

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WESTLANDS WATER DISTRICT; et al.,
Plaintiffs - Appellees-Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; et al.,
Defendants - Appellants-Cross-Appellees,

and

HOOPA VALLEY TRIBE AND YUOK TRIBE,
Defendant-Intervenors - Appellants-
Cross-Appellees

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

***AMICUS CURIAE* BRIEF OF THE PEOPLE OF THE OF STATE OF CALIFORNIA
EX REL. BILL LOCKYER, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA
IN SUPPORT OF APPELLANTS**

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BRIEF OF *AMICUS CURIAE* PEOPLE OF THE STATE OF CALIFORNIA

**INTEREST OF *AMICUS CURIAE*
CALIFORNIA ATTORNEY GENERAL BILL LOCKYER**

California Attorney General Bill Lockyer, in his independent capacity as representative of the people of the State of California, respectfully submits this *amicus curiae* brief in support of appellants Hoopa Valley Tribe and the federal appellants, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

The Attorney General has authority under California's constitution, statutes and common law to protect the environment and the natural resources of the State, and to participate in legal actions that could affect those resources. Cal. Gov. Code § 12600-12612. Section 12600 provides that "[i]t is in the public interest to provide the people of the State of California through the Attorney General with an adequate remedy to protect the natural resources of the State of California from pollution, impairment, or destruction." Cal. Gov. Code § 12600.

The federal government action being challenged in this case, the Trinity River Mainstem Fishery Restoration project, is a landmark decision designed to protect natural resources in one of California's most environmentally important river basins. Historically, the Trinity River has been valued for an abundant fishery that has supported the subsistence and commercial economies of California's native peoples. The Trinity River also contains significant habitat for numerous species of fish, wildlife and plants, and is an important recreational resource for fishing, swimming, boating, camping and other recreational activities. Protection and restoration of the

Trinity River Basin is of importance to, and in the interest of, all the people of the State of California.

In addition, this case raises important questions concerning the proper interpretation of several significant environmental statutes, the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and the Central Valley Project Improvement Act (CVPIA), all of which have a major impact on the level and degree of protection that the federal government must provide for California's environment and natural resources. Consequently, the Attorney General has a significant interest in ensuring that these statutes are properly interpreted and applied.

INTRODUCTION

Since 1964, most of the flow of the Trinity River has been diverted by artificial means to the Sacramento River, leading to the destruction of as much as 90% of the fish habitat and 80% of the fish populations in the river. ER 472-73. The diversions also have seriously threatened the way of life of the Hoopa Valley and Yurok Tribes, who have historically depended on the Trinity River fishery for their livelihood and for the practice of their religious beliefs. In authorizing the Trinity River Division (TRD) of the Central Valley Project (CVP) in 1955, Congress concluded that water surplus to the needs of the Klamath and Trinity river basins could be diverted to the Central Valley without detrimental effect on the fishery resources. H.R. Rep.No. 602, 84th Cong. 1st Sess. 4-5 (1955); S. Rep.No. 1154, 84th Cong. 1st Sess. 5 (1955). In reality, however, the reduced instream flows

have resulted in severe, detrimental changes to the river over the past four decades. See, e.g., ER 150-51, 161-62, 170-72.

In 1981, the Secretary of the Interior (Secretary), based in part on federal tribal trust responsibilities, directed the U.S. Fish and Wildlife Service (USFWS) to complete a study to evaluate the effectiveness of increased instream flows and other related measures in restoring the damaged Trinity River fishery. Twenty two years later, this restoration program ñ originally intended to take 12 years ñ still has not been implemented.

The Secretary adopted the long overdue Record of Decision (ROD) for the Trinity River Mainstem Fishery Restoration project on December 19, 2000. Both the draft and final Environmental Impact Statements (EISs) prepared for the project analyzed the impacts of a range of different instream flow and non-flow restoration measures for river restoration, using complex modeling of various scenarios and assumptions, in full compliance with NEPA.

Nevertheless, appellees challenged the EIS and ROD under NEPA and the ESA. The district court found the EIS inadequate and enjoined most of the flow provisions of the ROD. For the reasons explained below, however, the district court's rulings are incorrect both as a matter of law and as a matter of fact. Further, the district court incorrectly balanced the equities in fashioning its interim injunctive relief. *Amicus* People of the State of California respectfully ask this Court to reverse the district court's decision, and to allow a portion of the Trinity River's historic flows to be restored.

FACTUAL BACKGROUND

The challenged decision was rendered after over twenty years of scientific study concerning restoration of the Trinity River, commencing with the Secretary's January 14, 1981 directive to the USFWS to prepare a twelve-year, detailed study plan to assess the results of habitat and watershed restoration efforts in the Trinity River mainstem. Hoopa Valley Tribe's ER 1, Trinity River Flow Evaluation Final Report, June 1999, Appendix A-2.

