-run Chinook salmon, Central Valley steelhead, and Delta
6 Smelt migrate through the Delta and parts of the Sacramento and San Joaquin River watersheds
7 during different periods of their lives and depend upon the health of those ecosystems. The use
8 of the Delta and the Sacramento and San Joaquin River watersheds by members of the Plaintiff
9 organizations is and will continue to be detrimentally affected by the decline of these species and
10 the corresponding decline in the health of the Delta and the Sacramento and San Joaquin River
11 watersheds. Members of the Plaintiff organizations will continue to regularly derive benefit and
12 enjoyment from the existence of winter-run and spring-run Chinook salmon, Central Valley
13 steelhead, and Delta Smelt by regularly engaging in scientific, education, and conservation
14 activities involving these species. These benefits and enjoyments would increase if winter-run
15 and spring-run Chinook salmon, Central Valley steelhead, and Delta Smelt were to recover from
16 their precarious status of being threatened with extinction.

17 31. The populations of winter-run and spring-run Chinook salmon, Central Valley
18 steelhead, and Delta Smelt will continue to decline, and the species may soon become extinct,
19 unless the utmost care is taken to protect these species and their remaining habitat. The health of
20 these species is one indicator of the overall health of the Delta and the Sacramento and San
21 Joaquin River watersheds. Therefore, while the extirpation of any of the fish species from any
22 portion of the Delta or the Sacramento and San Joaquin River watersheds would constitute an
23 incalculable environmental loss in and of itself, it would also indicate more generally that the
24 health and diversity of the species' habitat has been severely degraded. These events, and the
25 threat of these events, would deprive Plaintiffs and members of Plaintiffs of the recreational,
26 spiritual, cultural, aesthetic, educational, conservation, commercial, and other benefits they
27 presently derive from the Delta and the Sacramento and San Joaquin River ecosystems.

28

1 32. The above-described aesthetic, conservation, recreational, scientific, educational,
2 commercial, wildlife and fisheries preservation, and other interests of Plaintiffs and members of
3 Plaintiff organizations have been, are being, and, unless the relief prayed for herein is granted,
4 will continue to be adversely affected and irreparably injured by Reclamation’s failure to satisfy
5 its section 7(a)(2) duty to ensure and the Defendants’ arbitrary and capricious adoption of and
6 reliance on the Biological Opinions and those Opinions’ arbitrary and capricious conclusions that
7 the proposed plan and Water Project operations will not jeopardize the Delta Smelt, Central
8 Valley steelhead, and winter-run and spring-run Chinook salmon. These injuries are actual and
9 concrete and would be redressed by the relief sought herein. Plaintiffs have no adequate remedy
10 at law.

11 33. Defendant Reclamation’s arbitrary and capricious actions and failure to comply
12 with NEPA has also resulted in informational, procedural, and organizational harm to Plaintiffs
13 and their members. Reclamation is the cause of these injuries, and the requested relief would
14 redress these injuries at least in part.

15 34. The Defendants in this action are:

- 16 a. WILBUR ROSS. Mr. Ross is sued in his official capacity as Secretary of the
17 Department of Commerce (the “Commerce Secretary”). He is responsible for
18 implementing the Endangered Species Act for species under the Department
19 of Commerce’s jurisdiction, including salmon and steelhead, and for ensuring
20 that formal consultations and biological opinions required under Section 7 of
21 the Endangered Species Act are completed in accordance with the letter and
22 intent of the law.
- 23 b. CHRIS OLIVER. Mr. Oliver is sued in his official capacity as Assistant
24 Administrator for Fisheries at the National Oceanic and Atmospheric
25 Administration. He has been delegated the responsibilities of the Secretary of
26 Commerce described in the preceding paragraph. 50 C.F.R. §402.01(b). He
27 is responsible for administering the Endangered Species Act for species under
28

1 the Department of Commerce’s jurisdiction, including reviewing and
2 approving the findings of the Fisheries Service Biological Opinion.

3 c. NATIONAL MARINE FISHERIES SERVICE. The Fisheries Service is an
4 agency of the United States government. The Fisheries Service is responsible
5 for performing consultations under Section 7 of the Endangered Species Act
6 for species under the Department of Commerce’s jurisdiction.

7 d. DAVID BERNHARDT. Mr. Bernhardt is sued in his official capacity as
8 Secretary of the Department of Interior (the “Interior Secretary”). He is
9 responsible for implementing the Endangered Species Act for species under
10 the Department of Interior’s jurisdiction, including Delta Smelt, and for
11 ensuring that formal consultations and biological opinions required under
12 Section 7 of the Endangered Species Act are completed in accordance with the
13 letter and intent of the law. He is also responsible for overseeing the Bureau
14 of Reclamation, its operation of the Central Valley Project, and its compliance
15 with the Endangered Species Act and NEPA.

16 e. AURELIA SKIPWITH. Ms. Skipwith is sued in her official capacity as
17 Director of the Fish and Wildlife Service. She has been delegated the
18 responsibilities of the Secretary of Interior described in the preceding
19 paragraph. 50 C.F.R. §402.01(b). She is responsible for administering the
20 Endangered Species Act for species under the Department of Interior’s
21 jurisdiction, including reviewing and approving the findings of the Fish and
22 Wildlife Service Biological Opinion.

23 f. FISH AND WILDLIFE SERVICE. The Fish and Wildlife Service is an
24 agency of the United States government. The Fish and Wildlife Service is
25 responsible for performing consultations under Section 7 of the Endangered
26 Species Act for species under the Department of Interior’s jurisdiction.

27 g. BRENDA BURMAN. Ms. Burman is sued in her official capacity as
28 Commissioner of the Bureau of Reclamation. Under the supervision and

1 direction of the Secretary of the Interior, she is responsible for managing the
2 Central Valley Project in accordance with the Endangered Species Act and
3 other laws, including by ensuring that Reclamation completes the consultation
4 process required by the Endangered Species Act and fulfills its substantive
5 duty to ensure that its actions are not likely to jeopardize listed species or
6 destroy or modify such species' habitat. Ms. Berman is also responsible for
7 ensuring Reclamation complies with its obligations under NEPA.

8 h. BUREAU OF RECLAMATION. The Bureau of Reclamation is an agency of
9 the United States government. It is responsible for managing the Central
10 Valley Project, including completing consultation under Section 7 of the
11 Endangered Species Act and complying with NEPA when operating the
12 Central Valley Project.

13 **JURISDICTION AND VENUE**

14 35. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (action
15 arising under the laws of the United States); 28 U.S.C. §1361 (mandamus); 28 U.S.C. §§2201–
16 2202 (declaratory judgment); 16 U.S.C. §1540(c) and (g) (action arising under the Endangered
17 Species Act); and 5 U.S.C. §§702, 703, and 706 (judicial review of federal agency actions).

18 36. The Commerce Secretary has issued the Fisheries Service Biological Opinion on
19 the effects of the proposed Water Project plan on winter-run and spring-run Chinook salmon,
20 Central Valley steelhead, Green Sturgeon, and Southern Resident killer whales pursuant to 16
21 U.S.C. §1536(b). The Interior Secretary has issued the Fish and Wildlife Service Biological
22 Opinion on the effects of the proposed Water Project plan on Delta Smelt, among other species,
23 pursuant to 16 U.S.C. §1536(b). Plaintiffs assert that these Biological Opinions are arbitrary and
24 capricious, an abuse of discretion, and not in accordance with law within the meaning of 5
25 U.S.C. §706(2). An actual controversy therefore exists between the parties within the meaning
26 of the Declaratory Judgment Act, 28 U.S.C. §2201(a).

27 37. On November 26, 2019, more than 60 days prior to the filing of this First
28 Amended Complaint, Plaintiffs provided Defendants Secretary Bernhardt and Commissioner

1 Burman with written notice of the violations of the Endangered Species Act alleged herein, as
2 required by 16 U.S.C. §1540(g)(2). A copy of this notice is attached hereto as Exhibit 1.

3 38. Reclamation made a Final EIS available on December 19, 2019 and adopted a
4 Record of Decision on the project on February 18, 2020. Plaintiffs provided comments on the
5 deficiencies of the EIS and Reclamation's NEPA process during the public and comment period
6 on the draft EIS, and have therefore exhausted administrative remedies. A copy of comments on
7 the draft EIS submitted by Plaintiffs Natural Resources Defense Council, Defenders of Wildlife,
8 The Bay Institute, and Golden State Salmon Association is attached hereto as Exhibit 2. Copies
9 of Plaintiffs Pacific Coast Federation of Fishermen's Association and Institute for Fisheries
10 Resources' comments on the draft EIS are attached hereto as Exhibits 3, 4, and 5.

11 39. Venue lies in this judicial district by virtue of 28 U.S.C. §1391(e)(1), because
12 several plaintiffs reside within this judicial district and a substantial part of the events or
13 omissions giving rise to the claims occurred within this judicial district. In particular, a
14 substantial part of the Delta Smelt's critical habitat lies in and adjacent to Contra Costa County.
15 Similarly, a substantial part of the winter-run Chinook salmon's critical habitat lies in and
16 adjacent to Contra Costa, Alameda, San Francisco, Marin, and Sonoma Counties. In addition,
17 the Water Projects' two major Delta pumping plants are located in this judicial district: the
18 Central Valley Project's Tracy (C.W. Bill Jones) Pumping Plant and the State Water Project's
19 Harvey O. Banks Delta Pumping Plant are located in Contra Costa County and Alameda County.
20 The operation of these pumping plants, which are used to pump and export water out of the
21 Delta, create many of the harmful conditions giving rise to this action. These pumps entrain and
22 kill fish, including Delta Smelt, juvenile Central Valley steelhead, and juvenile spring-run and
23 winter-run Chinook. The pumps also reduce the total amount of water flowing out of the Delta,
24 thus altering the basic water quality conditions and biological productivity of the Delta habitat, in
25 which Delta Smelt live and through which Central Valley steelhead and spring-run and winter-
26 run Chinook must pass as they migrate into and back from the Pacific Ocean at different stages
27 of their lives. Finally, many of the Plaintiffs maintain offices and/or have many members who
28 reside within this judicial district, as set forth above. Plaintiffs Pacific Coast Federation of

1 Fishermen’s Associations, Institute for Fisheries Resources, The Bay Institute, and Golden State
2 Salmon maintain their national offices and reside within this judicial district.

3 **INTRADISTRICT ASSIGNMENT**

4 40. This action should be assigned to the San Francisco or Oakland Division pursuant
5 to Civil L.R. 3-2(d) because a substantial portion of the events giving rise to the claims occurred,
6 or will occur, in Contra Costa County and Alameda County, and in the waters in and adjacent to
7 Contra Costa, Alameda, San Francisco, Marin, and Sonoma Counties.

8 **STATUTORY AND REGULATORY FRAMEWORK**

9 **A. The Endangered Species Act Imposes Substantive Duties Upon the Government**

10 41. Congress enacted the Endangered Species Act in 1973 “to provide a means
11 whereby the ecosystems upon which endangered species and threatened species depend may be
12 conserved, [and] to provide a program for the conservation of such endangered species and
13 threatened species” 16 U.S.C. §1531(b).

14 42. The Supreme Court has observed that “[t]he plain intent of Congress in enacting
15 this statute was to halt and reverse the trend toward species extinction, whatever the cost,” and
16 that, under the act, “[it] intended endangered species to be afforded the highest of priorities.”
17 *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978).

18 43. Section 7(a)(2) of the Endangered Species Act imposes a substantive duty on each
19 federal agency to ensure that any action which it authorizes, funds, or carries out is not likely to
20 jeopardize the continued existence of any threatened or endangered species or destroy or
21 adversely modify any listed species’ critical habitat. 16 U.S.C. §1536(a)(2); 50 C.F.R. §402.14.

22 44. An action “jeopardize[s] the continued existence” of a listed species if it
23 reasonably would be expected to reduce appreciably the likelihood of both the survival and
24 recovery of the species in the wild. 50 C.F.R. §402.02.

1 45. An action “destr[oys] or adverse[ly] modifi[es]” critical habitat if it directly or
2 indirectly alters critical habitat such that the value of the critical habitat for either the survival or
3 the recovery of a species is appreciably diminished. 50 C.F.R. §402.02.³

4 **B. Consultation Under the Endangered Species Act**

5 46. To ensure agency compliance with the substantive duty not to jeopardize
6 threatened or endangered species or to destroy or adversely modify their critical habitat, Section
7 7(a)(2) of the Endangered Species Act also imposes on federal agencies a procedural duty to
8 consult with either the Fish and Wildlife Service, in the case of terrestrial and freshwater species
9 including Delta Smelt, and/or the Fisheries Service with respect to anadromous species such as
10 winter-run and spring-run Chinook salmon and Central Valley steelhead, to evaluate the effects
11 of the agency action in question on listed species and their critical habitat. 16 U.S.C.
12 §1536(a)(2).⁴

13 47. To this end, the agency proposing the action (the “action agency”) provides to the
14 relevant agency with which it is consulting (the “consulting agency”) a Biological Assessment
15 outlining the action and the effects of that action on the species. 16 U.S.C. §1536(c); 50 C.F.R.
16 §402.12. Notably, the action agency requesting formal consultation is required to provide the
17 relevant consulting agency with “the best scientific and commercial data available or which can
18 be obtained during the consultation for an adequate review of the effects that an action may have
19 upon listed species or critical habitat.” 50 C.F.R. §402.14(d).

