

1 DANIEL J. O'HANLON, State Bar No. 122380
dohanlon@kmtg.com
2 WILLIAM T. CHISUM, State Bar No. 142580
wchisum@kmtg.com
3 HANSPETER WALTER, State Bar No. 244847
hwalter@kmtg.com
4 KRONICK, MOSKOVITZ, TIEDEMANN &
GIRARD
5 400 Capitol Mall, 27th Floor
Sacramento, CA 95814
6 Telephone: (916) 321-4500
Facsimile: (916) 321-4555
7

8 Attorneys for Plaintiffs
9 SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY; WESTLANDS WATER DISTRICT

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12
13 SAN LUIS & DELTA-MENDOTA
14 WATER AUTHORITY; WESTLANDS
WATER DISTRICT,

15 Plaintiffs,

16 v.

17 KENNETH LEE SALAZAR, as Secretary
of the Department of the Interior; UNITED
18 STATES DEPARTMENT OF THE
INTERIOR; UNITED STATES FISH
19 AND WILDLIFE SERVICE; ROWAN
GOULD, as Acting Director of the United
20 States Fish and Wildlife Service, United
States Department of the Interior; REN
21 LOHOEFENOR, as Regional Director of
the United State Fish and Wildlife Service,
22 Pacific Southwest Region, United States
Department of the Interior; UNITED
23 STATES BUREAU OF RECLAMATION;
J. WILLIAM McDONALD, as Acting
24 Commissioner of the United States Bureau
of Reclamation, United States Department
25 of the Interior; DONALD GLASER, as
Director of the United States Bureau of
26 Reclamation, Mid-Pacific Region, United
States Department of the Interior,
27

28 Defendants.

CASE NO.

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

1 Plaintiffs San Luis & Delta-Mendota Water Authority (“Authority”) and Westlands Water
2 District (“Westlands”) (collectively referred to as “Plaintiffs”) allege as follows:

3 **I.**

4 **INTRODUCTION**

5 1. This case arises from a fundamental and egregious failure by the United States
6 Fish and Wildlife Service (“FWS”) to competently, objectively, and lawfully fulfill its
7 responsibilities under the federal Endangered Species Act (“ESA”). On December 15, 2008,
8 FWS issued a biological opinion (“2008 Biological Opinion”) regarding the effects of proposed
9 operations of the Central Valley Project (“CVP”) and the State Water Project (“SWP”) on a
10 threatened fish species, the delta smelt. The 2008 Biological Opinion reflects a pervasive bias, a
11 predisposition to find significant adverse, population level effects to the delta smelt population
12 from project operations. It ignores contrary scientific data, misstates and misapplies the data it
13 cites, is internally inconsistent in use of data, relies on speculation and surmise, arbitrarily
14 attributes adverse effects to project operations that are actually linked to other stressors such as
15 pollution and invasive species, and fails to rationally relate the impacts of project operations to
16 population level effects. While the project pumps do take some delta smelt, the best available
17 scientific data show that this take, and other project effects, do not have population level effects
18 on the delta smelt. The 2008 Biological Opinion will result in significant harm to Californians
19 who depend upon CVP water supply, without reason to believe these costs will result in any
20 meaningful benefit to the delta smelt. The substantial changes to CVP operations mandated by
21 the FWS in the 2008 Biological Opinion are not required by the ESA; they are instead a
22 perversion of the ESA and an abuse of authority. By reaching a flawed and unjustified
23 conclusion that project operations will jeopardize the delta smelt, the 2008 Biological Opinion
24 will cause the needless and unlawful loss of water at a time when people desperately need it.

25 2. The 2008 Biological Opinion comes at a particularly harmful time for
26 Californians. On February 27, 2009, the Governor of California declared a state-wide drought
27 emergency, based on his finding that “conditions of extreme peril to the safety of persons and
28 property exist in California caused by the current and continuing severe drought conditions and

1 water delivery restrictions.” (Governor’s Proclamation dated February 27, 2009.) The
2 Governor’s Proclamation explains that “agricultural revenue losses exceed \$300 million to date
3 and could exceed \$2 billion in the coming season, with a total economic loss of nearly \$3 billion
4 in 2009” and that “it is expected that State Water Project and Central Valley Project water
5 delivery reductions will cause more than 80,000 lost jobs.” The Governor’s Proclamation
6 specifically identifies restrictions on the CVP and SWP in the 2008 Biological Opinion as one
7 contributing cause of the emergency conditions and the current threat to human health and safety.
8 Based on the dry conditions, and the restrictions in the 2008 Biological Opinion, agricultural
9 water service contractors on the west side of the San Joaquin Valley expect to receive a zero
10 percent allocation of CVP water this year. In 2009, hundreds of thousands of otherwise
11 productive lands in the San Joaquin Valley will be fallowed, and orchards will be destroyed.
12 Farmers in this region and the businesses that serve them will be put out of business.
13 Communities in the region will suffer severe blows in 2009, as the local economic base
14 disappears, and residents leave in search of employment elsewhere. The negative economic and
15 social impacts of the 2008 Biological Opinion will be felt throughout much of the rest of
16 California as well, because the CVP and the SWP provide some 25 million Californians with at
17 least a portion of their water supply. The 2008 Biological Opinion will also result in significant
18 adverse environmental impacts in the project services areas, including impacts related to land
19 fallowing, increased dust emissions, excessive groundwater pumping, subsidence, and increased
20 pressure on alternative surface supplies. Unless the restrictions in the 2008 Biological Opinion
21 are enjoined and it is remanded for revision, the 2008 Biological Opinion will continue to inflict
22 harm in future years, as it severely, needlessly and unlawfully curtails CVP water supplies.

23 3. There is no question that delta smelt abundance has substantially declined in recent
24 years, but FWS’s response is woefully misguided and promises only economic and social
25 disruption by restricting the CVP and SWP without any promise of meaningful benefit to delta
26 smelt survival or recovery. For example, in 2008 the CVP and SWP operated under pumping
27 restrictions similar to those in the 2008 Biological Opinion, at a significant cost in water supply.
28 But in 2008 the delta smelt population did not increase in response. Instead, based on the 2008

1 index for the Fall Midwater Trawl survey, abundance in 2008 fell to its lowest level ever
2 recorded. Conversely, the CVP and SWP have operated for many years, and delta smelt
3 population has shown strong increases after years when pumping was at much higher rates than
4 will be allowed in the 2008 Biological Opinion. Despite the lesson from 2008 and earlier years,
5 the 2008 Biological Opinion mandates costly pumping restrictions, without any scientific basis
6 for concluding that these pumping restrictions will likely result in increased delta smelt
7 population abundance next year.

8 4. The FWS is distorting the ESA. The ESA has a laudable purpose, to protect
9 species of fish, wildlife and plants from human activities untempered by adequate concern and
10 conservation, and to provide a means and program for federal agencies to promote conservation
11 of threatened and endangered species. In section 7 of the ESA, 16 U.S.C. § 1536, the Congress
12 required federal agencies to consult with the Secretary of the Interior regarding discretionary,
13 proposed agency action, to assist federal agencies in ensuring that their discretionary actions
14 would not likely threaten the continued existence of species or adversely modify habitat that is
15 critical to a species' survival or recovery. The ESA also reflects a concern that valuable and
16 necessary human activities not be unduly or unwisely constrained in pursuit of this purpose.
17 Congress required that such consultations, and the decisions arising from such consultations, be
18 based upon the best scientific data available, both to protect species and to ensure that human
19 activities with important and valuable economic and social benefits not be erroneously restricted
20 based upon poor science, speculation or surmise. ESA section 7, and the implementing
21 regulations, set forth standards and a process to determine the likely effects of proposed agency
22 action, and to develop measures to avoid or reduce such effects, but to allow federal agency
23 action to go forward despite some adverse effects on a listed species. Had the Secretary of the
24 Interior, the FWS, and the officers and employees within the FWS (collectively "FWS
25 Defendants") adequately and lawfully fulfilled their responsibilities under the ESA with regard to
26 the proposed operations of the CVP, the unwarranted conclusions and needless measures imposed
27 under the 2008 Biological Opinion would have been avoided. But the FWS Defendants failed to
28 meet their responsibilities in the 2008 Biological Opinion.