In the ensuing 20 years, Congress repeatedly mandated restoration of the Trinity River mainstem, commencing with enactment of the Trinity River Basin Fish and Wildlife Management Act in 1984 (as amended in 1995 - hereafter "1984 Act"), P.L. 98-541, 98 Stat. 2721 (as amended by P.L. 104-143, 110 Stat. 1338), and culminating in enactment of the CVPIA in 1992, P.L. 102-575, 106 Stat. 4706. The 1984 Act declared that construction of the TRD "has substantially reduced the streamflow in the Trinity River Basin thereby contributing to damage to pools, spawning gravels, and rearing areas and to a drastic reduction in the anadromous fish populations and a decline in the scenic and recreational qualities of such river system." *Id.*, 98 Stat. 2721, § 1(1), emphasis added.

The 1984 Act required the Secretary to "formulate and implement a fish and wildlife management program for the Trinity River Basin designed to restore the fish and wildlife populations in such basin to levels approximating those which existed prior to construction of the TRD, and to maintain such levels. *Id.*, 98 Stat. 2722, § 2(a); see also 98 Stat. 2721, § 1(6).

The 1992 CVPIA in turn specifically required the Secretary, by September 30, 1996, to complete the Trinity River Flow Evaluation Study (TRFES) that was then being conducted by the USFWS under the mandate of the 1981 Secretarial directive. Congress mandated that the TRFES be completed in a manner which insures the development of recommendations, based on the best available scientific data, *regarding permanent instream fishery flow requirements* and [TRD] operating criteria and procedures for the restoration and maintenance of the Trinity River fishery. P.L. 102-575, 106 Stat. 4720, section 3406(b)(23)(A), emphasis added. The CVPIA provides for minimum instream flows of 340,000 acre feet per year pending completion of the TRFES. *Id.*, section 3406(b)(23). Finally, the statute provides that, if the Hoopa Valley Tribe and the Secretary concur in the recommendations of the TRFES, any increase to the 340,000 acre feet minimum Trinity River instream fishery releases . . . *shall be implemented accordingly.* *Id.*, emphasis added.

The Secretary completed the final TRFES in June of 1999 (ER 1, 150-167) and transmitted the study to Congress on March 29, 2000 (ER 168-169). The TRFES recommends specific annual flow releases (ranging from 368,600 acre feet in critically dry years to 815,200 acre feet in extremely wet years) and various sediment management, channel rehabilitation and adaptive management measures. The goal of the TRFES is to create and sustain a dynamic alluvial channel that will provide measurable increases in fish habitat necessary to restore naturally producing fish populations in the mainstem Trinity River to historic levels. ER 474.

The Hoopa Valley Tribe concurred in the recommendations of the flow study on December 18, 2000, thereby triggering the CVPIA's requirement that the recommendations be implemented accordingly. ER 509-510.

Although the Hoopa Valley Tribe argues on appeal that NEPA does not apply to the TRFES in light of the CVPIA's statutory directive mandating its implementation, that issue need not be reached in this case. This is because the Secretary and the Hoopa Valley Tribe (in conjunction with the County of Trinity as co-lead agency under the California Environmental Quality Act) nevertheless prepared and circulated a comprehensive draft environmental impact study (DEIS) on the Trinity River restoration program, including the TRFES, in October 1999. ER 1. The DEIS exhaustively examines the impacts of the TRFES and other ongoing and proposed actions to restore the Trinity River mainstem *and* the South Fork tributary to the Trinity River. The DEIS analyzes in detail seven diverse alternatives for restoration of the mainstem Trinity River, five of which include a combination of flow and non-flow related measures, and discusses eight other alternatives that were considered but not analyzed in detail.

The Secretary and the Hoopa Valley Tribe issued a final EIS (FEIS) on November 17, 2000 (ER 1), and a ROD on December 19, 2000 (ER 468-492). The ROD adopts the Preferred Alternative, which incorporates the multiple flow and non-flow related recommendations contained in the final TRFES, as well as a number of other non-flow fishery restoration measures such as watershed restoration, additional channel modifications, and infrastructure improvements. ER

469-470, 477.

Appellees challenged the Secretary's decision to adopt the ROD on a variety of grounds. The district court invalidated the EIR and enjoined most of the ROD. The Hoopa Valley Tribe and the federal defendants timely appealed.