20
21 ³ Several Endangered Species Act implementing regulations, including several of the
22 definitions found in 50 C.F.R. §402.02, were amended effective October 28, 2019. Because the
23 biological opinions at issue in this case were published and adopted prior to that date, on or about
24 October 21, 2019, the relevant version of the regulations is the version that was in effect prior to
25 October 28, 2019. The Biological Opinions confirm this, stating that because the consultation
26 was pending and completed prior to October 28, 2019, they apply the previous version of the
27 regulations to the consultation.

28 ⁴ The text of the Endangered Species act requires consultation with “the Secretary,” 16
U.S.C. §1536(a)(2), which refers to either the Secretary of the Interior or the Secretary of
Commerce, *see* 16 U.S.C. §1532(15), depending on the species involved. The consultation
responsibilities of the Secretary of the Interior are carried out by the Fish and Wildlife Service,
and the consultation responsibilities of the Secretary of Commerce are carried out by the
Fisheries Service. *See* 50 C.F.R. §402.01(b).

1 48. Following consultation, the relevant consulting agency must issue a “biological
2 opinion” that determines whether the action is likely to jeopardize or destroy or adversely modify
3 the critical habitat of a listed species under that agency’s jurisdiction, and provides a summary of
4 the reasons for the biological opinion’s conclusion. 16 U.S.C. §1536(b)(3)(A).

5 49. If the biological opinion concludes that the proposed action will jeopardize the
6 species or destroy or adversely modify its critical habitat, the agency must recommend
7 “reasonable and prudent alternatives” that can be taken by the agency to implement the action
8 that would neither jeopardize the continued existence of the species nor destroy or adversely
9 modify its critical habitat. 16 U.S.C. §1536(b)(3)(A).

10 50. If the consulting agency concludes that a proposed agency action will not
11 jeopardize the continued existence of a species but is likely to result in incidental takings, it
12 issues an “incidental take statement” with the biological opinion. 16 U.S.C. §1536(b)(4); 50
13 C.F.R. §402.14(i). The statement acts as a safe harbor, exempting the specified amount of
14 incidental taking from the take prohibition of Endangered Species Act Section 9.

15 **C. Requirements Applicable to Biological Opinions**

16 51. In formulating a biological opinion, the consulting agency must use the best
17 scientific and commercial data available. 16 U.S.C. §1536(a)(2); 50 C.F.R. §402.14(g)(8).

18 52. A biological opinion must include a discussion of “whether the action, taken
19 together with [its] cumulative effects, is likely to jeopardize the continued existence of listed
20 species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R.
21 §402.14(g)(3), (4). The Fisheries Service and the Fish and Wildlife Service have defined the
22 “effects of the action” as “the direct and indirect effects . . . on the species or critical habitat,
23 together with the effects of other activities that are interrelated or interdependent with that action,
24 that will be added to the environmental baseline.” 50 C.F.R. §402.02. Indirect effects are further
25 defined as “those that are caused by the proposed action and are later in time, but still are
26 reasonably certain to occur.” *Id.* “Interrelated actions” are actions that are “part of a larger
27 action and depend on the larger action for their justification.” *Id.* “Interdependent actions” are
28 actions that “have no independent utility apart from the action under consideration.” *Id.*

1 53. A biological opinion may consider mitigation measures that are included with the
2 proposed action to assess whether the action will jeopardize the continued existence and
3 recovery of the species or adversely affect its critical habitat. However, any such “[m]itigation
4 measures supporting a biological opinion’s no jeopardy conclusion must be ‘reasonably specific,
5 certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-
6 enforceable obligations; and most important, they must address the threats to the species in a way
7 that satisfies the jeopardy and adverse modification standards.’” *Nat’l Wildlife Fed’n v. Nat’l*
8 *Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1125–26 (D. Or. 2011) (quoting *Ctr. for*
9 *Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002)); *see Ctr. for*
10 *Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1117 (9th Cir. 2012); *Nat.*
11 *Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 350–57 (E.D. Cal. 2007).

12 54. Reliance on uncertain future mitigation measures to conclude that the project will
13 not jeopardize the species or adversely modify its critical habitat violates Section 7(a)(2) of the
14 Endangered Species Act. Such reliance allows potential jeopardy to listed species, and
15 destruction or adverse modification of their habitats, without first ensuring that adequate
16 measures will be implemented, based on the best available science, to ensure that the action will
17 neither jeopardize the continued existence and recovery of the species nor adversely modify its
18 critical habitat.

19 55. In addition, the Endangered Species Act requires a biological opinion to analyze
20 the effects of the entire action authorized by the agency. Specifically, Section 7(a)(2) of the
21 Endangered Species Act, 16 U.S.C. §1536(a)(2), requires that a consulting agency consider the
22 “entire agency action” in a consultation that is “coextensive” with the extent and duration of the
23 action. *Conner v. Burford*, 848 F.2d 1441, 1453, 1458 (9th Cir. 1988); *see, e.g., Wild Fish*
24 *Conservancy v. Salazar*, 628 F.3d 513, 521–25, 532 (9th Cir. 2010) (holding that a biological
25 opinion was arbitrary and capricious where the Fish and Wildlife Service “committed legal error
26 by limiting the scope of the action to five years”). The term “agency action” must be defined
27 broadly because “caution can only be exercised if the agency takes a look at all the possible
28

1 ramifications of the agency action.” *Conner*, 848 F.2d at 1453 (brackets omitted) (quoting *N.*
2 *Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980)).

3 56. Failing to analyze the long-term effects of a project that will operate for decades
4 violates the Endangered Species Act’s mandate that the whole of the action, and its effects, be
5 analyzed.

6 57. Any incidental take statement that is included in a biological opinion must
7 “specif[y] the impact”—that is, the anticipated amount or extent—“of such incidental taking on
8 the species,” 50 C.F.R. §402.14(i)(1)(i), as well as “those reasonable and prudent measures . . .
9 necessary or appropriate to minimize such impact,” 16 U.S.C. §1536(b)(4). The level of take
10 authorized in the incidental take statement must be tied to the scope of the proposed action and
11 its effects that are analyzed in the underlying biological opinion; a take statement is invalid if it
12 is broader and allows for more take than is anticipated and supported by a valid biological
13 opinion. *See Oregon Nat. Res. Council v. Allen*, 476 F.3d 1031, 1036–37 (9th Cir. 2007).

14 58. “If during the course of the action the amount or extent of incidental taking, as
15 specified [in the statement], is exceeded, the Federal agency must reinitiate consultation
16 immediately.” 50 C.F.R. §402.14(i)(4). To effectuate this reinitiation requirement, an incidental
17 take statement must “establish a *meaningful* trigger for renewed consultation,” which requires
18 that the action agency be “capable of quantifying take to determine when the trigger has been
19 met.” *Wild Fish Conservancy*, 628 F.3d at 532 (emphasis added); *see also Oregon Nat. Res.*
20 *Council*, 476 F.3d at 1041 (“[A] limitation on take . . . cannot be so indeterminate as to prevent
21 the Take Statement from contributing to the monitoring of incidental take by eliminating its
22 trigger function.”).

23 59. The consulting agency “is responsible for specifying in the [incidental take]
24 statement how the action agency is to monitor and report the effects of the action on listed
25 species.” *Wild Fish Conservancy*, 628 F.3d at 532.

26 60. “A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions)
27 may be used to express the amount or extent of anticipated take.” 50 C.F.R. §402.14(i)(1)(i).
28 However, such use of a surrogate requires that the biological opinion or incidental take statement

1 “[d]escribe[] the causal link between the surrogate and take of the listed species” and “explain[]
2 why it is not practical to express the amount or extent of anticipated take or to monitor take-
3 related impacts in terms of individuals of the listed species.” *Id.*; *see also Oregon Nat. Res.*
4 *Council*, 476 F.3d at 1037 (“Congress has clearly declared a preference for expressing take in
5 numerical form, and an Incidental Take Statement that utilizes a surrogate instead of a numerical
6 cap on take must explain why it was impracticable to express a numerical measure of take.”). In
7 other words, “the agency must articulate a rational connection between the surrogate and the
8 taking of the species.” *Wild Fish Conservancy*, 628 F.3d at 531.

9 61. In addition, use of a surrogate requires that the incidental take statement “set[] a
10 clear standard for determining when the level of anticipated take has been exceeded.” 50 C.F.R.
11 §402.14(i)(1)(i). The Ninth Circuit “has rejected a surrogate trigger so vague that it failed to
12 ‘provide a clear standard for determining when the authorized level of take has been
13 exceeded,’ and a surrogate so broad—‘all spotted owls’ associated with the project—that it
14 ‘could not adequately trigger reinitiation of consultation.’” *Wild Fish Conservancy*, 628 F.3d at
15 531 (first quoting *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Service*, 273 F.3d 1229,
16 1250–51 (9th Cir. 2001), then quoting *Or. Natural Res. Council*, 476 F.3d at 1038).

17 62. Ultimately, if the consulting agency’s biological opinion fails to meet these or
18 other Endangered Species Act requirements, or if the agency fails to make a rational decision on
19 the record before it, the biological opinion is invalid as “arbitrary, capricious, an abuse of
20 discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). Thus, the consulting
21 agency must always “articulate[] a rational connection between the facts found and the
22 conclusions made” in a biological opinion. *Wild Fish Conservancy*, 628 F.3d at 525 (brackets in
23 original). “[I]f the agency has relied on factors which Congress has not intended it to consider,
24 entirely failed to consider an important aspect of the problem, offered an explanation for its
25 decision that runs counter to the evidence before the agency, or is so implausible that it could not
26 be ascribed to a difference in view or the product of agency expertise,’ the agency action may be
27 overturned as unlawful.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Bureau of*

28

1 *Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n v. State*
2 *Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

3 **D. Action Agency's Endangered Species Act Duties Go Beyond Consultation**

4 63. Even after the procedural requirements of consultation are complete, the ultimate
5 duty to ensure that an action is not likely to jeopardize a listed species or destroy or adversely
6 modify the species' critical habitat lies with the action agency. *See* 16 U.S.C. §1536(a)(2)
7 ("Each federal agency *shall . . . insure* that any action authorized, funded, or carried out by such
8 agency . . . is not likely to jeopardize the continued existence of any endangered species or
9 threatened species or result in the destruction or adverse modification of [critical] habitat of such
10 species." (emphasis added)).

11 64. In other words, because Section 7 includes "*substantive obligations*," an action
12 agency cannot "abrogate its responsibility to ensure that its actions will not jeopardize a listed
13 species" simply by requesting formal consultation or by relying on the mere fact that a
14 consultation occurred. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d
15 1410, 1415 (9th Cir. 1990); *see also Res. Ltd. v. Robinson*, 35 F.3d 1300, 1304 (9th Cir. 1994),
16 *as amended on denial of reh'g* (July 5, 1994) ("Consulting . . . alone does not satisfy an agency's
17 duty under the Endangered Species Act."); *City of Tacoma v. FERC*, 460 F.3d 53, 75-76 (D.C.
18 Cir. 2006) ("[T]he ultimate responsibility for compliance [with Section 7] . . . falls on the action
19 agency.").

20 65. Thus, regardless of the findings and conclusions of a biological opinion issued by
21 a consulting agency, the action agency has an independent and continuing substantive duty to
22 ensure that its action is not likely to jeopardize a listed species or destroy or adversely modify
23 such species' critical habitat. 16 U.S.C. §1536(a)(2); *see Stop H-3 Ass'n. v. Dole*, 740 F.2d
24 1442, 1460 (9th Cir. 1984) (holding that failure of action agency to independently consider
25 whether its actions jeopardize species is arbitrary and capricious).

26 66. An action agency's arbitrary and capricious reliance on an inadequate,
27 incomplete, or flawed biological opinion violates the agency's Section 7(a)(2) duty under the
28 Endangered Species Act to avoid jeopardy. *Wild Fish Conservancy*, 628 F.3d at 532

1 (“Arbitrarily and capriciously relying on a faulty Biological Opinion violates this [Section 7
2 substantive] duty.”); *see, e.g., id.* (holding that the action agency “violated its substantive duty to
3 ensure that its operations and maintenance did not [cause jeopardy]” because its “reliance on a
4 legally flawed biological opinion was arbitrary and capricious”); *Pyramid Lake Tribe of Indians*,
5 898 F.2d at 1415.

6 67. For example, an action agency’s reliance on a biological opinion that has legal
7 flaws—such as “failing to articulate a rational connection between its findings . . . and its no
8 jeopardy conclusion” or including an “inadequate incidental take statement”—is arbitrary and
9 capricious and violates the Endangered Species Act. *Wild Fish Conservancy*, 628 F.3d at 532.

10 68. Similarly, an action agency’s reliance on a biological opinion is unjustified where
11 the action agency fails to satisfy its requirement under 50 C.F.R. §402.14(d) to provide the
12 consulting agency with “the best scientific and commercial data available or which can be
13 obtained during the consultation for an adequate review of the effects that an action may have
14 upon listed species or critical habitat.” *Res. Ltd.*, 35 F.3d at 1304.

15 69. In fulfilling its substantive duty under Section 7(a)(2) of the Endangered Species
16 Act, an agency must “use the best scientific and commercial data available.” 16 U.S.C.
17 §1536(a)(2).

18 70. In addition, the obligation to “insure” against a likelihood of jeopardy or adverse
19 modification requires federal agencies to give the benefit of the doubt to endangered species and
20 to place the burden of protecting against risk and uncertainty on the agency. *See Ariz. Cattle*
21 *Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1166-67 (9th Cir. 2010).