1 5. Their failures are multiple and substantial. In the 2008 Biological Opinion, the
2 FWS Defendants failed to employ the best available scientific data, were selective in their use of
3 data, and took internally inconsistent and contradictory positions concerning the data and its
4 implications. The FWS Defendants failed to meet FWS’s own standards for the use, reporting
5 and quality of scientific data. In the 2008 Biological Opinion, the FWS Defendants failed to
6 assess the effects of proposed CVP and SWP operations in the manner required by ESA section 7
7 and the consultation regulations. The 2008 Biological Opinion overstates the effects of proposed
8 project operations, leading to faulty and unlawful prescriptions. The FWS Defendants failed to
9 appropriately define the environmental baseline, failed to identify the project operations that are
10 discretionary, and failed to determine the effects of discretionary project operations that would be
11 added to the environmental baseline. The FWS Defendants failed to critically assess the
12 essential question posed under ESA section 7 – whether the incremental effects of discretionary
13 CVP operations on the delta smelt, when added to the environmental baseline, and considering
14 cumulative effects, would likely jeopardize the delta smelt or adversely modify its critical habitat.
15 The 2008 Biological Opinion concludes that proposed CVP and SWP operations would cause
16 jeopardy to the delta smelt population, and would adversely modify its critical habitat. But that
17 conclusion is not based on the analysis required by law, or on an objective view of the best
18 available scientific data. The analysis in the 2008 Biological Opinion instead reflects only a
19 biased presumption that CVP and SWP operations would cause jeopardy to the delta smelt and
20 adversely modify its critical habitat.

21 6. The FWS Defendants compounded their failure to do a reasoned and lawful
22 analysis of project effects by developing a “reasonable and prudent alternative” to proposed CVP
23 and SWP operations that is neither reasonable nor prudent. The FWS Defendants failed to
24 consider all the factors relevant to determining a reasonable and prudent alternative. The
25 alternative in the 2008 Biological Opinion is not consistent with the CVP project objective of
26 providing water supply, and is not economically and technologically feasible. The alternative in
27 the 2008 Biological Opinion is further flawed in that it ignores and is contrary to the best
28 available scientific data. The alternative in the 2008 Biological Opinion is further unlawful

1 because it is not based upon avoiding or reducing effects of CVP operations that be would added
2 to the environmental baseline, and are necessary to avoid jeopardy or adverse modification of
3 critical habitat caused by effects of CVP operations. Instead, it is justified as a means to
4 “improve” conditions for and the status of the delta smelt based on its “needs,” regardless of the
5 cause of those conditions or FWS’s demonstrably incomplete understanding of the habitat needs
6 of the delta smelt. Finally, the incidental take statement in the 2008 Biological Opinion is
7 unlawful, to the extent that FWS claims authority in that statement to dictate operations of the
8 permanent operable gates that are to be constructed and installed as part of the South Delta
9 Improvements Project.

10 7. The requirements in the 2008 Biological Opinion will cause severe, ongoing water
11 supply shortages within the service areas of the Authority’s member agencies and elsewhere in
12 California. These water supply shortages will cause substantial, adverse environmental impacts.
13 The FWS Defendants, however, did not comply with the National Environmental Policy Act
14 (“NEPA”), 42 U.S.C. § 4321, *et seq.*, in promulgating the 2008 Biological Opinion. If the FWS
15 Defendants had complied with NEPA, they could have usefully measured their prescriptions for
16 alternative project operations against the sure adverse impacts for Californians, and the
17 unfounded and speculative likelihood of benefit for the delta smelt.

18 8. Accordingly, Plaintiffs bring this action to compel the FWS Defendants to do a
19 lawful and scientifically supported analysis of CVP and SWP operations consistent with the
20 requirements of the ESA section 7, 16 U.S.C. § 1536, and the consultation regulations, 50 C.F.R.
21 § 402.01, *et seq.*, as well as NEPA, 42 U.S.C. § 4321, *et seq.* Among other relief, Plaintiffs seek a
22 temporary, preliminary and permanent injunction to spare millions of Californians from the
23 devastating, unwarranted, and unlawful loss of water supplies threatened by the 2008 Biological
24 Opinion in 2009 and future years.

25 II.

26 **JURISDICTION AND VENUE**

27 9. This action involves claims arising under and based upon the Endangered Species
28 Act, 16 U.S.C. § 1531, *et seq.*, and the National Environmental Policy Act (“NEPA”), 42 U.S.C.

1 § 4321, *et seq.* Additionally, this action involves claims relating to water contracts executed
2 pursuant to the 1902 Reclamation Act, 32 Stat. 388, and acts amendatory thereof and
3 supplementary thereto. Plaintiffs seek review under, and the sovereign immunity of federal
4 agencies and employees is waived by, the judicial review provisions of the Administrative
5 Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* Consequently, this Court has jurisdiction over
6 this action pursuant to 28 U.S.C. § 1331. This Court is authorized to issue declaratory relief
7 pursuant to 28 U.S.C. § 2201, and is authorized to issue injunctive relief pursuant to Rule 65 of
8 the Federal Rules of Civil Procedure.

9 10. The acts and omissions giving rise to the claims alleged in this complaint occurred,
10 and will continue to occur, within the boundaries of the United States District Court for the
11 Eastern District of California, and the consequences of these acts and omissions will substantially
12 impact lands and communities situated within San Joaquin, Stanislaus, Merced, Fresno and Kings
13 Counties. Therefore, venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(e)(2)
14 and Rule 3-120 of the Local Rules of the United States District Court for the Eastern District of
15 California.

16 III.

17 PARTIES

18 11. Plaintiff San Luis & Delta-Mendota Water Authority (“Authority”) is, and at all
19 times mentioned herein was, a joint powers authority formed pursuant to California Government
20 Code § 6500, *et seq.* The Authority consists of 32 member public agencies that contract with the
21 United States Bureau of Reclamation for water supply from the CVP. Water delivered to the
22 Authority’s members by the CVP is used within areas of San Joaquin, Stanislaus, Merced,
23 Fresno, Kings, San Benito, and Santa Clara Counties, California. Some of the CVP water
24 delivered to its members is supplied via California’s State Water Project (“SWP”) pumps and
25 facilities located within the Sacramento and San Joaquin Rivers Delta (“Delta”). Among the
26 purposes for which the Authority was formed is to preserve and protect the quantity and quality
27 of surface and groundwater supplies available for use within the boundaries of its member
28 agencies. The Authority is authorized to commence and maintain suits on behalf of its member

1 agencies. Pursuant to an agreement between the Authority and the United States, which became
2 effective March 1, 1998, responsibility for the operation and maintenance of some facilities of the
3 Delta Division of the CVP was transferred to the Authority. Based upon this agreement, the
4 Authority operates the Jones Pumping Plant, the Delta-Mendota Canal, and other related facilities
5 of the CVP.

6 12. Plaintiff Westlands Water District (“Westlands”) is a California water district
7 formed pursuant to California Water Code section 34000, *et seq.* Westlands provides water to an
8 area of approximately 600,000 acres in Fresno and Kings Counties on the western side of the San
9 Joaquin Valley. Westlands is authorized to commence and maintain on behalf of landowners
10 within its boundaries any action involving or affecting the ownership or use of water. Westlands
11 holds vested contractual rights to receive water from the United States Bureau of Reclamation for
12 distribution and use within Fresno and Kings Counties. Westlands also holds vested contractual
13 rights to receive additional water under the Stipulated Judgment entered on December 30, 1986,
14 in the consolidated cases of *Barcellos and Wolfsen, Inc., et al. v. Westlands Water District* and
15 *Westlands Water District v. United States of America*, Nos. CV 79-106 OWW and CV F-89-245
16 OWW (E.D. Cal.) (collectively “Barcellos”). Most of Westlands CVP water is supplied via CVP
17 pumps and facilities located within the Delta, but some of Westlands’ CVP water can also be
18 supplied via SWP pumps and facilities located within the Delta. Westlands is a member of the
19 Authority.