SUMMARY OF ARGUMENT

This Court should reverse the district court's ruling and find that the EIS is adequate under NEPA and that there are no significant new circumstances or information warranting preparation of a supplemental EIS (SEIS). Specifically, the EIS is adequate because first, the co-lead agencies reasonably determined the scope of the EIS to encompass the restoration and maintenance of the natural production of anadromous fish in the Trinity River mainstem, in light of the CVPIA's specific directives that the Secretary develop both permanent instream fishery flow requirements and TRD operating criteria and procedures for the restoration and maintenance of a naturally-producing Trinity River fishery. CVPIA section 3406(b)(23). Second, the EIS is adequate because it fully analyzes a reasonable range of flow and non-flow related measures to achieve this goal.

Additionally, no SEIS is required because:

1) The DEIS analyzed the potentially significant environmental effects of the Preferred Alternative on endangered and threatened species in the Sacramento - San Joaquin Delta, the operation of the CVP and the availability of energy supplies, and there are no significant new circumstances or information warranting preparation of an SEIS.

2) There is no legal authority for the position that the lead agencies were required to delay release of the DEIS until after completion of the biological opinions and accompanying reasonable and prudent measures (RPMs) that were prepared for the Trinity River Mainstem Fishery Restoration project pursuant to the ESA. Although not yet referred to specifically as RPMs at the time the DEIS was released, the impacts of the specific mitigation measures later identified as RPMs were generally addressed in the DEIS' discussion of impacts of the Preferred Alternative, and were specifically addressed in the FEIS and ROD.

3) Even if the Court concludes that impacts of the Preferred Alternative on listed species in the Delta or on CVP operation somehow were not adequately analyzed in the EIS, this still does not render the EIS inadequate or require preparation of an SEIS. Section 3409 of the CVPIA provides that the impacts of all 23 enumerated CVPIA fishery restoration projects (including the Trinity instream flow project), among other actions mandated by the CVPIA, be analyzed in a programmatic EIS addressing the effects of these projects on the operation of the CVP as a whole.

Finally, this Court should reverse the district court's ruling enjoining most of the flow-related aspects of the Secretary's final Trinity River restoration decision, *even if* it finds that the Secretary committed a NEPA violation. Congress mandated that the TRFES recommendations be immediately and fully implemented upon the Secretary's and the Hoopa Valley Tribe's concurrence. Congress also specifically required the federal government to implement its tribal trust responsibilities to

protect and restore the Trinity River fishery for the benefit of the Hoopa Valley Tribe. CVPIA section 3406(b)(23)(B). The district court abused its discretion in failing to give these specific requirements of the CVPIA appropriate weight when determining the scope of injunctive relief that was warranted in this case. Section 3406(b)(23) tips the balance heavily against an injunction preventing implementation of the TRFES recommendations pending NEPA compliance.

ARGUMENT

I. The EIS Was Adequate Under NEPA.

A. The EIS Was Appropriately Scoped and Did Not Adopt an Unreasonably Narrow Statement of Purpose and Need.

NEPA regulations require each EIS to specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action. 40 C.F.R. § 1502.13. The EIS in this case stated that “[t]he purpose of the proposed action is to restore and maintain the natural production of anadromous fish on the Trinity River mainstem downstream of Lewiston Dam.” ER 173.

The district court held that this statement of purpose and need was unlawfully narrow, which in turn resulted in an unreasonably narrow range of alternatives being selected for analysis in the EIS. Specifically, the court held that because the EIS purpose and need focuses solely on the language in CVPIA section 3406(b)(23) regarding instream fishery flows, the lead agencies ignored the goals of improving the tributaries to and South Fork of the Trinity River, and did not appropriately

consider competing uses of the CVP. ER 622.

The Attorney General respectfully submits that this ruling is incorrect, for two reasons. First, the court incorrectly interpreted the statutory provisions governing restoration of the Trinity River. Second, as a factual matter, the EIS *did* address a range of broader, basin-wide restoration actions that the district court claims were improperly omitted (see discussion in section I.B *infra*).

The purpose and need statement in the EIS was entirely reasonable in light of the CVPIA's express statutory mandate that the Secretary develop recommendations regarding *permanent instream fishery flow requirements* and [TRD] operating criteria and procedures for the restoration and maintenance of the Trinity River fishery. CVPIA section 3406(b)(23)(A), emphasis added; cf. *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813 (9th Cir. 1999) [statement of purpose and need appropriate in light of stated goals of applicable land and resource management plan]. This mandate focuses the Trinity River restoration efforts on instream flow. Furthermore, language in section 3406(b) indicates that the focus of all the CVPIA's fishery restoration requirements is on the *long-term natural* fishery productivity of all [CVP] controlled rivers and streams. CVPIA section 3406(b), 106 Stat. 4721, emphasis added. As the district court conceded, the language of section 3406(b)(23) is controlling for purposes of the Secretary's decision regarding restoration of the Trinity River because it is the more specific statutory directive. ER 621; see *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 460 (9th Cir. 1994) [specific language controls the

general for purposes of statutory construction].