22 **E. Environmental Review under the National Environmental Policy Act**

23 71. The National Environmental Policy Act is the “basic national charter for
24 protection of the environment.” 40 C.F.R. §1500.1. Its purposes include: “To declare a national
25 policy which will encourage productive and enjoyable harmony between man and his
26 environment; to promote efforts which will prevent or eliminate damage to the environment and
27 biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the
28 ecological systems and natural resources important to the Nation.” 42 U.S.C. §4321.

1 72. To accomplish these purposes, the National Environmental Policy Act requires all
2 agencies of the federal government, including Reclamation, to prepare a “detailed statement” that
3 discusses the environmental impacts of, and reasonable alternatives to, all “major Federal actions
4 significantly affecting the quality of the human environment.” 42 U.S.C. §4332(2)(C). This
5 statement is commonly known as an environmental impact statement or “EIS.” The EIS is an
6 “action-forcing device” that ensures NEPA’s goals “are infused into the ongoing programs and
7 actions” of the federal government. 40 C.F.R. §1502.1.

8 73. Any federal agency that is considering approving an activity that may
9 significantly affect the environment must first prepare a draft EIS. The agency must solicit
10 comments on that draft from the public, any other federal agency that has jurisdiction or special
11 expertise on the subject matter, and Indian Tribes when the project may affect a reservation. *See*
12 *id.* §§1502.9(a), 1503.1(a). The agency must then prepare a final EIS based on its consideration
13 of those comments. *Id.* §§1502.9(b), 1503.4(a). The agency must respond to comments by
14 either making changes to the EIS or explaining why the comments do not warrant further agency
15 response. *Id.* §§1502.9(b), 1503.4(a). At the conclusion of the NEPA process, an agency must
16 issue a record of decision pursuant to 40 C.F.R. §1505.2.

17 74. The NEPA process is intended “to help public officials make decisions that are
18 based on understanding of environmental consequences, and to take actions that protect, restore,
19 and enhance the environment” and to “insure that environmental information is available to
20 public officials and citizens *before* decisions are made and *before* actions are taken.” 40 C.F.R.
21 §1500.1(b)-(c) (emphasis added). One of NEPA’s fundamental purposes is “to guarantee
22 relevant information is available to the public.” *N. Plains Res. Council, Inc. v. Surface Transp.*
23 *Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011).

24 75. When preparing an EIS, an agency must rely on “high quality” information and
25 ensure scientific integrity of the discussions and analyses in its EIS. *See* 40 C.F.R. §§1500.1(b),
26 1502.24. These requirements must be met in order to allow for “[a]ccurate scientific analysis,
27 expert agency comments, and public scrutiny.” *Id.* This is necessary to ensure NEPA’s twin
28 goals of (1) ensuring the agency has available and carefully considers detailed information

1 concerning significant environmental impacts and (2) promoting informed public participation
2 by requiring full disclosure of governmental decisions affecting environmental quality.

3 76. NEPA requires agencies to take a “hard look” at the environmental consequences
4 of proposed agency actions. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387
5 F.3d 989, 993 (9th Cir. 2004); *see* 42 U.S.C. §4332. “To take the required ‘hard look’ at a
6 proposed project’s effects, an agency may not rely on incorrect assumptions or data” *Native*
7 *Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005) (citing 40 C.F.R.
8 §1500.1(b)).

9 77. An EIS must include a “full and fair discussion” of the “direct,” “indirect,” and
10 “cumulative” effects of the action, as well as a discussion of “[m]eans to mitigate adverse
11 environmental impacts.” 40 C.F.R. §§1502.1, 1502.16(a), (b) & (h), 1508.25(c).

12 78. The EIS must also inform federal agency decision-makers and the public of the
13 “reasonable alternatives” that would “avoid or minimize adverse impacts or enhance the quality
14 of the human environment.” *Id.* §1502.1. This analysis of alternatives is the “heart” of the
15 EIS—*i.e.*, where the agency should “present the environmental impacts of the proposal and the
16 alternatives in comparative form, thus sharply defining the issues and providing a clear basis for
17 choice among options.” *Id.* §1502.14. The EIS must “[r]igorously explore and objectively
18 evaluate all reasonable alternatives,” including the alternative of “no action.” *Id.* §1502.14(a),
19 (d). “The existence of a viable but unexamined alternative renders an environmental impact
20 statement inadequate.” *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th
21 Cir. 2005) (quotation marks and citation omitted).

22 79. An EIS is deficient if it fails to provide the public with adequate, accurate
23 information that it can use to make an informed comparison of the alternatives evaluated in the
24 EIS. *See id.* at 811 (“Where the information in the initial EIS was so incomplete or misleading
25 that the decisionmaker and the public could not make an informed comparison of the
26 alternatives, revision of an EIS may be necessary to provide a reasonable, good faith, and
27 objective presentation of the subjects required by NEPA.” (quotation marks and citation
28 omitted)).

1 80. An EIS must also “specify the underlying purpose and need to which the agency
 2 is responding” in proposing the action the EIS describes and the alternatives the EIS identifies.
 3 *Id.* §1502.13. A statement of purpose and need “will fail if it unreasonably narrows the agency’s
 4 consideration of alternatives so that the outcome is preordained.” *Alaska Survival v. Surface*
 5 *Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013); *see Nat’l Parks & Conservation Ass’n v.*
 6 *Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (“An agency may not define the
 7 objectives of its action in terms so unreasonably narrow that only one alternative from among the
 8 environmentally benign ones in the agency’s power would accomplish the goals of the agency’s
 9 action, and the EIS would become a foreordained formality.” (quotation marks and citation
 10 omitted)). Since “[t]he stated goal of a project necessarily dictates the range of reasonable
 11 alternatives . . . an agency cannot define its objectives in unreasonably narrow terms.” *City of*
 12 *Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (internal
 13 quotation marks omitted). Moreover, “[w]here an action is taken pursuant to a specific statute,
 14 the statutory objectives of the project serve as a guide by which to determine the reasonableness
 15 of objectives outlined in an EIS.” *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853,
 16 866 (9th Cir. 2004).

FACTUAL BACKGROUND

Relevant Listed Species

A. Sacramento River Winter-Run Chinook Salmon

19 81. Winter-run Chinook salmon are born in the Sacramento River, below Keswick
 20 Dam.⁵ According to the Fisheries Service, winter-run Chinook salmon population estimates
 21 were as high as nearly 120,000 fish in the 1960s, but declined to less than 200 fish during the
 22

23
 24 ⁵ Winter-run Chinook inhabit the upper Sacramento River and its tributaries, where the
 25 flow of cold water throughout the summer allows for spawning, egg incubation, and rearing.
 26 Historically, winter-run Chinook relied on the McCloud, Pit, and Little Sacramento Rivers, as
 27 well as Hat and Battle Creeks, for habitat conducive to egg and fry development and survival and
 28 juvenile rearing. The construction of Shasta Dam blocked access to almost all of these rearing
 waters. Today, the upper Sacramento River below Keswick Dam is the only remaining
 spawning area used by winter-run Chinook. The survival of the winter-run Chinook is therefore
 completely dependent on the temperature and flow conditions below Keswick Dam.

1 1987-1992 drought. The Fisheries Service found that between 2007 and 2017, the population
2 “has shown a precipitous decline.” In 2014 and 2015, the population experienced extremely high
3 mortality due to lethal water temperatures below Keswick Dam.⁶ This is the only wild,
4 naturally-spawning population of winter-run Chinook salmon in California.

5 82. Winter-run Chinook salmon exhibit a unique life history pattern found nowhere
6 else in the world. Adults return to spawn in the winter and spring and lay their eggs during the
7 spring and summer months. The eggs develop and hatch into fry over the summer and fall
8 months. The juvenile winter-run Chinook salmon typically begin to migrate down the
9 Sacramento River during the fall. After rearing in the Sacramento River and the Delta, they
10 typically out-migrate to the ocean in the winter and spring, where they typically spend two or
11 more years before returning as adults to migrate through the Bay and Delta, and up the
12 Sacramento River to spawn. Winter-run Chinook salmon adults die after spawning.

13 83. The Fisheries Service listed the winter-run Chinook salmon as a threatened
14 species under the Endangered Species Act on August 4, 1989, 58 Fed. Reg. 32065, and elevated
15 its status to endangered on January 4, 1994. 59 Fed. Reg. 440. The Fisheries Service designated
16 critical habitat for winter-run Chinook salmon on June 16, 1993. 58 Fed. Reg. 33212. The
17 winter-run Chinook’s critical habitat includes waters of the Sacramento River, the Delta, and the
18 Bay. *Id.* at 33212–13.

19 84. According to the Fisheries Service, winter-run Chinook salmon are one of the
20 most endangered fish species in the United States. The Fisheries Service’s Biological Opinion
21 concludes that the risk of extinction has increased from moderate risk of extinction in 2005 to
22 high risk of extinction today, and that the species has recently experienced “continued low
23

24 ⁶ Specifically, during 2014 and 2015, operation of Shasta Dam resulted in high
25 temperatures that caused two consecutive years of high mortality, with temperature-dependent
26 mortality of 77 percent in 2014 and 85 percent in 2015, resulting in egg-to-fry survival rates of
27 only 5.6 percent and 4.2 percent in 2014 and 2015, respectively. As a result of this high juvenile
28 mortality, returns of adult winter-run Chinook salmon were low in 2016 to 2018, with only 977
adults returning in 2017. Moreover, on average 66 percent of spawning winter-run Chinook
were hatchery-origin from 2016 to 2018, which surpasses the fifty percent high risk threshold for
negative hatchery influence.

1 abundance, a negative growth rate over two complete generations, significant rate of decline
2 since 2006, increased hatchery influence on the population, and increased risk of catastrophe.”
3 Recent data indicates extremely low abundance levels, and the species is approaching extinction.

4 85. Water Project operations, including water storage and exports, impact winter-run
5 Chinook salmon—as well as spring-run Chinook salmon—by, among other things, creating high
6 water temperatures, dewatering redds (nests where salmon lay their eggs), and altering the
7 physical and biological features of the Delta and the rivers that flow into it, thus reducing the
8 survival of juvenile salmon as they migrate downstream to the Pacific Ocean.

9 *B. Central Valley Spring-Run Chinook Salmon*

10 86. Spring-run Chinook salmon currently exist in the Sacramento River, the Feather
11 River, and several tributaries including Mill, Deer, and Butte Creeks. In addition, salmon
12 exhibiting spring-run Chinook salmon life history have been observed in the Tuolumne and
13 Stanislaus rivers in recent years. Between the 1880s and 1940s, the Central Valley supported as
14 many as 600,000 spring-run Chinook salmon returning as adults to spawn per year.

15 87. According to the Fisheries Service, spring-run Chinook salmon adults typically
16 leave the ocean to begin their migration through the Delta in late January and February,
17 spawning typically occurs in September or October, and fry emerge from November to May.⁷
18 The downstream migration of juvenile spring-run Chinook salmon is highly variable, with some
19 juveniles staying upstream to rear for as long as a year. Peak migration through the Delta occurs
20 from November to May. Spring-run Chinook salmon typically spend several years in the ocean
21 before returning as adults to complete their life cycle. Like most other salmon species, they die
22 shortly after spawning.

23 88. The Fisheries Service listed the spring-run Chinook salmon as a threatened
24 species under the Endangered Species Act on September 6, 1999. 64 Fed. Reg. 50394. It

25
26 ⁷ Spring-run Chinook have similar temperature requirements for incubating eggs as
27 winter-run Chinook. The Fisheries Service has found that in 2014 and 2015 high water
28 temperatures in the Sacramento River resulted in increased, if not complete, temperature-
dependent mortality of spring-run Chinook salmon eggs in the mainstem of the Sacramento
River.

1 designated critical habitat for the spring-run Chinook salmon on September 2, 2005. 58 Fed.
2 Reg. 52488. The spring-run Chinook salmon's critical habitat includes waters of the Sacramento
3 River, lower Feather River, and Yuba Rivers, as well as Beegum, Battle, Clear, Cottonwood,
4 Antelope, Mill, Deer, Butte, and Big Chico Creeks, and portions of the northern Delta.

5 89. In 2016 the California Department of Fish and Wildlife estimated that only 8,112
6 spring-run Chinook salmon returned to spawn in the Sacramento River, its tributaries, and the
7 Feather River hatchery. Declines in abundance from 2005 to 2016 in Mill Creek and Deer Creek
8 placed those populations at increased risk of extinction, with adult populations in Mill Creek and
9 Deer Creek below 500 fish for four consecutive years (2015-2018). The Fisheries Service
10 Biological Opinion expresses concern that the species may deteriorate to high extinction risk
11 based on the population size or rate of decline of the species.

12 *C. Central Valley Steelhead*

13 90. Steelhead are an anadromous species that migrate from freshwater to the ocean as
14 juveniles and return to freshwater to spawn.

15 91. According to the Fisheries Service, steelhead typically spend two years in
16 freshwater before migrating to the ocean. They spend an additional two or three years in the
17 ocean prior to their return to freshwater streams for spawning. Unlike other Pacific salmonids,
18 steelhead can spawn more than once before they die, though they rarely spawn more than twice.

19 92. Historically, Central Valley steelhead were abundant throughout the Sacramento
20 and San Joaquin Rivers, with as many as one to two million adults annually. By the early 1960s,
21 the population had declined to an estimated 40,000 adults, and have declined significantly since
22 that time.

23 93. Central Valley steelhead were listed as threatened on March 19, 1998 (53 Fed.
24 Reg. 13347). Critical habitat was designated for Central Valley steelhead on September 2, 2005.
25 70 Fed. Reg. 52488, 52518.