20 13. Defendant Kenneth Lee Salazar is the Secretary of the Interior (“Interior
21 Secretary” or “Secretary”), and is named herein in his official capacity. Under ESA section 7(a),
22 16 U.S.C. § 1536(a), the Secretary is required to consult with and assist federal agencies in
23 determining whether proposed federal agency actions will jeopardize the continued existence of
24 threatened or endangered species, or adversely modify the critical habitat of threatened or listed
25 species. Under ESA section 7(b), 16 U.S.C. § 1536(b), after conclusion of formal consultation,
26 the Secretary is required to issue a written statement setting forth the Secretary’s opinion detailing
27 how the proposed agency action will affect the listed species and its critical habitat. The
28 Secretary has delegated this responsibility to the FWS.

1 14. Defendant Department of the Interior (“Interior”) is a department within the
2 Executive Branch of the United States government.

3 15. Defendant United States Fish & Wildlife Service (“FWS”) is an agency of the
4 United States, within Interior.

5 16. Defendant Rowan Gould is the Acting Director of the FWS, and is named herein
6 in his official capacity. The Acting Director is responsible for the administration of the ESA on
7 behalf of the Secretary.

8 17. Defendant Ren Lohofener is the Regional Director of the FWS’s Pacific
9 Southwest Region, and is named herein in his official capacity. The Regional Director is
10 responsible, in part, for the administration of the ESA within the Pacific Southwest Region, which
11 includes California.

12 18. The United States Bureau of Reclamation (“Reclamation”) is an agency of the
13 United States, within Interior, and is charged with various duties and responsibilities including
14 operating the CVP and entering into and administering contracts for CVP water on behalf of the
15 United States of America.

16 19. Defendant J. William McDonald is the Acting Commissioner of Reclamation
17 (“Commissioner”), and is named herein in his official capacity.

18 20. Defendant Donald Glaser is the Director of Reclamation’s Mid-Pacific Region,
19 and is named herein in his official capacity. The Regional Director is responsible for the
20 administration and operation of the CVP.

21 21. Defendants Salazar, Interior, FWS, Gould, Lohofener, Reclamation, McDonald
22 and Glaser are collectively referred to herein as “Defendants.” Defendants Salazar, Interior,
23 FWS, Gould, and Lohofener, are collectively referred to herein as the “FWS Defendants.”
24 Defendants Reclamation, McDonald, and Glaser are collectively referred to herein as the
25 “Reclamation Defendants.”
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1 IV.

2 **GENERAL ALLEGATIONS**

3 **OPERATIONS OF THE CENTRAL VALLEY PROJECT**

4 22. The CVP is operated by Reclamation, and is the largest water storage and delivery
5 system in California, covering 29 of the state's 58 counties. The CVP consists of 20 reservoirs
6 capable of storing 9 million acre-feet of water, 11 power plants, 500 miles of major canals,
7 aqueducts and tunnels. In order to facilitate CVP operations, Reclamation holds title to water
8 export facilities located in the Delta including the C.W. "Bill" Jones Pumping Plant (formerly
9 Tracy Pumping Plant). The Jones Pumping Plant pumps water from the Delta, for delivery to
10 areas of California south and west of the Delta.

11 23. For many years, the CVP and the SWP have been operated pursuant to a series of
12 cooperative operating agreements between Reclamation and the California Department of Water
13 Resources ("DWR"). The SWP is the largest state-operated water supply project in the United
14 States and includes 32 storage facilities, reservoirs and lakes; 17 pumping plants; 3 pumping-
15 generating plants; 5 hydroelectric power plants; and about 660 miles of pipelines and open canals
16 that collectively stretch from Oroville Reservoir, located on the Feather River in the north, to
17 Perris Reservoir, located in Riverside County in the south. Through the SWP, water is pumped
18 from the Delta at the Banks Pumping Facility, located near Tracy, California, for transmittal to
19 end users located within several regions of California via the California Aqueduct. The SWP
20 supplies urban and agricultural water to about two-thirds of the residents of California
21 (approximately 25 million Californians) and about 750,000 acres of the State's farmland located
22 in the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern
23 California.

24 24. The Delta is used to convey CVP and SWP water from the wetter northern regions
25 of California to farms, cities and industries in the drier central and southern regions. The flows of
26 the Sacramento River, San Joaquin River and countless smaller streams draining the west side of
27 the Sierra Nevada mountain range and the east side of the Coast Range all meet in the Delta. In
28 wetter months, the CVP and SWP divert surplus flows in the Delta using pumps located near

1 Tracy, California, both for direct use and for storage in facilities south of the Delta, including the
2 San Luis Reservoir. They also store flows in reservoirs on streams upstream from the Delta, such
3 as Shasta Reservoir, a CVP facility, and Oroville Reservoir, a SWP facility, for later release at
4 drier times of the year. Those later releases from reservoir storage serve various purposes,
5 including supporting deliveries to CVP and SWP contractors. The CVP and SWP contractors in
6 turn distribute the water to water users in their service areas.

7 25. The CVP provides water to irrigate approximately 3.25 million acres of farmland
8 and supplies water to more than 2 million people through more than 250 long-term water
9 contractors in the CVP service area. Most of the CVP service area is within the Central Valley,
10 but CVP water is also supplied to users within San Benito and Santa Clara Counties.
11 Approximately 90 percent of CVP water delivered to contractors located south of the Delta is
12 used for agricultural purposes.

13 26. The CVP is a project authorized by various acts of Congress, including among
14 others, the Rivers and Harbors Act of August 30, 1935 (49 Stat. 1028, 1038). The CVP was made
15 subject to federal reclamation law by the Rivers and Harbors Act of August 26, 1937 (50 Stat.
16 844, 850), and operates under water right permits and licenses granted by the California State
17 Water Resources Control Board and the Board's predecessors. Pursuant to federal reclamation
18 law, and as provided in the water rights permits issued for the CVP, the right to the use of water
19 appropriated by Reclamation pursuant to said permits and licenses is appurtenant to the lands
20 irrigated thereby.

21 27. Under the provisions of the federal San Luis Act, Central Valley Project, (Pub.
22 Law 86-488, 74 Stat. 156) (hereinafter "San Luis Act"), construction of the San Luis Unit of the
23 CVP was authorized for the principal purpose of furnishing water for the irrigation of the federal
24 San Luis Unit service area, including the area served by Westlands.

25 28. Pursuant to federal reclamation law, Reclamation entered into long-term water
26 supply contracts to supply water to numerous water districts, and other public entities, including
27 Westlands and other Authority member agencies, for distribution to and use by farmers,
28 businesses, municipalities and other persons. However, in the period since the early 1990's,

1 average annual deliveries have been well below contract entitlement amounts. This has occurred
2 primarily as a result of ever-increasing regulation and restrictions of CVP pumping from the
3 Delta. Implementation and enforcement of the 2008 Biological Opinion would likely result in
4 further reductions in the quantity of water available for delivery to Plaintiffs in the 2009 water
5 year and subsequent years.

6 ESA REQUIREMENTS

7 29. The ESA provides for the listing of, and affords certain protections to, species
8 determined to be threatened or endangered. Threatened species are defined as “any species which
9 is likely to become an endangered species within the foreseeable future throughout all or a
10 significant portion of its range.” 16 U.S.C. § 1532(20). Endangered species are those which are
11 “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).
12 The delta smelt is currently listed as a “threatened” species.

13 30. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536, requires that each federal agency, in
14 consultation with and with assistance of the Secretary, ensure that any activity which it
15 authorizes, funds, or carries out is not likely to jeopardize the continued existence of any
16 threatened or endangered species or destroy or adversely modify any listed species’ critical
17 habitat. 16 U.S.C. § 1536(a)(2).