The district court, however, turned this principle of statutory construction on its head and read the broader, basin-wide restoration goals in the 1984 Act to modify the CVPIA and to *require* the Secretary to expand the scope of his restoration decision to include a host of restoration actions on tributaries to the Trinity River and non-flow related actions that do not involve restoration of naturally reproducing fish stocks. We submit that the 1984 Act, while it does list other restoration actions that must be included in the Secretary's overall fish and wildlife restoration program for the entire Trinity River Basin, neither expressly or impliedly prohibits the Secretary from electing to proceed with one of the enumerated components of the overall program first.¹

In this case, the lead agencies determined to undertake the rehabilitation of fish habitat in the Trinity River mainstem, as specified in section 2(a)(1)(A) of the 1984 Act. This determination carries out clear Congressional intent, as the

¹ The 1984 Act states that the Trinity River Basin fish and wildlife restoration program shall include the following activities:

- (1) The design, construction, operation, and maintenance of facilities to:
 - (A) rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec;
 - (B) rehabilitate fish habitats in tributaries of such river below Lewiston Dam and in the south fork of such river; and
 - (C) modernize and otherwise increase the effectiveness of the Trinity River Fish Hatchery.
- (2) The establishment of a procedure to monitor (A) the fish and wildlife stock on a continuing basis, and (B) the effectiveness of such rehabilitation work.
- (3) Such other activities as the Secretary determines to be necessary to achieve the long term goal of the program. P.L. 98-541, 98 Stat. 2722, § 2(a).

separately enumerated goals of the 1984 Act must be viewed in the context of Congress' subsequent enactment of section 3406(b)(23) of the CVPIA, which is specifically directed at the instream flow component of the overall Trinity River fish and wildlife restoration program. Furthermore, the specificity with which Congress expressed its intent with regard to the other enumerated restoration actions in sections 3406(b)(1)-(22) indicates that, had Congress, when it enacted the CVPIA in 1992, intended the Secretary to implement the *entire* fish and wildlife restoration program identified in the 1984 Act in one single project or at one time, it could and would have said so.²

Appellees also argue that the EIS' statement of purpose and need is too narrow because the CVPIA itself states that one of the purposes of the statute is to achieve a reasonable balance among competing demands for use of [CVP] water, including the requirements of fish and wildlife, and agricultural, municipal and industrial and power contractors. CVPIA section 3402(f); ER 621. However, as the district court acknowledged, the more specific provisions of section 3406(b)(23) take precedence over this general intent language in the CVPIA. ER 617, 622; see

²That section 3406(b)(23) is directed at instream flow requirements is obvious when viewed in the context of the other specific fish and wildlife restoration actions enumerated in section 3406(b). CVPIA section 3406(b)(1)-(22). These other 22 subparagraphs require the Secretary to undertake specific restoration actions, including non-flow projects such as fish hatchery maintenance and fish ladders, in other areas served by the CVP. *Id.* By contrast, such non-flow projects are not mentioned in section 3406(b)(23).

Westlands, 43 F.3d at 460 and cases cited therein.³

Therefore, the lead agencies reasonably defined the scope of the EIS in light of the specific focus of CVPIA section 3406(b)(23) on restoring naturally reproducing fish stocks in the Trinity River mainstem through increased flows. Contrary to the district court's ruling, this Court has repeatedly upheld reasonable agency decisions to tackle one aspect of a problem first, particularly where a lead agency is carrying out a specific statutory directive. For example, in *Northwest Resource Information Center, Inc. v. National Marine Fisheries Service*, 56 F.3d 1060 (9th Cir. 1995), a case directly on point, this Court upheld the Army Corps of Engineers' decision to exclude discussion of a surface transportation program (trucking salmon around dams) from an EIS addressing interim measures to improve river flow for salmon in the Columbia and Snake River systems (*id.* at 1068), holding:

[W]e cannot agree . . . that the transportation program and the flow improvement measures . . . must be addressed in the same NEPA document. . . . While we cannot allow an agency to segregate its actions in order to support a contention of minimal environmental impact, *Thomas*, 753 F.2d at 758, we also cannot force an agency to aggregate diverse actions to the point where problems must be tackled from every angle at once. To do so risks further paralysis of agency decisionmaking.

³This conclusion is further bolstered by the fact that the restoration decision required by section 3406(b)(23) implements the federal government's trust responsibility to protect tribal fisheries in the Trinity River Basin, as well as to help meet the fishery restoration goals of the 1984 Act. See CVPIA section 3406(b)(23) [i]n order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the [1984 Act] . . .]; see also Hoopa Valley Tribe's Opening Brief at 22-31.