26 94. The Fisheries Service Biological Opinion found that wild steelhead have declined
27 in abundance over the past 25 years, that since 2011 natural production has been extremely low
28 and has likely declined further, and that the long-term trend remains negative. Small populations

1 of steelhead are found in the rivers and streams of the Sacramento River, San Joaquin River, and
2 eastside tributaries including the Stanislaus, Mokelumne, and Calaveras rivers. The Fisheries
3 Service has concluded that the species is likely to become endangered in the foreseeable future.

4 *D. Delta Smelt*

5 95. The Delta Smelt is an estuarine fish that averages 2.5 inches in length and that
6 spends its entire life span in the Delta. The Delta is home to the only Delta Smelt population on
7 Earth. Delta Smelt typically live only one year and spend most of their life span in the Delta's
8 low-salinity zone where saline and fresh waters mix, but they migrate upstream into freshwater
9 to spawn.

10 96. Historically, Delta Smelt was one of the most common and abundant pelagic
11 fishes in the estuary. Since the early 1980s, however, its abundance has declined by more than
12 ninety-nine percent.

13 97. The amount and the quality of Delta Smelt habitat has declined dramatically due
14 to the Water Projects' water storage, diversion, and export operations. As fresh water is stored,
15 diverted, or exported, the low-salinity zone shifts upstream from large, shallow habitats, found in
16 Suisun Bay, to narrow, deep river channels of the Delta. Those channels provide less suitable
17 habitat than open water environments for Delta Smelt rearing. This impact to the habitat of the
18 Delta Smelt is compounded by the high levels of mortality that can be caused by the Water
19 Projects' export pumps, which entrain and kill fish. Limiting the number of Delta Smelt that are
20 entrained and killed in the pumping plants and maintaining a minimum level of Delta outflow
21 (the amount of water flowing through the Delta and into the San Francisco Bay) during certain
22 times of the year are critical to protecting estuarine habitat in the Delta and to the abundance of
23 Delta Smelt.

24 98. The Fish and Wildlife Service listed the Delta Smelt as a threatened species under
25 the Endangered Species Act on March 5, 1993. 58 Fed. Reg. 12854 (March 5, 1993). The Fish
26 and Wildlife Service designated critical habitat for the Delta Smelt on December 19, 1994. 59
27 Fed. Reg. 65256 (Dec. 19, 1994). The Delta Smelt's critical habitat includes all waters and
28 submerged lands within the Delta, including those at the pumping plants for the Water Projects.

1 *Id.* at 65260. In 2010, the Fish and Wildlife Service determined that the Delta Smelt’s status
2 warranted reclassifying its listing as endangered, but found that the agency was precluded from
3 doing so by competing actions. 73 Fed. Reg. 39639 (July 10, 2008) (ninety-day endangerment
4 finding); 75 Fed. Reg. 17667 (April 7, 2010) (warranted but precluded).

5 99. Today, Delta Smelt are closer to extinction than when they were listed as
6 threatened. Operations of the Water Projects in recent years have resulted in lower survival and
7 record low abundance of Delta Smelt. Recent surveys report unprecedented and historically low
8 abundance levels and confirm that the species is more vulnerable than ever. The population of
9 Delta Smelt has declined so much that the species is “essentially undetectable” in long-running
10 fish surveys in the Delta. The Fish and Wildlife Service’s Biological Opinion estimates that the
11 entire adult population was 5,610 Delta Smelt in 2019, the lowest on record.

12 **The Central Valley Project and the State Water Project**

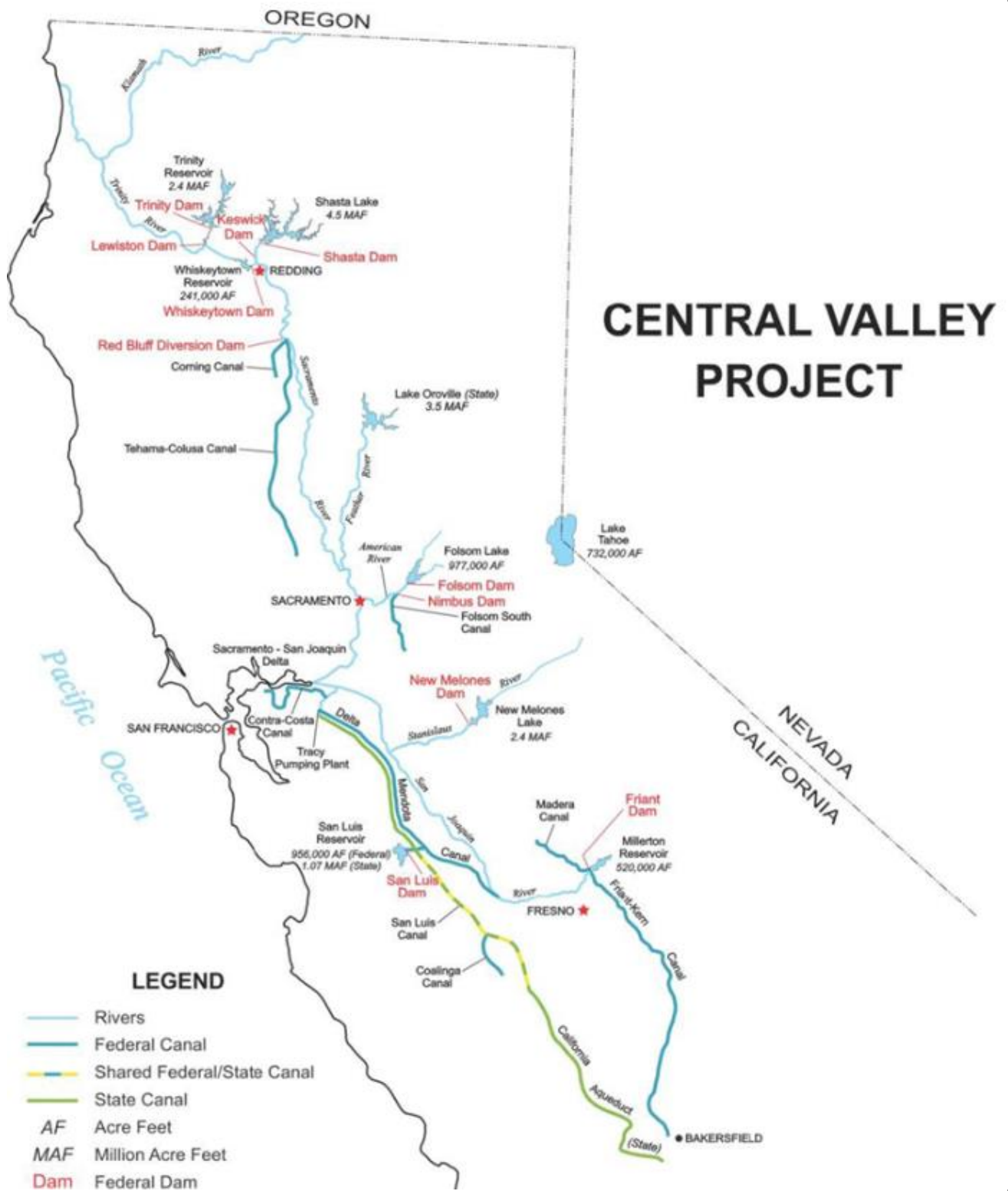
13 100. The Water Projects are among the largest water storage and diversion projects in
14 the country. The area impacted by the Water Projects is vast and includes the following: the
15 Trinity River from Lewiston Dam downstream to its confluence with the Klamath River; Clear
16 Creek from Whiskeytown Dam to the Sacramento River; Spring Creek from the Debris Dam to
17 Keswick Reservoir; the Sacramento River from Shasta Dam to the Delta; the Feather River from
18 Oroville Dam to its confluence with the Sacramento River; the American River from Folsom
19 Dam to the confluence with the Sacramento River; the Stanislaus River from New Melones Dam
20 to its confluence with the San Joaquin River; the San Joaquin River from Friant Dam to the
21 Delta; and the Delta to the Pacific Ocean.

22 101. The Central Valley Project is a federal water storage and diversion project
23 operated by Reclamation. The Central Valley Project alone is one of the largest water projects in
24 the world, annually managing, on average, more than 11 million acre-feet of water, and
25 delivering an average of approximately 7 million acre-feet of water to agricultural, and municipal
26 and industrial consumers. As depicted in the following map, which is reproduced from the
27 Fisheries Service Biological Opinion, the Central Valley Project is comprised of approximately
28 20 dams and reservoirs (including some of the largest water storage and diversion facilities in the

1 State, such as Shasta and Keswick Dams on the Sacramento River; the Trinity Dam on the
2 Trinity River; Whiskeytown Dam on Clear Creek; Folsom Dam on the American River; and
3 Friant Dam on the San Joaquin River), the Tracy Pumping Plant (which draws hundreds of
4 billions of gallons of water per year out of the Delta for export to the Central Valley), and some
5 500 miles of canals, as well as conduits, tunnels, power plants, and related facilities in two major
6 watersheds, the Sacramento River to the north and the San Joaquin River to the south.

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1 102. The State Water Project is a major water storage and diversion project of the State
2 of California that coordinates operations with the Central Valley Project and shares the use of the
3 San Luis Reservoir, among other facilities, with the Central Valley Project. One of the State
4 Water Project’s primary components is the Banks Pumping Plant in the south Delta, which
5 pumps water from Clifton Court Forebay into the California Aqueduct. The water then flows
6 from the aqueduct to O’Neill Forebay, and from there a portion is lifted to the joint San Luis
7 Reservoir/Canal, which extends south to the southern end of the San Joaquin Valley. The State
8 Water Project portion of the aqueduct stretches into the south coast region of the state.

9 **History of Consultation on Water Project Operations**

10 103. The history of Section 7 consultation on long-term, joint operations of the Water
11 Projects reaches back to the 1990s. The last set of biological opinions were issued by the Fish
12 and Wildlife Service in 2008 (“2008 Biological Opinion”) and the Fisheries Service in 2009
13 (“2009 Biological Opinion”), and were operative for more than a decade until February 18, 2020,
14 when they were superseded by the biological opinions at issue in this lawsuit. The 2008
15 Biological Opinion concluded that the joint operations of the Water Projects would likely
16 jeopardize the continued existence of Delta Smelt and adversely modify its critical habitat.
17 Similarly, the 2009 Biological Opinion concluded that the joint operations of the Water Projects
18 would likely jeopardize the continued existence of winter-run and spring-run Chinook salmon,
19 California Central Valley steelhead, and the distinct population segment of North American
20 green sturgeon, and adversely modify their critical habitats. The Fisheries Service also found
21 that the proposed operations would likely jeopardize Southern Resident killer whales.

22 104. The 2008 and 2009 Biological Opinions each included a Reasonable and Prudent
23 Alternative that specified terms under which the Water Projects could be operated to avoid
24 causing jeopardy to the species or adversely modifying critical habitat. The Reasonable and
25 Prudent Alternatives included various protective measures, including water temperature
26 requirements, Shasta Reservoir carryover storage requirements, minimum instream flows, limits
27 on Delta pumping to reduce entrainment, increased Delta outflow requirements in certain water
28 year types, requirements to create additional subtidal habitat, and monitoring of ongoing

1 operations, all of which the 2008 and 2009 Biological Opinions determined were required to
2 avoid jeopardizing listed species and adversely modifying critical habitat.

3 105. The 2008 and 2009 Biological Opinions were fully upheld by the United States
4 Court of Appeals for the Ninth Circuit. *See San Luis & Delta-Mendota Water Auth. v. Jewell*,
5 747 F.3d 581 (9th Cir. 2014) (upholding 2008 Biological Opinion concerning Delta Smelt); *San*
6 *Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971 (9th Cir. 2014) (upholding 2009
7 Biological Opinion concerning winter-run and spring-run Chinook salmon, Central Valley
8 steelhead, green sturgeon, and Southern Resident killer whales).

9 106. During California's recent drought, state and federal agencies repeatedly
10 weakened or did not implement important protections for salmon, Delta Smelt, and other listed
11 species, including protections required under the 2008 and 2009 Biological Opinions. In 2014
12 and 2015, endangered winter-run Chinook salmon were nearly entirely wiped out by lethal water
13 temperatures below Shasta Dam, and juvenile spring-run Chinook salmon suffered similarly high
14 mortalities. In addition, multiple surveys of Delta Smelt indicated that the population declined
15 precipitously during the drought, and is now on the brink of extinction.

16 107. On August 2, 2016, Reclamation requested reinitiation of consultation with the
17 Fisheries Service and the Fish and Wildlife Service. In its letters to those agencies, Reclamation
18 stated that the reinitiation request was "based on new information related to multiple years of
19 drought and recent data demonstrating low Delta Smelt populations" and "extremely low listed-
20 salmonid population levels for the endangered winter-run Chinook salmon," as well as "new
21 information available and expected to become available as a result of ongoing work through
22 collaborative science processes." *See* Bureau of Reclamation, Letter to Fish and Wildlife
23 Service Re: Request for Reinitiation of Section 7 Consultation Addressing Coordinated Long-
24 Term Operation of the Central Valley Project (CVP) and State Water Project (SWP) (Aug. 2,
25 2016); Bureau of Reclamation, Letter to National Marine Fisheries Service Re: Request for
26 Reinitiation of Section 7 Consultation Addressing Coordinated Long-Term Operation of the
27 Central Valley Project (CVP) and State Water Project (SWP) (Aug. 2, 2016).