18 31. After conclusion of the consultation, the Secretary must issue a “biological
19 opinion” to the federal action agency in which the Secretary opines whether the action is likely to
20 jeopardize the continued existence of a listed species or adversely modify its critical habitat. The
21 biological opinion must include a summary of the information on which the opinion is based, and
22 must detail how the agency action affects the species or its critical habitat. 16 U.S.C.
23 § 1536(b)(3)(A). In formulating this opinion, the Secretary must use the best scientific and
24 commercial data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

25 32. If after consultation the Secretary concludes that taking of an endangered or
26 threatened species incidental to an agency action will not violate subsection 7(a)(2), the Secretary
27 shall issue an incidental take statement. 16 U.S.C. § 1536(b)(4). Such incidental take statements
28 allow incidental take of the endangered or threatened species notwithstanding the take

1 prohibitions of 16 U.S.C. section 1538. 16 U.S.C. § 1536(o). The Secretary has delegated his
2 responsibilities under ESA section 7 to consult with federal agencies proposing to take agency
3 action that may affect a listed species to FWS.

4 **PROCEEDINGS RELATED TO THE DELTA SMELT**

5 33. The delta smelt is a small fish that averages 2.5 inches in length, and is found
6 predominantly in the Delta and the northern parts of San Francisco Bay. Most delta smelt live
7 less than one year, but a small percentage can live two years.

8 34. The delta smelt has been listed as a threatened species since 1993. 58 Fed. Reg.
9 12,863 (March 5, 1993). The FWS later designated critical habitat for the delta smelt, which
10 includes all waters and submerged lands within the Delta. 59 Fed. Reg. 65,256 (Dec. 19, 1994).

11 35. On or about July 30, 2004, the FWS issued a biological opinion addressing Formal
12 and Early Section 7 Endangered Species Consultation on the Coordinated Operations of the
13 Central Valley Project and the State Water Project and the Operations Criteria and Plan. This was
14 followed and superseded by the FWS's February 16, 2005, issuance of its Reinitiation of Formal
15 and Early Section 7 Endangered Species Consultation on the Coordinated Operations of the
16 Central Valley Project and State Water Project and the Operational Criteria and Plan to Address
17 Potential Critical Habitat Issues. Both consultations related to Reclamation's proposed Long-
18 term Operations Criteria and Plan ("OCAP"), and both related to the effect of CVP and SWP
19 operations on the delta smelt.

20 36. The FWS's OCAP biological opinions were challenged in the case of *National*
21 *Resources Defense Council v. Kempthorne*, Case No. 05-CV-01207 OWW GSA (E.D. Cal.). In
22 May 2007, the Court issued an order finding the OCAP biological opinion was inadequate. After
23 a multi-week trial on those remedies, on August 31, 2007, the Court issued an oral decision
24 ordering specific restrictions on CVP and SWP operations until a new biological opinion could be
25 prepared. On December 14, 2007, the Court issued written findings of fact and conclusions of
26 law memorializing those restrictions.

27 37. On May 16, 2008, Reclamation submitted a biological assessment and requested
28 formal consultation on the coordinated operations of the CVP and SWP. The outcome of that

1 consultation was the 2008 Biological Opinion.

2 38. In the 2008 Biological Opinion, FWS concludes that proposed CVP and SWP
3 operations would jeopardize the continued existence of the delta smelt, and would adversely
4 modify its critical habitat.

5 39. The 2008 Biological Opinion includes a “reasonable and prudent alternative” to
6 the proposed operation of the CVP and SWP. The 2008 Biological Opinion finds that CVP and
7 SWP operations in accordance with the “reasonable and prudent alternative” would not
8 jeopardize the continued existence of the delta smelt or adversely modify its critical habitat.

9 40. The reasonable and prudent alternative includes five components. Component 1 is
10 intended to protect adult delta smelt from entrainment at the project pumps, beginning
11 December 1 through March. Under this component, FWS will specify to Reclamation and DWR
12 the allowable level of negative flows in Old and Middle Rivers (“OMR”), based on various
13 conditions. Depending upon the time period and conditions, the most negative flows allowable in
14 OMR are 1,250 cubic feet per second (“cfs”) or 5,000 cfs. Component 2 is intended to protect
15 larval and juvenile fish from entrainment at the project pumps after spawning commences. Under
16 this component, the FWS will specify to Reclamation and DWR the allowable level of negative
17 OMR flows, based on various conditions, in a range between 1,250 cfs and 5,000 cfs.
18 Component 3 is intended to improve habitat conditions for delta smelt by requiring Reclamation
19 and DWR to operate the CVP and SWP to achieve specified levels of increased Delta outflow
20 during the fall. In years succeeding years of wet or above normal precipitation and runoff,
21 Reclamation and DWR would be required to maintain the location of X2 no more eastward than
22 specified locations in the Delta. Component 4 is intended to improve habitat conditions for delta
23 smelt by requiring DWR to restore 8,000 acres of intertidal and associated subtidal habitat in the
24 Delta and Suisun Marsh. Component 5 requires Reclamation and DWR to perform monitoring
25 and reporting of information to implement and potentially revise the other components based on
26 results.

27 41. As part of the 2008 Biological Opinion, the FWS promulgated an incidental take
28 statement. This incidental take statement allows a conditional exemption from the ESA take

1 prohibition. Anticipated incidental take for adult smelt was calculated at 7.25 times the prior
2 year's Fall Mid-Water Trawl ("FMWT") Index. Anticipated incidental take of larval and juvenile
3 delta smelt was based on historical averages for the months April through June over the years
4 from 2005-2008. Term and Condition 1 of the incidental take statement provides that "[t]he
5 Service shall have the final decision on the operations" of the permanent gates to be constructed
6 and installed as part of the South Delta Improvements Program.

7 IMPACTS OF DEFENDANTS' ACTIONS

8 42. Water supplies across California are already scarce from two consecutive years of
9 dry weather, restrictions imposed by the State Water Resources Control Board in Decision 1641,
10 and restrictions on SWP and CVP operations imposed by the injunction entered in the
11 *Kemphorne* action. Entering the current water year, reservoirs were at some of the lowest levels
12 ever recorded. Precipitation so far in the current water year is below average.

13 43. On June 4, 2008, Governor Schwarzenegger declared a condition of statewide
14 drought. (Executive Order S-06-08.) On June 12, 2008, the Governor proclaimed a state of
15 drought emergency to exist within the Counties of Sacramento, San Joaquin, Stanislaus, Merced,
16 Madera, Fresno, Kings, Tulare and Kern. (Proclamation dated June 12, 2008.) On February 27,
17 2009, the Governor declared a state of drought emergency state-wide. (Proclamation dated
18 February 27, 2009.) The 2008 Biological Opinion is cited in the Governor's proclamation as one
19 of the factors leading to the current water supply emergency, based on a thirty percent reduction
20 in CVP and SWP supplies from operation of the 2008 Biological Opinion. Numerous contractors
21 and local districts within Plaintiffs' boundaries have issued calls for voluntary and mandatory
22 reductions in water use. Water agencies that serve municipal uses have delayed issuance of so-
23 called "will serve letters" or related "water supply assessments" or "written verifications" that are
24 required for certain new developments under California's water supply adequacy laws, while
25 others have questioned their ability to demonstrate sufficient water supplies under applicable
26 standards. Water Code § 10910, *et seq.*; Gov. Code § 66473.7.

27 44. The service area that will be affected by water supply losses from the 2008
28 Biological Opinion cannot easily absorb additional losses of water supply. Reclamation's

1 ongoing inability and failure to consistently deliver the full amount of CVP water to the
2 Authority's members, like Westlands, has resulted in extensive conservation efforts within
3 Westlands and other districts. As a result, gains from conservation in these areas have been
4 exhausted. Farmers must instead turn to increased pumping of groundwater, purchase of
5 supplemental water supplies from other sources, and ultimately to fallowing land. A zero percent
6 allocation of CVP water pushes farmers beyond the level to which they can adapt even in the
7 short term. Water supply shortages resulting from the 2008 Biological Opinion therefore threaten
8 numerous adverse environmental effects including, but not necessarily limited to, worsening of
9 groundwater basin overdraft, land subsidence, decreased groundwater recharge, threatened
10 violation of state-adopted basin plan water quality objectives, reductions in crop yields, reduced
11 agricultural employment, endangerment of permanent crops, and decreased air quality.