Northwest Resource Information Center, 56 F.3d at 1069. Similarly here, the district court's decision, by requiring the lead agencies to examine nearly every conceivable means of restoring the entire Trinity River Basin, attempts to force the agencies to aggregate diverse actions to the point where problems must be tackled from every angle at once, and risks further paralysis of agency decisionmaking. *Id.*

Finally, for the reasons described below, the EIS in fact did address many of the broader restoration actions that the district court claimed were improperly excluded from analysis. Consequently, the scope of the EIS and EIS's purpose and need statement were adequate under NEPA.

B. The EIS Examined a Reasonable Range of Alternatives.

Appellees argue that, partly due to the allegedly unlawfully narrow scope of the EIS, the EIS failed to examine a reasonable range of alternatives for restoration of the Trinity River. The district court agreed with this assertion, concluding that the lead agencies were required to consider a variety of non-flow and mid-range restoration alternatives that would have minimized the impact of the restoration decision on all other CVP users. ER 641-642.

This ruling is incorrect both as a matter of law and as a matter of fact. Most importantly, the court completely disregards the principle that "[t]he NEPA alternatives requirement must be interpreted less stringently when [as here] the proposed agency action has a primary and central purpose to conserve and protect the natural environment, rather than to harm it." *Kootenai Tribe of Idaho v.*

Veneman, 313 F.3d 1094, 1120 (9th Cir. 2003). Also, while it acknowledges the proper standard of review, the district court's actual holding ignores the basic rule of reason's standard for adequacy of the alternatives analysis in an EIS. *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).

1. The district court failed to consider that the purpose of the action was to restore Trinity River flows.

This case is directly analogous to *Kootenai Tribe*. In upholding the EIS prepared by the U.S. Forest Service for the rule identifying and designating areas as "off limits" to road development (the "Roadless Rule"), this Court disagreed with the district court that the Forest Service failed to consider a reasonable range of alternatives because it considered only three viable alternatives, all of which included a total ban on road construction. *Kootenai Tribe*, 313 F.3d at 1120. As this Court found, it was not the original purpose of Congress in NEPA that government agencies, when taking environmentally protective actions, must consider alternatives inconsistent with the agency's policy objective in proposing the action. *Id.* at 1120-21. This principle is even more apt here, where Congress has directed the Secretary to undertake a specific activity to protect the environment (e.g. developing instream flow releases).

Although appellees argue that the EIS was required to consider alternatives that minimize Trinity River mainstem flows (thereby maximizing out of basin diversions), this claim is belied by the original legislation authorizing the TRD. The authorizing statute only permitted diversions from the Trinity River Basin that were

surplus to the basin's present and future needs and that would not adversely affect the fish and wildlife resources in the basin. See H.R. Rep. No. 602, 84th Cong. 1st Sess., 4-5 (1955) and S. Rep. No. 1154, 84th Cong. 1st Sess., 5 (1955).

2. The district court failed to properly apply the rule of reason standard.

An EIS must examine a reasonable and appropriate range of feasible alternatives to the proposed action, considering the statement of purpose and need and the nature and scope of the proposed action. *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 524 (9th Cir. 1997); *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1180-1181 (9th Cir. 1990).

An EIS need not consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives. *Seattle Audubon Society v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996); see also *Kootenai Tribe*, 313 F.3d at 1120-1121. Nor must the EIS analyze alternatives which are not sufficiently distinguishable from alternatives actually considered, or which have substantially similar consequences. *Headwaters*, 914 F.2d at 1180.

In this case, the alternatives analysis fully satisfies the rule of reason standard. The EIS examined in detail seven separate alternatives, ranging from the Maximum Flow alternative (which focused solely on Trinity River flows), to the Mechanical Restoration alternative, which relies solely on mechanical means (such as dredging and gravel recruitment) to restore the river beyond the statutory minimum flows of

340,000 acre feet per year. ER 176-202, 475-476. Other ongoing restoration actions, including implementation of the South Fork Trinity River Action Plan,⁴ various other habitat improvement projects and programs,⁵ and the Klamath Fishery Management Council and Pacific Fishery Management Council fishery management plans, were included within the environmental baseline as part of the "no action" alternative. ER 179-185. The EIS also discussed eight other alternatives that were considered but ultimately rejected as infeasible: harvest management, improving fish passage facilities, trucking fish around dams, predator control, increased hatchery production, pumped storage, and channel augmentation using Weaver Creek. ER 204-211, 476. Particularly because this action is directed at protecting the environment, this range of alternatives satisfies NEPA. See *Laguna Greenbelt*, 42 F.3d at 524 [an EIS is adequate where it "discusses in detail all the alternatives that were feasible and briefly discusses the reasons others were eliminated"].