28

1 108. On August 3, 2016, the Fish and Wildlife Service agreed that “reinitiation of
2 consultation is required under the terms of the 2008 Biological Opinion and the reinitiation
3 regulations, due to multiple dry years and new information.” Fish & Wildlife Service, Response
4 to Request for Reinitiation of Section 7 Consultation Addressing Coordinated Long-Term
5 Operation of the Central Valley Project (CVP) and State Water Project (SWP) (Aug. 3, 2016).
6 The Fish and Wildlife Service “recognize[d] that this new information is demonstrating the
7 increasingly imperiled state of the Delta Smelt and its designated critical habitat, and that
8 emerging science shows the importance of outflows to all life stages of Delta Smelt and to
9 maintaining the primary constituent elements of designated critical habitat.” *Id.*

10 109. Similarly, on August 17, 2016, the Fisheries Service agreed that “reinitiation is
11 required under the terms of the 2009 Biological Opinion and ESA regulations” for reasons
12 including “new information related to the effects of multiple years of drought, recent data
13 demonstrating extremely low abundance levels for endangered Sacramento River winter-run
14 Chinook salmon and threatened Central Valley spring-run Chinook salmon, and new information
15 resulting from ongoing scientific collaboration.” National Marine Fisheries Service, Reinitiation
16 of OCAP Consultation (Aug. 17, 2016).

17 110. On August 30, 2016, then-Interior Secretary Sally Jewell wrote a memo to the
18 President explaining that the reinitiation of consultation likely would lead to new or amended
19 biological opinions *increasing* protections for listed species, and that these new protections
20 would likely reduce water supply from the Delta. The memo found that “[e]ndangered winter-
21 run Chinook are in a . . . perilous state since low water levels and excessive temperatures on the
22 Sacramento River in 2014 and 2015 resulted in the loss of over 90 percent of the population both
23 years.” Secretary Sally Jewell, Memorandum for the President Re: Update on California Water
24 Issues (Aug. 30, 2016). In addition, the memo noted the “downward trajectory of the
25 endangered Delta Smelt, whose population last year hit a record low level, and is down an
26 additional 90 percent this year.” *Id.*

27 111. On January 19, 2017, the Fisheries Service issued a draft amendment to the 2009
28 Biological Opinion that would have immediately strengthened protections for endangered

1 winter-run Chinook salmon regarding water temperature impacts from Reclamation's operations
2 of Shasta Dam. However, Reclamation refused to accept or implement this amendment to the
3 2009 Biological Opinion.

4 **Reclamation's New Proposed Plan to Increase Diversions and Exports**

5 112. Despite the imperiled state of listed species, the known adverse effects of the
6 Water Projects and increased water diversions and exports, and the demonstrated need for
7 increased protections, the current Administration, including the Interior Department and
8 Reclamation, throughout the consultation process improperly focused on increasing water
9 diversions and exports by the Water Projects and spurning protections for listed species.

10 113. In December 2017, Reclamation issued a notice that it intended to evaluate the
11 effects of alternative operations of the Water Projects. Even though the reinitiation of
12 consultation was required in order to *increase* protections and avoid jeopardy for Endangered
13 Species Act-listed species, Reclamation's notice explained that the purpose of its proposed plan
14 was to "maximize water deliveries and optimize marketable power generation," restore water
15 supply to contractors that was reduced by existing Endangered Species Act protections, and
16 increase operational flexibility. *See* 82 Fed. Reg. 61789. Nowhere in its notice did Reclamation
17 acknowledge that the species were in peril or that, despite the protections offered by the 2008
18 and 2009 Biological Opinions, Water Project operations were causing further decline of the
19 species. *See id.*

20 114. On October 19, 2018, the President of the United States issued a memorandum
21 entitled, "Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in
22 the West." This memorandum identified a policy of minimizing or eliminating regulatory
23 burdens that limit water and power deliveries, directed agencies to suspend or revise regulations
24 or procedures that limit water deliveries, mandated a very short timeline for completion of the
25 consultation, and directed agencies to take the irregular step of designating a single federal
26 official to coordinate and oversee the required Endangered Species Act consultations (as opposed
27 to allowing the Fisheries Service and the Fish and Wildlife Service to oversee their own
28

1 consultations). Presidential Documents, Promoting the Reliable Supply and Delivery of Water in
2 the West, 83 Fed. Reg. 53961 (Oct. 25, 2018).

3 115. On January 31, 2019, Reclamation issued its Reinitiation of Consultation
4 Biological Assessment, which set forth and described Reclamation's proposed Water Project
5 operations through at least 2030.⁸ This Biological Assessment stated that the purpose of the
6 proposed operations was "to continue the coordinated long-term operation of the [Central Valley
7 Project and State Water Project] to maximize water supply delivery and optimize power
8 generation . . . and to increase operational flexibility by focusing on non-operational measures to
9 avoid significant adverse effects."

10 116. Reclamation's Biological Assessment, however, did not provide the consulting
11 agencies with the best scientific and commercial data available or obtainable during the
12 consultation. For example, Reclamation did not include any biological modeling in the January
13 Biological Assessment, except for modeling of temperature-dependent mortality of winter-run
14 Chinook salmon.

15 117. Reclamation's failure to provide a Biological Assessment that reflected the best
16 scientific and commercial data available or obtainable affected the sufficiency of the
17 consultation. Reclamation's failure to engage in a scientific rigorous analysis further
18 underscores that Reclamation was focused primarily on politically determined goals and not on
19 identifying means of protecting species that are admittedly in peril.

20 **Impacts of Proposed Operations on Listed Species**

21 118. Reclamation's proposed plan would increase water exports and diversions and
22 would dramatically weaken or eliminate many of the protections for threatened and endangered
23 fish mandated by the Fish and Wildlife Service's 2008 Biological Opinion and the Fisheries
24 Service's 2009 Biological Opinion. The proposed plan would kill more Chinook salmon,
25 steelhead, and smelt and further degrade the species' habitat as compared to the 2008 and 2009
26 Biological Opinions, further reducing the species' survival rates and abundance.

27 _____
28 ⁸ Reclamation amended its proposed plan several more times after issuing its initial
Biological Assessment.

1 119. Reclamation's proposed plan would result in environmental degradation of the
2 Delta and the Sacramento and San Joaquin River ecosystems, and harm winter-run and spring-
3 run Chinook salmon, Central Valley steelhead, Delta Smelt, and other Endangered Species Act-
4 protected species. Among other specific changes with adverse impacts on fish species, winter-
5 run and spring-run Chinook salmon, Central Valley steelhead, and Delta Smelt would be
6 adversely affected by the following effects of Reclamation's proposed plan:

- 7 a. Entrainment and impingement. Increased water exports from the Delta are
8 achieved by increasing Delta pumping, which will result in increased
9 mortality because Delta Smelt and larval and juvenile winter-run and spring-
10 run Chinook salmon and Central Valley steelhead are often entrained and
11 killed in the pumps. In addition, survival of Delta Smelt, and of juvenile
12 winter-run and spring-run Chinook salmon and Central Valley steelhead
13 migrating through the Delta, will be reduced because of increased pumping in
14 the Delta.
- 15 b. Reduced Delta outflow. The proposed Water Project operations will reduce
16 the amount of water that flows through the Delta into the Bay (Delta outflow).
17 Reduced Delta outflow during certain seasons adversely affects the survival
18 and abundance of Delta Smelt and migrating juvenile winter-run and spring-
19 run Chinook salmon.
- 20 c. Failing to provide adequate water temperature. Reclamation's plan eliminates
21 important protections that were required by the 2009 Biological Opinion and
22 intended to ensure adequate cold water to meet temperature requirements, and
23 is likely to result in adverse water temperatures below Keswick Dam and New
24 Melones Dam, and in Clear Creek, among other places, causing adverse
25 impacts on winter-run and spring-run Chinook salmon and Central Valley
26 steelhead.
- 27 d. Increased salinity. By increasing diversions and exports, the proposed plan
28 will allow salt water to intrude further upstream into the Delta, infiltrating the

1 Delta Smelt's habitat. Upstream movement of the low salinity zone is likely
2 to constrict and degrade the habitat of Delta Smelt, reduce survival and
3 geographic distribution, and increase the risk of extinction.

- 4 e. Reduced flows at certain times of year in the Sacramento River and San
5 Joaquin River watersheds. By permitting increased diversions of water from
6 the Sacramento River and San Joaquin River and their tributaries, the
7 proposed operations may at times reduce instream flows available for fish
8 species. This degradation of fish habitat will impact the survival of juvenile
9 salmon and steelhead migrating downstream, as well as the ability of adults to
10 successfully return to upstream spawning areas.

11 120. The harmful effects of Reclamation's proposed plan, including those described in
12 the preceding paragraph, will significantly threaten the continued existence and recovery of
13 winter-run and spring-run Chinook salmon, Central Valley steelhead, and Delta Smelt, and will
14 adversely affect and modify their designated critical habitat.

15 **The Biological Opinions**

16 121. Following submittal of Reclamation's Biological Assessment, the Fisheries
17 Service and the Fish and Wildlife Service began drafting biological opinions assessing the
18 effects of the proposed Water Project operations plan.

19 122. In April and July, 2019, the Fish and Wildlife Service circulated portions of its
20 draft biological opinion for independent scientific peer review. Those reviews raised numerous
21 significant concerns, including statements indicating that the plan would degrade Delta Smelt
22 critical habitat, increase the risk of jeopardy, and pose "great peril" for Delta Smelt.

23 123. Nevertheless, on October 21, 2019, the Fish and Wildlife Service released the
24 Fish and Wildlife Service Biological Opinion authorizing Reclamation's plan. The Fish and
25 Wildlife Service Biological Opinion documents the severe decline of Delta Smelt and the
26 substantial additional adverse impacts that the proposed action would have on Delta Smelt.
27 Despite these findings and the substantial environmental harm that the proposed action would
28 cause, and in contrast to the agency's repeated findings regarding the need for additional species

1 protections, the Fish and Wildlife Service Biological Opinion concludes that the proposed action
2 is not likely to jeopardize listed Delta Smelt or adversely modify or destroy its critical habitat.

3 124. The Fisheries Service completed a 1,123-page biological opinion on or about July
4 1, 2019, in which it concluded that Reclamation’s plan would jeopardize listed salmon and
5 steelhead, as well as Southern Resident killer whales, and would likely destroy or modify the fish
6 species’ critical habitat, in violation of the Endangered Species Act.⁹ The Fisheries Service’s
7 analysis identified multiple and significant adverse effects of the proposed action on Sacramento
8 River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, California Central
9 Valley steelhead, and Southern Resident killer whales. As a result of these findings, the July 1
10 version of the biological opinion included a reasonable and prudent alternative to Reclamation’s
11 proposed action.

12 125. Although the July 1 Fisheries Service biological opinion had been signed by
13 multiple staffers and cleared by Fisheries Service attorneys, the Fisheries Service ultimately did
14 not adopt or officially release that opinion. Instead, in response to the July 1 biological opinion’s
15 finding that the proposed action would jeopardize listed species, the Trump administration
16 reportedly removed most of the scientists working on the biological opinion and established a
17 team of lawyers and scientists from Reclamation and other agencies to review and revise the
18 biological opinion, deeming the July version a “draft” in need of improvement. *See* Bettina
19 Boxall, *A report shows Trump’s water plan would hurt California salmon. The government hid*
20 *it*, L.A. Times, Aug. 21, 2019; Email from Paul Souza Re: Federal Team for CVP and ESA –
21 Meet on Tuesday in Sacramento (July 3, 2019) (attached as Exhibit 6). In addition, the Fisheries
22 Service apparently revoked the existing authority of the Regional Administrator to sign a final
23 biological opinion, reserving that authority to political appointees in Washington, D.C.

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⁹ That biological opinion is available online at:
<https://www.documentcloud.org/documents/6311822-NMFS-Jeopardy-Biop-2019-OCR.html>.

1 126. On October 21, 2019, the Fisheries Service released the Fisheries Service
2 Biological Opinion, which was significantly revised from the July 1 version.¹⁰ The Fisheries
3 Service Biological Opinion documents the severe decline of spring-run and winter-run Chinook,
4 Central Valley steelhead, and Southern Resident killer whales, and the substantial additional
5 adverse impacts that the proposed action would have on those and other species. Despite these
6 findings and the substantial environmental harm that the proposed action would cause, and in
7 contrast to the agency’s jeopardy conclusions in the July 1 version of the biological opinion and
8 its repeated findings regarding the need for additional species protections, the Fisheries Service
9 Biological Opinion concludes that the proposed action is not likely to jeopardize listed species or
10 adversely modify or destroy their critical habitat.

11 127. The Fisheries Service Biological Opinion was signed by a political appointee of
12 the Fisheries Service, rather than by the Fisheries Service Administrator for the West Coast
13 region.¹¹

14 128. Both the Fisheries Service Biological Opinion and the Fish and Wildlife
15 Biological Opinion fail to provide a reasoned explanation between the agencies’ findings
16 regarding the status of the species, the demonstrated need for increased protections, and the
17 impacts of the proposed Water Project plan, on the one hand, and the no jeopardy / no adverse
18 modification of critical habitat conclusions on the other hand. In other words, the agencies failed
19 to make rational decisions on the records before them and failed to “articulate[] a rational
20 connection between the facts found and the conclusions made,” because the evidence and facts in
21 the record demonstrate that the proposed action would jeopardize listed species and adversely
22 affect their habitat. *See Wild Fish Conservancy*, 628 F.3d at 525 (brackets in original).