12 45. The 2008 Biological Opinion will exacerbate significant shortages in 2009, and
13 create substantial uncertainty regarding the potential availability of CVP water in the coming
14 water years.

15 46. Plaintiffs have exhausted any and all administrative remedies required by law and
16 have performed any and all conditions precedent to the filing of this action.

17 47. Plaintiffs' interests have been, are, and will continue to be directly and adversely
18 affected by the FWS Defendants' failures and unlawful actions with respect to the CVP and the
19 delta smelt. FWS Defendants are acting contrary to law as set forth in this Complaint and have
20 been, are, and will continue to subject Plaintiffs and their constituents to significant and
21 detrimental water quality and water supply impacts, and related adverse economic and
22 environmental impacts.

23 48. Plaintiffs have no plain, speedy or adequate remedy at law. In the absence of such
24 remedies, the FWS Defendants' continued violation of the ESA as it applies to the delta smelt
25 will remain in effect, contrary to federal law, and the Plaintiffs will be irreparably injured. The
26 2008 Biological Opinion will likely prevent the CVP from pumping otherwise available water at
27 the Delta pumping plants, and such water will be irrevocably and irretrievably lost and
28 unavailable to Plaintiffs for allocation in the 2008-2009 water year and water years thereafter.

1 49. The APA provides: “agency action made reviewable by statute and final agency
2 action for which there is no other adequate remedy in a court are subject to judicial review.” 5
3 U.S.C. § 704.

4 50. The FWS Defendants’ issuance of the 2008 Biological Opinion is a final agency
5 action, and the Plaintiffs have no other adequate remedy at law. Thus, the FWS Defendants’
6 action is reviewable pursuant to the APA. Section 706(2) of the APA provides that a reviewing
7 court shall “hold unlawful and set aside agency action, findings, and conclusions found to be (A)
8 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (C)
9 in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C.
10 § 706(2). In the 2008 Biological Opinion, the FWS Defendants failed to consider important
11 factors, offered explanations that are contrary to the best available data, failed to articulate a
12 rational connection between the data and their conclusions, and acted in a manner that was
13 contrary to ESA section 7 and the consultation regulations. The actions and omissions of the
14 FWS Defendants with respect to the 2008 Biological Opinion alleged in this complaint were
15 arbitrary, capricious, an abuse of discretion, not in accordance with law, and were in excess of the
16 FWS Defendants’ jurisdiction and authority.

17 51. The Reclamation Defendants operate the CVP, and provide water to the
18 Authority’s member agencies pursuant to contract. The 2008 Biological Opinion has and unless
19 FWS Defendants are restrained will continue to unlawfully constrain CVP operations under
20 supposed authority of the ESA. The Reclamation Defendants are named as defendants to this
21 action so that the Court may provide an adequate remedy to the Plaintiffs regarding CVP
22 operations, as provided for by the APA.

23 **CLAIMS FOR RELIEF**

24 **FIRST CLAIM FOR RELIEF**

25 **(The 2008 Biological Opinion Fails To Use The Best Available Scientific And Commercial
26 Data, And Is Arbitrary, Capricious, And Contrary To Law)**

27 52. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every
28 allegation contained in paragraphs 1 through 51, inclusive, of this Complaint and further allege as

1 follows.

2 53. Section 7 of the ESA, 16 U.S.C. § 1536 (“Section 7”), requires the Secretary to
3 consult with federal agencies to assist federal agencies in ensuring that agency actions are “not
4 likely to jeopardize the continued existence of any endangered or threatened species or result in
5 the destruction or adverse modification of habitat of such species, which is determined by the
6 Secretary . . . to be critical.” 16 U.S.C. § 1536(a)(2). Upon completion of a Section 7
7 consultation, the Secretary must provide the federal action agency with a “written statement
8 setting forth the Secretary’s opinion, and a summary of the information on which the opinion is
9 based, detailing how the agency action affects the species or its critical habitat.” 16 U.S.C.
10 § 1536(b)(3)(A). In fulfilling these requirements, Section 7 mandates that “each agency shall use
11 the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). Section 7’s mandate
12 to use the “best scientific and commercial data available” applies to FWS Defendants’ preparation
13 and issuance of the 2008 Biological Opinion.

14 54. There are several official documents that interpret and inform the requirements of
15 FWS Defendants’ mandate under Section 7 to use the “best scientific and commercial data
16 available.”

17 55. On July 1, 1994, FWS and the National Marine Fisheries Service (“NMFS”)
18 published an official policy statement in the Federal Register. This policy statement was titled
19 “Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on
20 Information Standards Under the Endangered Species Act.” 59 Fed. Reg. 34271-01; 1994 WL
21 288350. The purpose of this “interagency policy [is] to provide criteria, establish procedures, and
22 provide guidance to ensure that decisions made by the Services under the authority of the . . .
23 [ESA] . . . represent the best scientific and commercial data available.” 59 Fed. Reg. 34271-01;
24 1994 WL 288350 (“FWS Information Standards Policy”). The FWS Information Standards
25 Policy “applies Servicewide for all species of fish and wildlife and plants, . . . and for . . .
26 interagency consultation.” (*Id.*) Therefore, the FWS Information Standards Policy applies to the
27 2008 Biological Opinion.

28 56. The FWS Information Standards Policy states that to “assure the quality of

1 biological, ecological, and other information that is used by the Services in their implementation
2 of the Act [ESA] it is the policy of the Services: To require biologists to evaluate all scientific and
3 other information that will be used . . . to prepare biological opinions, incidental take statements,
4 and biological assessments.” (*Id.*) This review “will be conducted to ensure that any information
5 used by the Services to implement the Act [ESA] is reliable, credible, and represents the best
6 scientific and commercial data available.” (*Id.*)

7 57. The FWS Information Standards Policy states that it is the policy of the FWS
8 “[t]o gather and impartially evaluate biological, ecological, and other information that disputes
9 official positions, decisions, and actions proposed or taken by the Services during their
10 implementation of the Act.” (*Id.*)

11 58. The FWS Information Standards Policy states that it is the policy of the FWS “[t]o
12 require biologists to document their evaluation of information that supports or does not support a
13 position being proposed as an official agency position on an . . . interagency consultation, or
14 permitting action.” (*Id.*) Further, “[t]hese evaluations will rely on the best available
15 comprehensive, technical information regarding the status and habitat requirements for a species
16 throughout its range.” (*Id.*)

17 59. On February 22, 2002, pursuant to Section 515 of the Treasury and General
18 Government Appropriations Act of 2001 (P.L. 106-554, HR 5658), referred to as the Information
19 Quality Act, the Office of Management and Budget (“OMB”) directed Federal agencies to issue
20 and implement guidelines to ensure and maximize the quality, objectivity, utility, and integrity of
21 government information disseminated to the public. 67 Fed. Reg. 8452. In response to OMB’s
22 direction, the Department of the Interior (“DOI”) issued a document titled “Information Quality
23 Guidelines Pursuant To Section 515 Of The Treasury And General Government Appropriations
24 Act For Fiscal Year 2001.” 67 Fed. Reg. 36642 (“DOI Information Quality Guidelines”).
25 Interior issued its Information Quality Guidelines “in order to: 1) ensure high quality information
26 is generated, used, and disseminated at the Department of the Interior; and 2) comply with this
27 direction.” (*Id.*) The DOI Information Quality Guidelines are “the basis for Departmental
28 policy.” (*Id.*)