Further, the district court's ruling that the EIS was inadequate because it failed to examine a reasonable range of "mid-range" non-flow alternatives ignores the fact that the EIS *did* examine a number of such measures in its alternatives analysis. While both appellees and the district court concede that the EIS examined non-flow watershed protection and adaptive management measures, they

⁴This plan includes a variety of watershed restoration and other projects on the South Fork of the Trinity River. ER 183.

⁵ These other programs included dredging of sediment ponds in Grass Valley Creek, operation of Buckhorn Reservoir, placement of salmon spawning gravel, and maintenance of the 27 existing channel rehabilitation projects. ER 183.

nevertheless complain that these actions were not appropriately integrated with the flow related measures in a manner that might have reduced the volume of mainstem flow releases. Water Agencies' Opening Brief at 49-50.

The EIS *did* examine a range of alternatives that combined or integrated non-flow and flow related restoration actions on the mainstem and elsewhere. The Preferred Alternative itself represented just such an approach. ER 469-470. The Preferred Alternative combines the flow regime of the 'Flow Evaluation' Alternative (which incorporated the recommendations of the TRFES) with two components of the Mechanical Restoration Alternative: (1) a variety of watershed protection measures (including road maintenance, rehabilitation and decommissioning on lands within the Trinity River basin below Lewiston Dam and on the South Fork of the Trinity River); and (2) 47 mainstem channel rehabilitation measures. ER 199, 476-481. The Preferred Alternative also includes various infrastructure improvements and modifications, as well as the sediment management measures (including gravel recruitment for salmon spawning) and adaptive environmental assessment and management program recommended by the TRFES. *Id.*; see also ER 156-160. In addition to the Preferred Alternative, four other alternatives combined flow and non-flow related restoration measures (ER 179-185, 189-201) and one alternative examined substantially reduced flows of 120,500 acre feet per year (ER 201-202).

In sum, appellees' essential complaint is that the EIS is inadequate because it did not consider the *specific* combination of actions appellees determined would

minimize the effects of the Secretary's flow decision on their *economic* interests.

There is no such requirement in NEPA, and appellees cite no authority for this novel proposition. See *Headwaters*, 914 F.2d at 1181 [i]n]while the BLM did not consider some of the specific proposals advanced by Headwaters, it reasonably concluded that these proposals were similar to alternatives actually considered, infeasible, or incompatible with the management objectives for the region]; see also *Laguna Greenbelt*, 42 F.3d at 525 [it he [EIS] cannot be found wanting simply because the agency failed to include every alternative . . . conceivable], quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978). Similarly here, while the EIS may not have examined the *specific* combination of flow and non-flow actions that appellees advanced in the district court, the lead agencies reasonably rejected these other options as similar to alternatives actually considered, as infeasible or as incompatible with the project objectives.⁶

II The Secretary Was Not Required to Prepare an SEIS.

⁶ Appellees also argue that the Secretary erred in failing to complete environmental review prior to forwarding the final TRFES to Congress pursuant to section 3406(b)(23)(B) of the CVPIA. Even assuming this argument has any merit, it is moot. The lead agencies did comply with NEPA prior to their adoption of the ROD and implementation of the recommendations in the TRFES. ER 468-492. See *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893 (9th Cir. 2002) [i]n]othing in the record indicates that the Forest Service made its final decision . . . until after conducting its [environmental assessment]. . . the agency was free to decide *not* to amend the Forest Plan road density standard up until the time it issued its Decision Notice for the . . . timber sale], emphasis in original.

The district court held that the DEIS⁷ was inadequate, and therefore an SEIS was required, because the DEIS failed to adequately analyze the impacts of: (1) the Preferred Alternative on endangered and threatened species in the Sacramento River Delta; and (2) the unreasonable and prudent measures (RPMs - i.e. mitigation measures) included within the biological opinions subsequently prepared by the USFWS and National Marine Fisheries Service (NMFS - now referred to as NOAA - Fisheries) pursuant to the ESA. For the reasons stated below, this Court should reverse these holdings.

A. The DEIS Adequately Analyzed the Out-of-Basin Impacts of the Preferred Alternative on Listed Species and CVP Operations, and Was Not Required to Separately Analyze the Impacts of the Biological Opinions and RPMs Themselves.