25 ¹⁰ Reclamation issued its final Biological Assessment on October 21, 2019, having
26 finalized its proposed action on October 17, 2019, only days before the Biological Opinion was
signed.

27 ¹¹ The Administrator for the West Coast region is a scientist and career civil service
28 staff person, and he (or his designee) is the official who traditionally signs the Fisheries Service
biological opinions concerning operations of the Central Valley Project and State Water Project.

1 129. In particular, as described above, the listed species at issue have been in decline,
2 and some are reaching the brink of extinction. The Fisheries Service and the Fish and Wildlife
3 Service agreed that reinitiation of consultation was required under the Endangered Species Act
4 because the dramatic declines these species were suffering despite the protections in the 2008
5 and 2009 Biological Opinions showed that the species required increased protection. But the
6 recently issued Biological Opinions eliminate existing protections for listed species, fail to
7 increase protections for the species, and fail to provide a reasoned explanation why increased
8 protection is not necessary despite earlier findings to the contrary and the Biological Opinions'
9 own findings regarding the imperiled status of the species and the additional adverse effects that
10 the proposed plan will have on those species and their habitat.

11 130. For example, the Fisheries Service Biological Opinion finds that the proposed
12 plan will worsen conditions for salmon and other endangered species as compared to the 2008
13 and 2009 Biological Opinion, but nonetheless concludes that the proposed plan will not cause
14 jeopardy. For instance, the Fisheries Service Biological Opinion finds that, "Based on the
15 analyses of expected effects of the proposed action to ESA-listed CV Chinook salmon
16 populations, reductions in the survival and productivity of all CV Chinook salmon populations
17 (including fall-run and late fall-run Chinook salmon) are expected to occur throughout the
18 proposed action, and the greatest effects will occur during the drier water years when effects of
19 the proposed action are most pronounced." Particularly given the imperiled state of the listed
20 Chinook salmon species and the abundant evidence that even the *status quo* under the prior
21 biological opinion was not adequate to provide the conditions needed to prevent extinction, the
22 Fisheries Service Biological Opinion's no-jeopardy conclusion is irreconcilable with its findings
23 about the adverse impacts of the proposed plan.

24 131. Similarly, the Fish and Wildlife Service Biological Opinion finds that even
25 without weakening protections for Delta Smelt as authorized by the proposed plan, the
26 population of Delta Smelt is anticipated to decline by 70-100% over the next decade from the
27 record low abundance in 2018. The Fish and Wildlife Service Biological Opinion fails to
28 provide a reasoned explanation why these continued declines would not jeopardize the species

1 under the protections required by the 2008 Biological Opinion, let alone under the weakened
2 protections provided by the newly issued Fish and Wildlife Service Biological Opinion.

3 132. In addition, the Biological Opinions improperly rely on uncertain future
4 mitigation measures without adequate evidence that the mitigation measures are reasonably
5 certain to occur and will be effective to address the adverse impacts that have already been
6 identified to ensure protection of the winter-run and spring-run Chinook salmon and Central
7 Valley steelhead, and their critical habitat (in the case of the Fisheries Service Biological
8 Opinion) and of the Delta Smelt and its critical habitat (in the case of the Fish and Wildlife
9 Service Biological Opinion). For example, protective restrictions on Delta pumping are not
10 reasonably certain to be implemented as they were modeled and analyzed in the Biological
11 Opinions, because the Biological Opinions allow nearly unlimited Delta pumping in excess of
12 those restrictions during any storm event, and real-time management actions to reduce pumping
13 are not certain to occur because of exceptions allowing for increased pumping. The Biological
14 Opinions also fail to address the fact, admitted by the agencies, that some protective
15 requirements are likely to be waived in future droughts, as occurred during the recent drought.

16 133. Next, the Biological Opinions fail to consider and analyze the entire “effects of
17 the action,” thereby significantly underestimating and/or ignoring the adverse effects of the
18 proposal. Among other problems, the Biological Opinions fail to consider both the full extent of
19 the proposed action and the long-term impacts of the proposed operations, particularly long-term
20 impacts in the context of climate change.

21 134. For example, the Water Projects are anticipated to operate for decades to come,
22 and Reclamation’s plan includes full implementation of water supply contracts that run past the
23 year 2040, but the Biological Opinions only analyze effects through the year 2030. The
24 Biological Opinions also fail to model and analyze the effect of full water supply contract
25 deliveries, instead only modeling and analyzing historic deliveries, which are significantly less
26 than the total contract amounts that the Biological Opinions purport to authorize. Increased
27 deliveries up to full contract amounts would result in additional impacts to the species (such as
28 reduced instream flows, reduced Delta outflows, and reduced water storage in upstream

1 reservoirs that would cause additional water temperature impacts) that are not analyzed in the
2 Biological Opinions. Similarly, the Biological Opinions fail to model or analyze the effects of
3 an enlarged Shasta Dam and of the OMR¹² storm flexibility rules that are included in the
4 proposed action. The modeling and analyses assume very limited OMR storm flexibility, and
5 more restrictive OMR operations thereafter, than is actually required by the proposed operations
6 and the Biological Opinions, thereby greatly underestimating and failing to analyze the full
7 extent of the adverse effects of the proposed plan's OMR operating rules.

8 135. The Biological Opinions fail to use the best available science as required by
9 Section 7(a)(2) of the Endangered Species Act. 16 U.S.C. §1536(a)(2). Among other failures to
10 use the best available science, the Biological Opinions fail to use the best available science for
11 various modeling, the best available science regarding the effects of climate change, and, in the
12 case of the Fisheries Service Biological Opinion, the best available science regarding the effects
13 of Sacramento River flows on survival of migrating salmon.

14 136. For example, the Fisheries Service Biological Opinion admits that it does not use
15 the best scientific data on climate change, instead relying on older climate modeling that
16 underestimates the anticipated effects of increased air and water temperatures resulting from
17 climate change, and which does not account for more frequent or more severe droughts from
18 climate change.

19 137. In addition, the Biological Assessment lacks accurate modeling in several areas
20 that provide the bases for the analysis in the Biological Opinions. Modeling presented in the
21 Biological Opinions is not based on the final version of Reclamation's proposed action, which
22 results in the hydrological models—and all of the biological models which are based on
23 hydrologic models—providing inaccurate results, which likely underestimate the adverse effects

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25 ¹² The Old and Middle Rivers (OMR) are channels of the San Joaquin River as it enters
26 the Delta. Pumping by the Water Projects can result in "reverse" flows in these channels, such
27 that water flows toward the pumps instead of naturally flowing toward the ocean, causing a
28 negative flow rate. Higher pumping levels generally results in higher negative flows, which in
turn increase the probability of fish being entrained and killed in the pumps. OMR rules and
restrictions thus refer to managing the negative flow rate in the OMR by managing the rate of
Delta pumping.

1 on listed species. For instance, the hydrologic modeling does not include the Fall outflow action
2 in the Fish and Wildlife Service Biological Opinion, and fails to accurately model the extent of
3 OMR storm waivers authorized in both Biological Opinions.

4 138. The Biological Opinions further fail to use the best available science regarding the
5 effects of instream flows and Delta outflows. For example, the Fish and Wildlife Service
6 Biological Opinion fails to adequately consider the importance of Delta outflows for the survival
7 of Delta Smelt throughout the year, particularly the proposed reductions in Delta outflows in the
8 winter, spring, summer, and fall. The Fisheries Service Biological Opinion’s Winter Run Life
9 Cycle Model also fails to include the published, peer-reviewed research from Fisheries Service
10 scientists documenting the flow-to-survival relationship for juvenile salmon migrating in the
11 Sacramento River.

12 139. Similarly, the Fish and Wildlife Service Biological Opinion fails to use the best
13 available science because it relies on the Enhanced Delta Smelt Monitoring (“EDSM”) program
14 for real time operations, yet independent scientific peer reviews have explicitly concluded that,
15 “resulting abundance and distribution estimates are highly uncertain,” and that “it is difficult to
16 see how the EDSM currently can be used to inform water operations in near real time.”

17 140. The Biological Opinions’ incidental take statements also fail to satisfy the
18 requirements of the Endangered Species Act. The Biological Opinions set incidental take limits
19 at levels that would jeopardize listed species, and fail to provide a reasoned explanation for those
20 levels. The levels of incidental take permitted by the Biological Opinions are also well beyond
21 the levels of take that are actually analyzed and anticipated in the Biological Opinions. In
22 addition, the Biological Opinions fail to ensure that the incidental take limits provide a clear and
23 meaningful trigger for reinitiation of consultation, and they use surrogates for various take limits
24 without adequately justifying the use of such surrogates, despite the Endangered Species Act’s
25 requirement to do so.

26 141. One example of these unlawful take statements is that the Fisheries Service
27 Biological Opinion allows for *three consecutive years* of complete mortality—*zero percent* egg
28 to fry survival of winter-run Chinook salmon below Shasta Dam—before reinitiation of

1 consultation is required. This means that high water temperatures could result in extinction of
2 winter-run Chinook salmon in the wild before reinitiation of consultation would be required,
3 which sets a meaningless reinitiation trigger and would plainly jeopardize the continued
4 existence and recovery of the species.

5 142. In addition, the Fisheries Service Biological Opinion sets incidental take limits,
6 including for Central Valley steelhead, that are completely untethered and independent from the
7 size of the remaining population of the species, meaning take could continue as a species
8 continues to decline, thereby jeopardizing the species.

9 143. Similarly, some take limits in the Fisheries Service Biological Opinion use
10 surrogates that have no clear causal link with take of the listed species, and do so without
11 explaining why it is not practical to express the amount or extent of anticipated take in terms of
12 individuals of the listed species. For instance, the Fisheries Service Biological Opinion fails to
13 justify or articulate a rational connection between using temperature-related mortality of winter-
14 run Chinook salmon as a surrogate for incidental take of spring-run Chinook salmon and Central
15 Valley steelhead. Spring-run Chinook salmon spawn much later in the year, and steelhead
16 spawn at different times and locations. As a result, there is not a causal link between the
17 incidental take limit and the impact on these species.

18 144. The Fish and Wildlife Service Biological Opinion fails to provide a reasoned
19 explanation for eliminating any limit on the number of adult Delta Smelt that can be killed at the
20 pumps and instead using turbidity as a surrogate for take of adult Delta Smelt. This is irrational
21 in part because it is clear that take of adult Delta Smelt occurs even during low turbidity events.

22 145. In addition, the Fish and Wildlife Service Biological Opinion unlawfully defers to
23 the future how to calculate a limit on the number of larval and juvenile Delta Smelt that can be
24 killed at the pumps.

25 **The Environmental Impact Statement**

26 146. On December 29, 2017, Reclamation notified the public of its intent to prepare an
27 environmental impact statement regarding the long-term operations of the Central Valley Project.
28 82 Fed. Reg. 61789, 61790 (Dec. 29, 2017). Despite recognition in August 2016 by then-

1 Secretary Jewell, the Fisheries Service, the Fish and Wildlife Service, and Reclamation that
2 reinitiation of consultation and modifications to the Water Project operations were necessary to
3 ensure protection of species, Reclamation defined the purpose and need of the action it planned
4 to take as follows: “The purpose of the action considered in this EIS is to continue the operation
5 of the CVP in a coordinated manner with the SWP, for its authorized purposes, in a manner that
6 enables Reclamation and California Department of Water Resources to maximize water
7 deliveries and optimize marketable power generation consistent with applicable laws, contractual
8 obligations, and agreements; and to augment operational flexibility by addressing the status of
9 listed species.” *Id.*

10 147. On July 11, 2019 Reclamation issued a draft Environmental Impact Statement
11 (“DEIS”) that purported to analyze the environmental impacts associated with the project entitled
12 “Reinitiation of Consultation on the Long-term Operation of the Central Valley Project and State
13 Water Project.”

14 148. On December 19, 2019, Reclamation issued the final Environmental Impact
15 Statement (“FEIS”) for the project entitled “Reinitiation of Consultation on the Long-term
16 Operation of the Central Valley Project and State Water Project.”

17 149. In the Purpose and Need section of the DEIS and FEIS, Reclamation did not
18 specifically reference ensuring protection of endangered and threatened species as among the
19 reasons for the proposed action. Reclamation’s Purpose and Need is thus unlawfully narrow and
20 Reclamation acted arbitrarily and capriciously and in violation of NEPA when preparing the
21 Purpose and Need statement in the EIS.

22 150. In the DEIS, Reclamation analyzed a total of five alternatives including the No-
23 Action Alternative.

24 151. Neither the DEIS nor the FEIS presented or analyzed an alternative that fairly
25 addresses the fish and wildlife protection purposes required by law, including by failing to
26 include an alternative that would increase protections for listed species, despite increased
27 protections being the stated goal of the reinitiation. In addition, Reclamation did not even
28 consider an alternative that would reduce water deliveries to senior water rights holders and other

1 water contractors in order to meet the needs of fish and wildlife protection, mitigation, and
2 restoration. Reclamation acted arbitrarily and capriciously and in violation of NEPA when it
3 failed to include an analysis and discussion of a reasonable range of alternatives in the EIS.

4 152. The operations modeled in the Biological Assessment, and presented in the DEIS,
5 do not accurately or adequately reflect the operations proposed in Alternative 1. The results of
6 the modeling performed therefore do not represent the impacts of operations under Alternative 1.