1 60. The DOI Information Quality Guidelines state that “all information disseminated
2 by the Department must comply with basic standards of quality to ensure and maximize its
3 objectivity, utility, and integrity,” and that “[t]he Department’s methods for producing quality
4 information will be made transparent, to the maximum extent practicable, through accurate
5 documentation, use of appropriate internal and external review procedures, consultation with
6 experts and users, and verification of its quality.” (*Id.*) They further state that “[i]nformation
7 released by the Department will be developed only from reliable data sources based on accepted
8 practices and policies, utilizing accepted methods for information collection and verification,”
9 and “[i]t will be reproducible to the extent possible.” (*Id.*)

10 61. The DOI Information Quality Guidelines require that “[a]nalytic results shall
11 generally require sufficient transparency about data and methodology that an independent
12 reanalysis could be undertaken by a qualified member of the public resulting in substantially the
13 same results.” (*Id.*) They further require that “[i]n situations where the public will not be
14 provided full access to the data or methodology, the Department shall apply and document
15 especially rigorous robustness checks. In all cases, Departmental guidelines require a disclosure
16 of the specific data sources used and the specific quantitative methods and assumptions
17 employed.” (*Id.*)

18 62. The DOI Information Quality Guidelines explain that “[o]bjectivity includes
19 whether the disseminated information is being presented in an accurate, clear, complete, and
20 unbiased manner. This involves whether the information is presented within a proper context.
21 Sometimes, in disseminating certain types of information to the public, other information must
22 also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation.”
23 (*Id.*) They further state, “[w]here appropriate, transparent documentation, and error sources
24 affecting the data quality should be identified and disclosed to users.” (*Id.*)

25 63. The DOI Information Quality Guidelines specifically require that “[i]nfluential
26 information will be produced with a high degree of transparency about data and methods.” (*Id.*)
27 They further state that “[i]n the dissemination of influential scientific information about risks [to
28 the environment], ensure that the presentation of information is as comprehensive as possible,

1 informative, and understandable.” (*Id.*) The 2008 Biological Opinion is and contains such
2 influential information to which these heightened standards apply.

3 64. Pursuant to the Information Quality Act and OMB’s directive that Federal
4 agencies issue and implement guidelines to ensure and maximize the quality, objectivity, utility,
5 and integrity of government information disseminated to the public, the FWS published its own
6 guidelines “for ensuring the quality, objectivity, utility, and integrity of information disseminated
7 by FWS.” (FWS Information Quality Guidelines.) The FWS Information Quality Guidelines
8 “establish FWS policy and procedures for reviewing, substantiating, and correcting the quality of
9 information it disseminates to the public,” and they “apply to all FWS offices that disseminate
10 information to the public.” (*Id.*)

11 65. The FWS Information Quality Guidelines “apply to all information disseminated
12 by the agency to the public if it represents an official view of the FWS or DOI . . . [t]his also
13 includes information from an outside party that is disseminated by the agency in a manner that a
14 reasonable person would likely infer agency endorsement or agreement with the information.”
15 The FWS Information Quality Guidelines apply to the 2008 Biological Opinion.

16 66. The FWS Information Quality Guidelines state that FWS adheres to the OMB
17 Memorandum (M-05-030) “Final Quality Bulletin for Peer Review” dated December 16, 2004, to
18 ensure that influential scientific information disseminated to the public is subject to peer review.

19 67. The FWS Information Quality Guidelines state that “influential information means
20 that FWS can reasonably determine that dissemination of the information will have or does have a
21 clear and substantial impact on important public or private sector decisions.” They further state
22 that “[a]s a general rule, FWS considers an impact clear and substantial when a specific piece of
23 information or body of information is a principal basis for a FWS position. If a FWS position
24 would lose its fundamental scientific, financial or statistical underpinnings if the information was
25 absent, then this information is the principal basis for the position, and its presence has a clear and
26 substantial impact. Finally, the clear and substantial impact must be on an important public
27 policy or private sector decision.”

28 68. The FWS Information Quality Guidelines state that “[t]he preparer of a highly

1 influential assessment or of influential information will document the strengths and weaknesses
2 of the data underlying the assessment/information so that the reader will understand the context
3 for the FWS decision. . . . The documentation may be done in a narrative that includes a
4 complete literature cited section, and an assessment of the strengths and weakness of the
5 information used for advising the decision at hand.” (*Id.*)

6 69. The 2008 Biological Opinion is “influential information” within the DOI
7 Information Quality Guidelines and FWS Information Quality Guidelines because it will have a
8 “clear and substantial impact on important private or public sector decisions.” Accordingly, the
9 DOI’s and FWS’s higher quality standards for influential information apply to the 2008
10 Biological Opinion.

11 70. The FWS has an official Scientific Code of Professional Conduct applicable to all
12 FWS employees when they “apply the information resulting from scientific activities.” (“FWS
13 Scientific Code of Conduct”.) The FWS Scientific Code of Conduct applies to the FWS
14 Defendants’ promulgation of the 2008 Biological Opinion.

15 71. The FWS Scientific Code of Conduct requires that employees “[c]omply fully with
16 applicable laws, policies, and procedures regarding the development, conduct, application, and
17 disclosure of science.” (FWS Scientific Code of Conduct section 7.6(B).) The FWS Scientific
18 Code of Conduct also requires employees to “[a]cknowledge the ideas and work of others, [and]
19 take care to avoid misrepresentation.” (*Id.* at 7.6(E).) It also requires employees to “[a]dvocate
20 the use of rigorous scientific methodology, thorough analysis, and logical inference to promote
21 transparency and produce reliable information for management decisions affecting fish and
22 wildlife and their habitats” and to “differentiate among facts, scientific principles, mathematical
23 or statistical estimates based on data, hypotheses, professional judgments, and personal opinions
24 to the extent possible and practicable in reporting the results of scientific activities to others,
25 including scientists, decision makers, and the public.”

26 72. The FWS Scientific Code of Conduct requires employees to “[c]onsider and
27 acknowledge uncertainty in decisionmaking,” and “[b]e forthright and honest about the scientific
28 foundation used for possible policy options and the uncertainties associated with any resulting

1 prediction of consequences for fish and wildlife and their habitats.” (*Id.* at 7.9(B-C).)

2 73. FWS Defendants promulgated the 2008 Biological Opinion in a manner that is
3 arbitrary, capricious and not in accordance with law, in excess of their statutory jurisdiction and
4 authority, and in violation of the APA, because FWS Defendants failed to base their decisions on
5 the best scientific and commercial data available, and failed to follow the applicable FWS
6 Information Standards Policy, DOI Information Quality Guidelines, FWS Information Quality
7 Guidelines, and FWS Scientific Code of Conduct.

8 74. The FWS Defendants failed to comply with the foregoing standards in the 2008
9 Biological Opinion. The 2008 Biological Opinion, including but not limited to the effects
10 analysis, jeopardy and adverse modification determinations, reasonable and prudent measures,
11 and incidental take statement, violated Section 7’s “best scientific and commercial data available”
12 mandate and the policies and guidelines interpreting this mandate in at least the following ways:

13 (a) FWS Defendants did not conduct an objective analysis but instead
14 displayed a pervasive bias against the CVP and SWP, which caused Defendants to exclude and
15 dismiss credible analyses whose results indicate that major adverse effects on the population
16 dynamics of delta smelt are caused by factors other than the operations of the CVP and SWP, and
17 involve relationships and factors other than those highlighted in the 2008 Biological Opinion;

18 (b) FWS Defendants arbitrarily selected the data they did rely upon and
19 disregarded relevant data without explanation, including analyses and comments provided by a
20 peer review panel and by the Authority and State Water Contractors submitted to FWS
21 Defendants before promulgation of the final 2008 Biological Opinion;

22 (c) FWS Defendants based their analyses on data that was incorrect,
23 incomplete, or otherwise of poor quality, including analyses that were not statistically significant
24 and that suffered from invalid assumptions, improper transformation of data, and improper
25 exclusion of valid data points;