No SEIS was required here because the DEIS thoroughly addressed the impacts of implementation of the Preferred Alternative (and all other analyzed alternatives) on listed species and water quality in the Delta and on CVP operations. This analysis *specifically included* modeled and projected changes in the Delta salinity standard and water temperatures, and the resulting impacts of such changes. See, e.g. ER 226-227, 236-240, 257-258, 270-278, 328-332, 356-361; see also ER 1, DEIS Cumulative Impacts section, 4-11 - 4-32 and Appendices A and B to DEIS. The DEIS cumulative impact analysis and appendices to the DEIS in particular

⁷In this section, this brief discusses the adequacy of the *DEIS*, because the appellees have challenged its sufficiency and have claimed that any deficiencies were not cured in the FEIS. Elsewhere in this brief, we have used the more general "EIS" label to refer to both the DEIS and FEIS.

examined impacts to listed species in the Delta and changes in Delta water quality through increased salinity or water temperatures, as well as effects on water contract deliveries, storage in CVP reservoirs, wildlife refuge water supplies, State Water Project deliveries, power generation, and groundwater supplies, and the impacts of various mitigation measures, among other issues.

Because the DEIS comprehensively evaluated the impacts of the project on Delta listed species and CVP operations, this case is distinguishable from other cases that have held an SEIS is required. See, e.g., *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-559 (9th Cir.2000) Therefore, the USFWS' and NMFS' subsequent promulgation of the biological opinions and accompanying RPMs (after publication of the DEIS) did not constitute significant new information triggering the requirement to prepare an SEIS. 40 C.F.R. § 1502.9(c)(1)(ii); *Headwaters v. BLM*, 914 F.2d at 1177-1178.

Contrary to appellees' assertion, neither NEPA nor the ESA requires a lead agency to delay the draft environmental analysis of the impacts of a project until the release of biological opinions and accompanying RPMs. Rather, the NEPA and ESA regulations require the NEPA and ESA processes to be coordinated. See, e.g. 40 C.F.R. § 1502.25(a); 50 C.F.R. § 402.06(a). There is no allegation that coordination did not occur here; instead the claim is essentially that the DEIS failed to specifically examine the impacts of the biological opinions and RPMs *by name* because the biological opinions were not prepared until after circulation of the DEIS. This argument is quintessential *form over substance*.

NEPA analysis of the biological opinion *itself* is required in circumstances where USFWS or NMFS issuance of the biological opinion and accompanying incidental take statement (ITS) is the *only* federal agency action at issue, which is a fairly rare occurrence. See *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996). In this case, where the biological opinions were prepared on *another* federal agency action, and were not issued until after the DEIS was circulated for public review, NEPA requires that the DEIS examine the effects of the *proposed action* on listed species. As discussed above, the Trinity River restoration DEIS did examine these effects. See, e.g. ER 226-227, 236-240, 257-258, 270-278, 328-332, 356-361; see also ER 1, DEIS Cumulative Impacts section, 4-11 - 4-32 and Appendices A and B to DEIS. Moreover, the impacts of the Preferred Alternative on listed species and on operation of the CVP are virtually indistinguishable from the impacts of the biological opinions and RPMs. An EIS need only discuss impacts of mitigation measures for the proposed action to the extent that these differ from the impacts of the action itself. 40 C.F.R. §§ 1502.14(f), 1502.16(h); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-352 (1989). NEPA compliance surely does *not* mean that the DEIS would need to be either delayed or recirculated simply to reference the biological opinions and RPMs by name when, as here, these biological opinions and RPMs do not alter the analysis and conclusions in the DEIS.

Finally, the FEIS and ROD did specifically analyze the effects of the biological opinions and RPMs, as well as the effects of the Preferred Alternative, on listed species in the Sacramento-San Joaquin delta and on CVP operation. See, e.g.

ER 328-329, 331-332, 484-491, 502-508. In fact, the lead agencies selected the Preferred Alternative based in part on their consideration of its effects on listed species, CVP operation, consumptive uses of CVP water, and power supply. See, e.g., ER 484, 469, 498, 49. Significantly, the ROD concluded that the Preferred Alternative would only decrease long term average annual deliveries to the CVP by 2% in normal years and up to 4% in dry years, when compared to the No Action Alternative. ER 486. This analysis is sufficient.

B. Even if the Court Concludes that the EIS Did Not Analyze Every Out-of-Basin Impact of the Preferred Alternative, the CVPIA Requires a Programmatic EIS for the Specific Purpose of Analyzing the Impacts of All CVPIA Fishery Restoration Programs on Operation of the CVP as a Whole.

Even if this Court concludes that certain impacts of either the Preferred Alternative itself or the mitigation measures for such a alternative on listed Delta species or CVP operations still remained unanalyzed after publication of the FEIS and ROD, this does not necessarily invalidate the EIS. Congress specifically required that this kind of broad, programmatic analysis of the collective environmental effects of implementation of the CVPIA on the CVP as a whole be evaluated in a comprehensive programmatic EIS (PEIS). CVPIA section 3409 provides that:

Not later than three years after the date of enactment of this title, the Secretary shall prepare and complete a programmatic [EIS] pursuant to [NEPA] analyzing the *direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions* and the potential renewal of all [CVP] water contracts. Such statement *shall consider impacts and benefits* within the Sacramento, San Joaquin and *Trinity River* basins, and the San

Francisco Bay/Sacramento-San Joaquin River Delta Estuary. P.L. 102-575, 106 Stat. 4730, section 3409, emphasis added.