7 153. The modeling that forms the bases of the analysis in the DEIS and FEIS is
8 inaccurate for several reasons, including but not limited to:

- 9 a. The modeling does not account for deliveries of full water contract amounts and
10 therefore does not identify the full scope of the potential impacts of the operations
11 under the proposed action or the alternatives.
- 12 b. The modeling does not accurately reflect the scope of OMR storm related
13 flexibility that may occur under Alternative 1, instead it underestimates the
14 frequency and duration of pumping that could occur. As a result, the analysis in
15 the DEIS and FEIS does not disclose or consider the extent of the impacts of
16 increased pumping that is authorized to occur under Alternative 1.
- 17 c. The modeling of OMR flows in March and April assumes flows will be kept no
18 more negative than -3,500 cfs even though there is no such requirement. As a
19 result, the impacts of more negative flows during these months that may occur
20 under Alternative 1 are not disclosed or analyzed in the DEIS and FEIS as
21 required.
- 22 d. The modeling does not include operation of an enlarged Shasta Dam even though
23 the Biological Opinions both authorize operation of an enlarged Shasta Dam
24 without requiring reinitiation of consultation under the Endangered Species Act or
25 further environmental review of the impacts of operation of an enlarged Shasta
26 Dam. As a result, the modeling does not account for, and the DEIS and FEIS
27 does not disclose or analyze, the impacts of operating an enlarged Shasta Dam,
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1 which include impacts of holding more water in storage than would otherwise
2 flow downstream in the Sacramento River and through the Delta.

- 3 e. The modeling does not account for the likely situation in which water quality
4 standards or other protective measures are waived (as they were during drought
5 periods in 2014 and 2015). As a result, the impacts of waiving these protective
6 measures are not disclosed, discussed, or analyzed in the DEIS or the FEIS as
7 required.

8 154. There was no way for the public or a decisionmaker to understand the full scope
9 of the environmental impacts of the proposed action because the quantitative analysis presented
10 throughout the NEPA process was fundamentally flawed and did not provide an analysis of the
11 actual proposed action and its alternatives.

12 155. Reclamation thus did not present an accurate picture of the impacts of the water
13 project operations under the proposed action and alternatives. In addition, Reclamation failed to
14 model and present results of entrainment of endangered and threatened salmonids and Delta
15 smelt caused by pumping and exporting water from the Delta, even though such modeling and
16 results could have been presented in the DEIS and FEIS. Overall, Reclamation's failure to
17 accurately model and quantify the impacts of its proposed action and alternatives demonstrates
18 that it did not present and rely on high quality information and ensure the scientific and analytic
19 integrity of the analysis presented in the EIS. Reclamation thus acted arbitrarily and capriciously
20 and violated NEPA by failing to provide a full and fair discussion and take the required "hard
21 look" at the environmental effects of the proposed action and its alternatives in the EIS.

22 156. Reclamation also did not rely on high quality information that was available to it
23 when it prepared the DEIS and FEIS when it did not fully disclose and analyze the potential
24 effects of the proposed action and alternatives by failing to give full consideration to the
25 importance of Delta outflows to endangered and threatened species, and by failing to identify
26 and address flaws in the proposed real-time monitoring approach to managing impacts to
27 endangered and threatened species.

1 157. The California State Water Resources Control Board submitted comments
2 identifying significant flaws in Reclamation’s consideration of the proposed action and
3 alternatives in the DEIS. These flaws include, but are not limited to:

- 4 a. The failure to include an alternative that adequately considered the needs of fish
5 and wildlife, including by incorporating recently adopted Lower San Joaquin
6 River flows, fall Delta outflows, and export constraints based on the previous
7 biological opinions.
- 8 b. The failure to clearly articulate proposed OMR flow criteria and the apparent
9 intent to allow for significantly greater exports resulting in increased OMR
10 reverse flows and reduced Delta outflows below existing conditions.
- 11 c. The failure to explain the specific effects of the proposed Delta smelt summer-fall
12 habitat action, and whether it will actually provide the benefits asserted in the
13 DEIS.
- 14 d. The lack of sufficient “detail ... to fully evaluate the potential environmental
15 effects of the project due to the vague nature of many of the actions and gross
16 summations of some of the results which prevents meaningful analysis of
17 important intra-annual, monthly, and water year type differences in potential
18 impacts.”
- 19 e. The lack of certainty that the DEIS actually “captur[es] the full extent of the
20 additional operational flexibility proposed as part of the proposed project given
21 modeling assumptions and existing and potential future unmet demands.”

22 158. The California Department of Fish and Wildlife also submitted comments
23 identifying significant flaws in Reclamation’s consideration of the effects of the proposed action
24 and alternatives in the DEIS. These flaws include, but are not limited to:

- 25 a. The failure of the operational criteria related to OMR storm related flexibility to
26 “allow for meaningful evaluation of potential impacts to species from storm
27 operations because it is unclear under what scenarios storm operations would be
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1 pursued, how long they might last, and the extent to which storm operations
2 would influence entrainment risk and OMR flows.”

3 b. The failure to adequately analyze and disclose likely adverse environmental
4 impacts, including for example by failing to quantify impacts to Longfin Smelt.

5 c. The failure to “adequately identify or mitigate the projects significant impacts on
6 biological resources.”

7 159. Despite receiving numerous comments identifying significant flaws in the DEIS
8 and FEIS, Reclamation failed adequately to address those flaws.

9 **Reclamation Adopts Proposed Operations in Reliance on Unlawful Biological Opinions and**
10 **Flawed Environmental Impact Statement**

11 160. On February 18, 2020, Reclamation issued its Record of Decision and approved
12 Alternative 1 as the set of criteria and actions it plans to implement when operating the Central
13 Valley Project. The Record of Decision does not identify any changes to Alternative 1 as that
14 alternative was described in the FEIS. Nor does the Record of Decision provide any further
15 analysis of the impacts of the action that were not provided in the Biological Assessment, DEIS,
16 or FEIS.

17 161. The Water Project operations plan adopted in the Record of Decision relies on the
18 Fisheries Service Biological Opinion and the Fish and Wildlife Service Biological Opinion,
19 including for the incidental take coverage provided by the incidental take statements in those
20 Biological Opinions.

21 162. In concluding that its Water Project operations plan was not likely to jeopardize
22 the continued existence of any endangered species or threatened species or result in the
23 destruction or adverse modification of the critical habitat of such species, Reclamation failed to
24 use the best scientific and commercial data available.

25 163. Reclamation knew or had reason to know that the Biological Opinions were
26 inadequate and legally flawed.

27 164. For example, Reclamation knew that the Fisheries Service and the Fish and
28 Wildlife Service failed to use the best available science in preparing the Biological Opinions,

1 including because Reclamation itself failed to satisfy its legal obligation to provide the Fish and
2 Wildlife Service and the Fisheries Service with the best scientific data available. In addition,
3 Plaintiffs notified Reclamation on November 26, 2019 in their extensive Endangered Species Act
4 notice letter (attached as Exhibit 1), that the Biological Opinions' conclusions were not based on
5 the best available science.

6 165. As further examples, Reclamation knew that the Biological Opinions: improperly
7 rely on uncertain future mitigation measures; fail to articulate a rational connection between their
8 findings and their no jeopardy conclusions; fail to consider and analyze the entire effects of
9 Reclamation's plan; and contain incidental take statements that violate the requirements of the
10 Endangered Species Act. These legal flaws in the Biological Opinions were readily apparent and
11 discernable without any scientific or technical expertise. Nonetheless, Plaintiffs provided
12 extensive notice to Reclamation of legal flaws in the Biological Opinions on November 26,
13 2019, nearly three months before Reclamation formally chose to adopt and implement its Water
14 Project operations plan in reliance on the Biological Opinions.

15 166. Despite the numerous flaws in the Biological Opinions, Reclamation has taken
16 and is taking actions in reliance on those Biological Opinions, even in the face of significant take
17 of threatened and endangered species and adverse modification of those species' critical habitats.
18 Reclamation has thus failed to ensure that its actions are not likely to jeopardize listed species or
19 destroy or adversely modify the critical habitat of such species.

20 167. In their comments on the DEIS, Plaintiffs, as well as the State Water Resources
21 Control Board, the California Department of Fish and Wildlife, and others, notified Reclamation
22 of the factual, scientific, and legal flaws in Reclamation's assessment of the impacts of the
23 proposed operations of the Water Projects on endangered and threatened species. Reclamation,
24 however, failed adequately to address those comments and instead proceeded with a flawed
25 assessment of the Water Projects' proposed operations.
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CLAIMS FOR RELIEF

First Claim for Relief

Violation of the Administrative Procedure Act, 5 U.S.C. §706

(Against Defendants Wilbur Ross, Chris Oliver, and the Fisheries Service)

168. Plaintiffs reallege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

169. The Commerce Secretary’s conclusion, in the Fisheries Service Biological Opinion, that Reclamation’s proposed long-term operations of the Water Projects will not jeopardize the continued existence of the listed species at issue—winter-run and spring-run Chinook salmon, and Central Valley steelhead—and will not result in the destruction or adverse modification of the species’ critical habitat is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

170. The Fisheries Service Biological Opinion not only fails to establish the necessary link between the facts found and the conclusions made, but, indeed, is filled with factual findings that contradict its “no jeopardy” conclusions. The Commerce Secretary’s conclusion in the Fisheries Service Biological Opinion that the planned operational and other changes to the Water Projects will not jeopardize the continued existence of Central Valley steelhead and winter-run and spring-run Chinook salmon, and will not result in the destruction or adverse modification of their critical habitat, run counter to the evidence before the agencies, are not rationally connected to facts or supported by reasoned explanations, and are pretextual and politically motivated. These conclusions of the Fisheries Service Biological Opinion, therefore, are arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. §706(2).

171. The Fisheries Service Biological Opinion improperly relies on uncertain future mitigation measures without adequate evidence that the mitigation measures are reasonably certain to occur and will be effective to address the adverse impacts that have already been identified to ensure protection of the winter-run and spring-run Chinook salmon and Central Valley steelhead, and their critical habitat. In relying on these uncertain mitigation measures, the

1 Fisheries Service Biological Opinion violates Section 7(a)(2) of the Endangered Species Act and
2 is arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the
3 Administrative Procedure Act, 5 U.S.C. §706(2).

4 172. The Fisheries Service Biological Opinion fails to consider and analyze the entire
5 “effects of the action,” thereby significantly underestimating and/or ignoring the adverse effects
6 of the proposal on fish and wildlife. 50 C.F.R. §402.02. The Fisheries Service Biological
7 Opinion fails to consider both the full extent of the proposed action and the long-term impacts of
8 the proposed operations, particularly long-term impacts in the context of climate change. The
9 failure of the Commerce Secretary, Assistant Administrator for Fisheries, and Fisheries Service
10 (collectively, “Fisheries Service defendants”) to consider all relevant factors, including the full
11 extent and effects of the entire proposed agency action, violates the Endangered Species Act and
12 renders the Fisheries Service Biological Opinion arbitrary, capricious, an abuse of discretion, and
13 not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. §706(2).

14 173. The Fisheries Service Biological Opinion fails to use the best available science as
15 required by Section 7(a)(2) of the Endangered Species Act. 16 U.S.C. §1536(a)(2). In addition,
16 in reaching the no jeopardy / no adverse modification of critical habitat conclusions, the
17 Fisheries Service failed to adequately consider the findings of internal experts, independent peer
18 reviewers, and data regarding the measures necessary to protect the species, without explanation
19 or justification. In reaching the no jeopardy / no adverse modification of critical habitat
20 conclusions, the Fisheries Service disregarded the best available science which demonstrates that
21 the proposed operations are likely to jeopardize the continued existence of the winter-run and
22 spring-run Chinook salmon and Central Valley steelhead and adversely modify and destroy
23 critical habitat. The Fisheries Service defendants’ failure to use, and failure to base the Fisheries
24 Service Biological Opinion’s conclusions upon, the best available scientific data violated
25 Endangered Species Act Section 7(a)(2) and was arbitrary, capricious, an abuse of discretion,
26 and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C.
27 §706(2).

28

1 174. The Fisheries Service Biological Opinion's incidental take statements also violate
2 the requirements of the Endangered Species Act and are arbitrary and capricious. The Fisheries
3 Service Biological Opinion sets incidental take limits at levels that would jeopardize listed
4 species, and fails to provide a reasoned explanation why those limits would not jeopardize listed
5 species. The levels of incidental take permitted by the Fisheries Service Biological Opinion are
6 also well beyond the levels of take that are actually analyzed and anticipated in the Biological
7 Opinion. In addition, the Fisheries Service Biological Opinion fails to ensure that the incidental
8 take limits provide a clear and meaningful trigger for reinitiation of consultation, and it uses
9 surrogates for various take limits without adequately justifying the use of such surrogates,
10 despite the Endangered Species Act's requirement to do so. Similarly, some take limits in the
11 Fisheries Service Biological Opinion use surrogates that have no clear causal link with take of
12 the listed species, and do so without explaining why it is not practical to express the amount or
13 extent of anticipated take in terms of individuals of the listed species. The Fisheries Service
14 defendants' inclusion in the Fisheries Service Biological Opinion of incidental take statements
15 that violate multiple requirements of the Endangered Species Act renders the Fisheries Service
16 Biological Opinion and its incidental take statements arbitrary, capricious, an abuse of discretion,
17 and not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C.
18 §706(2).

19 175. The analysis, reasoning, and conclusion of the Fisheries Service Biological
20 Opinion, and the Fisheries Service defendants' actions described herein, are arbitrary, capricious,
21 an abuse of discretion, not in accordance with law, in excess of statutory authority, and without
22 observance of procedure required by law, in violation of Endangered Species Act Section 7 and
23 its implementing regulations and the standards of the Administrative Procedure Act, 5 U.S.C.
24 §706.