26 (d) FWS Defendants reached conclusions that are internally inconsistent,
27 including relying upon particular reports and analyses as sufficient to support certain conclusions
28 and assumptions in the 2008 Biological Opinion, but ignoring or discounting other findings in

1 those same reports and analyses that refute or cast doubt upon the conclusions and assumptions
2 the FWS Defendants relied upon in the 2008 Biological Opinion;

3 (e) FWS Defendants failed to disclose all the data, analyses, or reports that
4 they relied upon, and relied on key reports and analyses that were and are unavailable for review;

5 (f) FWS Defendants failed to critically analyze and assess the quality (e.g.,
6 accuracy, objectivity, reproducibility, and robustness) of the data and reports they relied upon;

7 (g) FWS Defendants relied on speculative and conclusory determinations
8 without providing any foundation linking such determinations to actual data or analyses;

9 (h) FWS Defendants failed to properly identify and discuss the numerous
10 assumptions upon which they based their calculations and determinations, and failed to consider
11 or discuss alternative assumptions that are equally valid and supportable;

12 (i) FWS Defendants failed to identify and discuss the risk to the quality and
13 accuracy of the 2008 Biological Opinion as a result of their use of one or more unsubstantiated
14 assumptions to reach certain conclusions or make certain calculations;

15 (j) FWS Defendants failed to discuss and address numerous research results
16 and data that conflict with and cast doubt upon the assumptions made, the reports relied upon, and
17 the ultimate determinations made in the 2008 Biological Opinion regarding the major driving
18 factors in delta smelt population dynamics;

19 (k) FWS Defendants failed to disclose numerous research results and data
20 known to them indicating that other factors, not the operations of the CVP and SWP, are the
21 major causes of population-level effects to delta smelt;

22 (l) FWS Defendants improperly relied upon loose correlations between certain
23 factors and delta smelt population abundance while at the same time ignoring much stronger
24 linear and multiple-factor correlations between other factors and delta smelt population
25 abundance; and

26 (m) FWS Defendants ignored or failed to respond to comments critiquing and
27 questioning the analyses, conclusions, and recommendations in the 2008 Biological Opinion.

28 75. FWS Defendants' failures to use the best scientific and commercial data available,

1 as listed in the preceding paragraph, include, but are not limited to, the following specific
2 examples:

3 (a) FWS Defendants failed to support, and instead presumed without basis,
4 that a significant relationship exists between entrainment at the CVP and SWP pumps and the
5 following year's FMWT index of delta smelt;

6 (b) FWS Defendants referenced analyses that concluded there were no
7 important, statistically significant, year-to-year relationships between entrainment and subsequent
8 spawning abundance, then dismissed those analyses with an argument that entrainment was
9 nonetheless "sporadically significant," without explaining how sporadically significant effects on
10 a fish with a one-year life cycle would not be detected in statistical analyses of year-to-year
11 effects or how, in the year with highest "sporadically significant" effects, 2003, delta smelt
12 abundance actually increased by 50%. FWS Defendants also rely on the Kimmerer 2008 article
13 that has several mistakes and misinterpretations that should reasonably have been detected had
14 FWS Defendants carried out a review of that article and the underlying data consistent with their
15 own data quality guidelines. For example, correcting for calculation errors, Kimmerer's
16 estimated adult proportional entrainment in 2003 should have been 6%, not 22%;

17 (c) FWS Defendants followed up their flawed presumption that entrainment is
18 significant to abundance by imposing restrictions on OMR flows, and based those restrictions on
19 an invalid regression curve, and without considering all the data and the presence of other factors
20 and variables that render the purported relationship statistically insignificant;

21 (d) FWS Defendants failed to consider or explain voluminous data showing:
22 (1) the relationship between fall X2 and subsequent summer abundance was driven by a single
23 year's data point, and (2) a much closer relationship between prey density and water temperature
24 on the one hand and subsequent FMWT abundance of delta smelt on the other hand;

25 (e) FWS Defendants invalidly relied upon the location of X2 in fall as a
26 surrogate for delta smelt critical habitat and an indicator of adverse modification of critical habitat
27 that would affect delta smelt population abundance. FWS Defendants failed to respond to data
28 submitted by Plaintiffs indicating that changes in fall X2 could not have been associated with

1 recent abundance declines in delta smelt, as well as analyses showing that the purported
2 relationship of fall X2 to subsequent summer abundance was driven by a single data point from
3 an unusual year. FWS Defendants also failed to respond to their own peer review's critique and
4 substantive concerns with the 2008 Biological Opinion's use of the location of X2 in the fall as a
5 regulatory measure;

6 (f) FWS Defendants ignored that the best scientific and commercial data
7 available indicates that there are much more significant relationships between other factors (such
8 as prey density, ammonia, and water temperature) and delta smelt population abundance as
9 compared to the relationship between CVP operations and delta smelt population abundance;

10 (g) FWS Defendants failed to provide any scientific data or analysis to support
11 the 2008 Biological Opinion's claim that CVP or SWP pumping is causally related to adverse
12 effects caused by other stressors including, but not limited to: (1) toxics, (2) in-Delta diversion
13 losses, or (3) predation; and

14 (h) FWS Defendants failed to support through the use of the best scientific and
15 commercial data available the incidental take formula of 7.25 times prior year's FMWT index.

16 76. FWS Defendants' failure to utilize the best scientific and commercial data
17 available in promulgating the 2008 Biological Opinion violates Section 7 of the ESA, violates the
18 consultation regulations, and is contrary to other applicable policies and guidelines informing and
19 interpreting the best available scientific data standard. The 2008 Biological Opinion is therefore
20 agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law.
21 These failures resulted in the 2008 Biological Opinion making erroneous determinations and
22 reaching unsupported conclusions that caused, among other things, FWS Defendants to impose
23 excessive and unlawful regulation on the joint operations of the CVP and SWP.

24 77. A judicial declaration is necessary and appropriate at this time under the
25 circumstances in order that the Plaintiffs may ascertain their rights and the Defendants'
26 obligations pursuant to the ESA and the ESA regulations. Unless such a declaration is issued, the
27 Plaintiffs will suffer a loss and/or impairment of their rights and property in violation of the law,
28 and FWS Defendants will continue to almost singularly focus on regulation of the CVP and SWP

1 as the key to delta smelt survival and recovery, and hence fail to investigate or address the actual
2 causes of its decline.

3 78. Plaintiffs have no plain, speedy and adequate remedy in the course of law, and
4 absent immediate judicial intervention, Plaintiffs will suffer irreparable injury.

5 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

6 **SECOND CLAIM FOR RELIEF**

7 **(The 2008 Biological Opinion’s Analysis Of The Effects Of CVP Operations And Its
8 Conclusion That CVP Operations Will Jeopardize the Delta Smelt And Adversely Modify
9 Its Critical Habitat Are Arbitrary, Capricious, And Contrary To Law)**

9 79. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every
10 allegation contained in the foregoing paragraphs of this Complaint and further allege as follows.

11 80. The analysis of the effects of proposed CVP operations in the 2008 Biological
12 Opinion, and the conclusions in the 2008 Biological Opinion that proposed CVP operations will
13 jeopardize the continued existence of the delta smelt and adversely modify its critical habitat, are
14 not based on or consistent with the best available scientific data. These analyses and conclusions
15 in the 2008 Biological Opinion are therefore arbitrary, capricious, an abuse of discretion, and not
16 in accordance with law.