The general impacts of any specific aspect of the CVPIA, including implementation of the Trinity River decision pursuant to section 3406(b)(23), on operation of the CVP as a whole, depend upon a wide variety of factors, such as the water year type, reservoir inflow and Delta outflow, water temperatures in rivers located downstream of CVP facilities, overall water supply and demand, Delta inflow to export ratios, and implementation of other required actions under the CVPIA and other statutes. The Trinity EIS did in fact consider these other factors when modeling the impacts of the analyzed alternatives, to the extent feasible. See, e.g. ER 271, 328-329. However, the *overall* modeling of the impacts of the Trinity River decision, considered in conjunction with the impacts of implementation of all other aspects of the CVPIA, on operation of the CVP as a whole, is precisely the kind of complex, comprehensive analysis that Congress mandated be examined in the CVPIA PEIS. CVPIA section 3409.

Contrary to the language of the CVPIA, the district court appears to have required that such a comprehensive analysis be done in the context of the Trinity EIS. This is not a reasonable construction of the requirements of section 3406(b)(23). An EIS that is focused on implementing one specific aspect of the CVPIA is not intended, and should not be required, to examine in detail all conceivable CVP-wide effects of that action, including interaction with other CVPIA projects. This is particularly true when Congress has expressly required

that the broader direct and indirect effects of all CVPIA projects be examined in a programmatic environmental document. *Westlands Water Dist.*, 43 F.3d at 462 [all sections of CVPIA must be construed as a whole to give effect and independent significance to every section of the statute].

III Even If There Were a Violation of NEPA, the District Court Abused Its Discretion in Failing to Require Full Implementation of the TRFES Recommendations Pending Completion of NEPA Review.

Even if this Court agrees with the district court that NEPA was violated, the district court still abused its discretion in not requiring full implementation of the TRFES recommendations pending completion of NEPA review. CVPIA section 3406(b)(23) provides that once the Secretary and the Hoopa Valley Tribe concur in the recommendations of the TRFES, these recommendations *must be* implemented. All parties interpret this provision in the same way. See NCPA Opening Brief at 2, Water Agencies' Opening Brief at 32, Federal Appellants' Opening Brief at 4, 28, Hoopa Valley Tribe Brief, *passim*. The Secretary and the tribe concurred in the TRFES recommendations on December 18 and 19, 2000. ER 492, 509-510. These recommendations provide for increases in the minimum instream fishery flows in all water year types. ER 156.

When a statute contains an express legislative command as is found in section 3406(b)(23), it may be interpreted to require the court to exercise its traditional equitable discretion in a particular manner to effectuate the purposes of the statute. *Cf. Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173, 193-195 (1978) [because ESA unequivocally requires protection of endangered species, no matter what the

cost, the court had no discretion to refuse to enjoin construction of dam that would harm listed species]; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) [Congress may intervene and guide or control the exercise of the courts' discretion]. In this case, at a minimum, Congress' specific directive in section 3406(b)(23) that the TRFES recommendations be implemented should be interpreted to require these recommendations to be immediately and fully implemented pending NEPA compliance.

This conclusion is further reinforced by the fact that section 3406(b)(23) is designed to effectuate the federal government's tribal trust responsibilities to protect and restore the Trinity River fishery. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) [recognizing federal government's trust responsibility to protect the Hoopa Valley Tribe's salmon fishing rights]. Congress specifically referenced these trust obligations in requiring the Secretary to develop and immediately implement the recommendations in the TRFES with the Hoopa Valley Tribe's concurrence. CVPIA section 3406(b)(23); cf. *Westlands Water Dist.*, 43 F.3d at 460.

Therefore, this Court should reverse the district court's ruling enjoining full implementation of the flow aspects of the Trinity River.

CONCLUSION

Congress has enacted at least three specific directives to restore the damage done to the Trinity River from 40 years of water diversions from the basin. Nearly 20 years of scientific study has identified increased instream flows as the key

component to a restored river and fishery, and the federal government and Hoopa Valley Tribe have adopted a scientifically-based decision to increase flows - a decision that was informed by a comprehensive and detailed analysis of the decision's environmental effects. Despite this, the people of California have yet to see restored flows in the Trinity River.

The Attorney General respectfully requests that the Court reverse the district court's decision, and order immediate and full implementation of all aspects of the Trinity River Mainstem Fishery Restoration decision.

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