1 **Second Claim for Relief**

2 **Violation of the Administrative Procedure Act, 5 U.S.C. §706**

3 **(Against Defendants David Bernhardt, Margaret Everson,**

4 **and the Fish and Wildlife Service)**

5 176. Plaintiffs reallege, as if fully set forth herein, each and every allegation contained
6 in the preceding paragraphs.

7 177. The Interior Secretary’s conclusion in the Fish and Wildlife Service Biological
8 Opinion, that Reclamation’s proposed long-term operations of the Water Projects will not
9 jeopardize the continued existence of the Delta Smelt and will not result in the destruction or
10 adverse modification of the Delta Smelt’s critical habitat, is arbitrary, capricious, an abuse of
11 discretion, and not in accordance with law.

12 178. The Fish and Wildlife Service Biological Opinion not only fails to establish the
13 necessary link between the facts found and the conclusions made, but, indeed, is filled with
14 factual findings that contradict its “no jeopardy” conclusion. The Interior Secretary’s conclusion
15 in the Fish and Wildlife Service Biological Opinion that the planned operational and other
16 changes to the Water Projects will not jeopardize the continued existence of the Delta Smelt, and
17 will not result in the destruction or adverse modification of its critical habitat, runs counter to the
18 evidence before the agencies, is not rationally connected to facts or supported by reasoned
19 explanations, and is pretextual and politically-motivated. This conclusion of the Fish and
20 Wildlife Service Biological Opinion, therefore, is arbitrary and capricious, an abuse of
21 discretion, and not in accordance with law, in violation of the Administrative Procedure Act, 5
22 U.S.C. §706(2).

23 179. The Fish and Wildlife Service Biological Opinion improperly relies on uncertain
24 future mitigation measures without adequate evidence that the mitigation measures are
25 reasonably certain to occur and will be effective to address the adverse impacts that have already
26 been identified to ensure protection of the Delta Smelt and its critical habitat. In relying on these
27 uncertain mitigation measures, the Fish and Wildlife Service Biological Opinion violates Section
28

1 7(a)(2) of the Endangered Species Act and is arbitrary, capricious, an abuse of discretion, and not
2 in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. §706(2).

3 180. The Fish and Wildlife Service Biological Opinion fails to consider and analyze
4 the entire “effects of the action,” thereby significantly underestimating and/or ignoring the
5 adverse effects of the proposal on fish and wildlife. 50 C.F.R. §402.02. The Fish and Wildlife
6 Service Biological Opinion fails to consider both the full extent of the proposed action and the
7 long-term impacts of the proposed operations, particularly long-term impacts in the context of
8 climate change. The failure of the Interior Secretary, Acting Director of the Fish and Wildlife
9 Service, and Fish and Wildlife Service (collectively, “Fish and Wildlife Service defendants”) to
10 consider all relevant factors, including the full extent and effects of the entire proposed agency
11 action, violates the Endangered Species Act and renders the Fish and Wildlife Service Biological
12 Opinion arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation
13 of the Administrative Procedure Act, 5 U.S.C. §706(2).

14 181. The Fish and Wildlife Service Biological Opinion fails to use the best available
15 science as required by Section 7(a)(2) of the Endangered Species Act. 16 U.S.C. §1536(a)(2).
16 In addition, in reaching the no jeopardy / no adverse modification of critical habitat conclusions,
17 the Fish and Wildlife Service failed to adequately consider the findings of internal experts,
18 independent peer reviewers, and data regarding the measures necessary to protect the species,
19 without explanation or justification. In reaching the no jeopardy / no adverse modification of
20 critical habitat conclusions, the Fish and Wildlife Service disregarded the best available science
21 which demonstrates that the proposed operations are likely to jeopardize the continued existence
22 of the Delta Smelt and adversely modify and destroy critical habitat. The Fish and Wildlife
23 Service defendants’ failure to use, and base the Fish and Wildlife Service Biological Opinion’s
24 conclusions upon, the best available scientific data violated Endangered Species Act Section
25 7(a)(2) and was arbitrary, capricious, an abuse of discretion, and not in accordance with law, in
26 violation of the Administrative Procedure Act, 5 U.S.C. §706(2).

27 182. The Fish and Wildlife Service Biological Opinion’s incidental take statement also
28 violates the requirements of the Endangered Species Act and is arbitrary and capricious. The

1 Fish and Wildlife Service Biological Opinion fails to ensure that the incidental take limits
2 provide a clear and meaningful trigger for reinitiation of consultation, and it uses surrogates for
3 take limits without adequately justifying the use of such surrogates, despite the Endangered
4 Species Act's requirement to do so. The Fish and Wildlife Service Biological Opinion fails to
5 include an incidental take limit for larval and juvenile Delta Smelt, instead deferring the
6 identification of such an incidental take limit to a future process with undefined requirements.
7 The Fish and Wildlife Service defendants' inclusion in the Fish and Wildlife Service Biological
8 Opinion of incidental take statements that violate multiple requirements of the Endangered
9 Species Act renders the Fish and Wildlife Service Biological Opinion and its incidental take
10 statements arbitrary, capricious, an abuse of discretion, and not in accordance with law, in
11 violation of the Administrative Procedure Act, 5 U.S.C. §706(2).

12 183. The analysis, reasoning, and conclusion of the Fish and Wildlife Service
13 Biological Opinion, and the Fish and Wildlife Service defendants' actions described herein, are
14 arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory
15 authority, and without observance of procedure required by law, in violation of Endangered
16 Species Act Section 7 and its implementing regulations and the standards of the Administrative
17 Procedure Act, 5 U.S.C. §706.

18 **Third Claim for Relief**

19 **Violation of the Endangered Species Act, 16 U.S.C. §1536(a)(2)**

20 **(Against Defendants David Bernhardt, Brenda Burman, and the Bureau of Reclamation)**

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

23 185. Defendants Bernhardt, Burman, and Reclamation (collectively "Reclamation
24 Defendants") failed to use the best scientific data available in its Biological Assessment, in
25 violation of the Endangered Species Act, 16 U.S.C. §1536(a)(2). Relatedly, the Reclamation
26 Defendants also failed to provide the Fish and Wildlife Service and the Fisheries Service with
27 "the best scientific and commercial data available or which can be obtained during the
28 consultation for an adequate review of the effects that an action may have upon listed species or

1 critical habitat,” in violation of the Endangered Species Act implementing regulations, 50 C.F.R.
2 §402.14(d).

3 186. Because the Reclamation Defendants failed to provide the Fish and Wildlife
4 Service and the Fisheries Service with the best available science as required, the Reclamation
5 Defendants were unjustified, and are acting arbitrarily and capriciously, in relying on the
6 Biological Opinions, thereby violating the Endangered Species Act, 16 U.S.C. § 1536(a)(2).

7 187. As alleged above, the Biological Opinions are arbitrary and capricious and not in
8 accordance with law, and incorrectly conclude that Reclamation’s proposed operations will not
9 jeopardize Delta smelt, winter-run and spring-run Chinook salmon, and Central Valley steelhead,
10 or adversely modify those species’ critical habitat.

11 188. Reclamation’s reliance on inadequate and legally flawed Biological Opinions is
12 arbitrary and capricious, contrary to law, and violates the Endangered Species Act, 16 U.S.C. §
13 1536(a)(2).

14 189. Implementation of Reclamation’s newly adopted Water Project operations plan,
15 and the direct, indirect, and cumulative effects of that implementation, has both short-term and
16 long-term adverse impacts on Delta Smelt, winter-run and spring-run Chinook salmon, and
17 Central Valley steelhead that jeopardize those species’ continued existence and destroy or
18 adversely modify their critical habitat.

19 190. Reclamation acted arbitrarily and capriciously in concluding, on the record as a
20 whole, that its Water Project operations plan was not likely to jeopardize listed species or destroy
21 or adversely modify the critical habitat of such species.

22 191. For the foregoing reasons, Reclamation has failed and is failing to satisfy its
23 substantive and independent duty to ensure, based on the “best scientific and commercial data
24 available,” that its actions are “not likely to jeopardize the continued existence of any
25 endangered species or threatened species or result in the destruction or adverse modification of
26 [critical] habitat of such species,” in violation of the Endangered Species Act, 16 U.S.C.
27 §1536(a)(2).

28

1 **Fourth Claim for Relief**

2 **Violation of the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.***

3 **and Administrative Procedures Act, 5 U.S.C. §§701–706**

4 **(Against Defendants David Bernhardt, Brenda Berman, and Bureau of Reclamation)**

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

7 193. The “Reinitiation of Consultation on the Long-term Operations of the Central
8 Valley Project and State Water Project” is a major federal action that requires compliance with
9 NEPA. 42 U.S.C. §4332(2)(C). Reclamation prepared an EIS to analyze proposed impacts to
10 the environment that resulted from this reinitiation of consultation.

11 194. Reclamation, in violation of NEPA, failed to properly define the “purpose and
12 need” for the action in the FEIS. NEPA requires federal agencies to “briefly specify the
13 underlying purpose and need to which the agency is responding in proposing the alternative
14 including the proposed action.” 40 C.F.R. §1502.13. Because “[t]he stated goal of a project
15 necessarily dictates the range of reasonable alternatives . . . an agency cannot define its
16 objectives in unreasonably narrow terms.” *City of Carmel-by-the-Sea*, 123 F.3d at 1155. Rather,
17 an action agency must consider its “statutory authorization to act” in relation to the proposed
18 project. *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The EIS’s
19 stated purpose and need is unreasonably narrow and does not address the necessity for
20 reinitiating consultation in order to ensure protection of endangered and threatened species and
21 instead prioritizes the maximization of water supply.

22 195. Reclamation’s failure to properly define its purpose and need statement in the EIS
23 is arbitrary and capricious, an abuse of discretion, and contrary to the requirements of NEPA, in
24 violation of the Administrative Procedure Act, 5 U.S.C. §706(2).

25 196. In further violation of NEPA, Reclamation failed to consider a reasonable range
26 of alternatives in the EIS. NEPA requires that a federal agency “rigorously explore and
27 objectively evaluate all reasonable alternatives” to a proposed action. 42 U.S.C. § 4332(2)(C);
28 40 C.F.R. §§1502.14(a), 1508.9(b). Reclamation failed to satisfy this requirement.

- 1 B. Hold unlawful and set aside the Biological Opinions, including their Incidental Take
2 Statements.
- 3 C. Find and declare that Reclamation, the Commissioner of Reclamation, and the Secretary
4 of the Interior have and are violating their Section 7(a)(2) duties under the Endangered
5 Species Act.
- 6 D. Order the Secretary of Commerce, the Secretary of the Interior, Assistant Administrator
7 for Fisheries, and the Acting Director of the Fish and Wildlife Service to comply with the
8 law forthwith by withdrawing the Biological Opinions and reinitiating consultation with
9 respect to Reclamation's operation of the Central Valley Project.
- 10 E. Enjoin the Secretaries, their agents, and any other federal officers, including Brenda
11 Burman in her official capacity as Commissioner of Reclamation, from taking any other
12 actions in reliance on the Biological Opinions until such time as the Secretaries have
13 complied with the Endangered Species Act and produced lawful biological opinions as
14 ordered by this court.
- 15 F. Enjoin the Secretary of Interior, the Commissioner of Reclamation, their agents, and any
16 other federal officers from taking action to implement the action adopted by Reclamation
17 on February 18, 2020 until such time as the Secretary and Commissioner have complied
18 with their duties under Section 7(a)(2) of the Endangered Species Act.
- 19 G. Find and declare that Reclamation, the Commissioner of Reclamation, and the Secretary
20 of the Interior acted arbitrarily and capriciously, contrary to law, abused their discretion,
21 and failed to follow the procedure required by law in their approval of the FEIS and the
22 Record of Decision.
- 23 H. Hold unlawful and set aside the FEIS and Record of Decision.
- 24 I. Order Reclamation, the Commissioner of Reclamation, and the Secretary of the Interior
25 to comply with their obligations under NEPA and prepare an EIS that meets the statutory
26 and regulatory requirements.
- 27 J. Enjoin Reclamation, the Commissioner of Reclamation, and the Secretary of the Interior
28 from taking any other actions in reliance on the FEIS or Record of Decision until such

1 time as Reclamation, the Commissioner of Reclamation, and the Secretary of the Interior
2 have complied with their duties under NEPA and produced lawful NEPA documents as
3 ordered by this Court.

4 K. Retain jurisdiction over this matter until such time as the Secretaries and their agents
5 have fully complied with the Court's order.

6 L. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees.

7 M. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.
8

9 Dated: February 24, 2020

/s/ Barbara J. Chisholm

Hamilton Candee

Barbara Jane Chisholm

Elizabeth Vissers

Altshuler Berzon LLP

177 Post St., Suite 300

San Francisco, CA 94108

Telephone: (415) 421-7151

Facsimile: (415) 362-8064

Email: hcandee@altber.com; bchisholm@altber.com;
evissers@altber.com

*Attorneys for Plaintiffs Golden State Salmon
Association, Natural Resources Defense Council, Inc.,
Defenders of Wildlife, and Bay.Org d/b/a The Bay
Institute*

/s/ Glen H. Spain

Glen H. Spain

P.O. Box 11170

Eugene, OR 97440-3370

Telephone: (541) 689-2000

Email: fish1ifr@aol.com

*Attorney for Plaintiffs Pacific Coast Federation
of Fishermen's Associations and Institute for Fisheries
Resources*