17 81. The analysis of the effects of proposed CVP operations in the 2008 Biological
18 Opinion fails to determine and identify the effects of proposed CVP and SWP operations in the
19 manner required by the ESA and the consultation regulations. Under the consultation regulations,
20 the effects of the federal agency action are defined as “the direct and indirect effects of an action
21 on the species or critical habitat, together with the effects of other activities that are interrelated or
22 interdependent with that action, that will be added to the environmental baseline.” 50 C.F.R.
23 § 402.02. The environmental baseline “includes the past and present impacts of all Federal, State,
24 or private actions in the action area, the anticipated impacts of all proposed Federal projects in the
25 action area that have already undergone formal or early consultation, and the impact of State or
26 private actions which are contemporaneous with the consultation in process.” *Id.* “Direct effects
27 are the immediate effects of the action and are not dependent on the occurrence of any additional
28 intervening actions for the impact to species or critical habitat to occur. Indirect effects are those

1 for which the proposed action is an essential cause, and that are later in time, but still are
2 reasonably certain to occur.” *Id.*

3 82. In the 2008 Biological Opinion, the FWS Defendants failed to properly analyze,
4 determine or describe the environmental baseline to be used to determine the effects of proposed
5 CVP and SWP operations. Among other failures, the FWS Defendants used a baseline that
6 reflected past conditions, in which water supply demands on the CVP and SWP were lower, and
7 when both project-related and non-project related conditions were substantially different, instead
8 of a baseline reflecting current operations and conditions. By failing to properly define the
9 environmental baseline based on current conditions, the 2008 Biological Opinion exaggerated the
10 changes and incremental impact that would result from proposed CVP operations.

11 83. ESA section 7(a)(2) applies only to discretionary federal agency actions. 50
12 C.F.R. § 402.03. In order to properly determine whether proposed CVP operations would violate
13 the prohibition in section 7(a)(2) against causing jeopardy or adverse modification, the FWS
14 Defendants therefore were required to identify and describe baseline conditions and the effects of
15 those conditions, identify and describe nondiscretionary CVP operations and the effects of those
16 operations, and identify and describe discretionary CVP operations and the effects of those
17 operations. In the 2008 Biological Opinion, the FWS Defendants failed to identify, describe and
18 distinguish the effects of baseline conditions, nondiscretionary CVP operations, and proposed
19 discretionary CVP operations. Because FWS Defendants failed to do so, the 2008 Biological
20 Opinion fails to properly and lawfully identify and assess the effects of the CVP that are subject
21 to ESA section 7.

22 84. In the 2008 Biological Opinion, the FWS Defendants failed to properly and
23 lawfully identify, describe, analyze, or determine the incremental effects of proposed
24 discretionary CVP operations, that is, those that would be “added to” the environmental baseline
25 by proposed discretionary operations. Among other things, the 2008 Biological Opinion failed to
26 identify, describe, analyze or determine what conditions or impacts delta smelt would experience
27 absent proposed discretionary CVP operations, and failed to identify, describe and determine the
28 increment of additional impacts to delta smelt that would be caused by proposed discretionary

1 CVP operations and added to the environmental baseline. In the 2008 Biological Opinion, the
2 FWS Defendants further erred in attributing to the CVP the effects of other stressors on the
3 species, such as lack of food, pollution and invasive species, for which the CVP is not an essential
4 cause, and that are not within the scope of indirect effects properly deemed to have been caused
5 by proposed CVP operations, thereby further exaggerating the impacts of proposed CVP
6 operations.

7 85. In the 2008 Biological Opinion, the FWS Defendants failed to properly and
8 lawfully determine whether proposed CVP operations would be the cause of jeopardy to the delta
9 smelt or would cause the adverse modification of its critical habitat. In the 2008 Biological
10 Opinion, the FWS Defendants should have identified and defined the current environmental
11 baseline, and which CVP operations are discretionary. Then the FWS Defendants should have
12 determined whether, given – (1) the current status of the species, (2) the existing environmental
13 baseline; and (3) the expected cumulative effects of future non-federal activities – the expected
14 effects of future proposed, discretionary CVP operations that would be added to the
15 environmental baseline would jeopardize to the continued existence of the delta smelt, or would
16 cause adverse modification of its critical habitat. The FWS Defendants failed to do this analysis.
17 The FWS Defendants did not properly and clearly define the current environmental baseline, did
18 not identify which operations of the CVP are discretionary, did not distinguish between the
19 effects of proposed discretionary CVP operations and other factors, and did not determine what
20 effects beyond the effects in the environmental baseline and cumulative effects would be added
21 by future discretionary CVP operations. Accordingly, in the 2008 Biological Opinion the FWS
22 Defendants could not and did not determine what additional, discrete effects proposed,
23 discretionary CVP operations would have upon the delta smelt, and hence had no basis upon
24 which to lawfully determine whether proposed CVP operations would be sufficient to appreciably
25 diminish the likelihood of the delta smelt’s survival or recovery, or appreciably diminish the
26 value of critical habitat for survival or recovery.

27 86. Instead of determining whether the added effects of proposed, discretionary CVP
28 operations would cause jeopardy or adverse modification of critical habitat, the FWS Defendants

1 employed an “analytical framework” that is contrary to ESA section 7 and the consultation
2 regulations. In the 2008 Biological Opinion, the FWS Defendants claimed to identify what
3 conditions or outcomes the delta smelt “needs” within its range for “survival and recovery.” The
4 FWS Defendants then found jeopardy and adverse modification of critical habitat from proposed
5 CVP operations, based on their expectation that future conditions in the range of the delta smelt,
6 including conditions and effects resulting from baseline stressors and non-federal actions, would
7 not likely be consistent with the list of needs of the delta smelt for survival and recovery. This
8 analysis was flawed and contrary to law, because among other failings it omitted the required
9 analysis of baseline conditions, causation and incremental effect from discretionary agency
10 action, as alleged above. The FWS Defendants failed to identify the effects of proposed
11 discretionary CVP operations that would be added to the baseline conditions, and failed to
12 determine whether that increment of additional effect would cause jeopardy to the delta smelt or
13 adverse modification of its critical habitat. As alleged below, given this failure, there is no basis
14 for the FWS Defendants’ conclusion that the reasonable and prudent alternative to proposed CVP
15 operations identified in the 2008 Biological Opinion is necessary to comply with the requirement
16 in ESA section 7(a)(2) to avoid jeopardy or adverse modification of critical habitat from CVP
17 operations.

18 87. The effects analysis and the conclusions in the 2008 Biological Opinion that
19 proposed CVP operations would jeopardize the continued existence of the delta smelt and would
20 adversely modify its critical habitat are arbitrary, capricious, an abuse of discretion, and not in
21 accordance with law.

22 88. A judicial declaration is necessary and appropriate at this time under the
23 circumstances in order that the Plaintiffs may ascertain their rights and the Defendants’
24 obligations pursuant to the ESA and the ESA regulations. Unless such a declaration is issued, the
25 Plaintiffs will suffer a loss and/or impairment of their rights and property in violation of the law.

26 89. Plaintiffs have no plain, speedy and adequate remedy in the course of law, and
27 absent immediate judicial intervention, Plaintiffs will suffer irreparable injury.

28 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

1 **THIRD CLAIM FOR RELIEF**

2 **(The 2008 Biological Opinion’s Reasonable And Prudent Alternative Is Arbitrary,**
3 **Capricious, And Contrary To Law)**

4 90. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every
5 allegation contained in the foregoing paragraphs of this Complaint, and further allege as follows.

6 91. Under ESA section 7(b)(3)(A), when the Secretary finds that a proposed agency
7 action would jeopardize the continued existence of a species, or adversely modify its critical
8 habitat, then the Secretary must suggest any reasonable and prudent alternatives that the action
9 agency can implement that he believes would not jeopardize the continued existence of the
10 species or adversely modify its critical habitat. The consultation regulations define “reasonable
11 and prudent alternatives” as “. . . alternative actions . . . that can be implemented in a manner
12 consistent with the intended purpose of the action, that can be implemented consistent with the
13 scope and purpose of the Federal agency’s legal authority and jurisdiction, that is economically
14 and technologically feasible. . . .” 50 C.F.R. § 402.02. Additionally, the consultation regulations
15 require that FWS formulate any reasonable and prudent alternatives based upon the best scientific
16 and commercial data available.

17 92. The reasonable and prudent alternative in the 2008 Biological Opinion is not based
18 upon, and is contrary to, the best available scientific data. The reasonable and prudent alternative
19 in the 2008 Biological Opinion is based on the flawed and unsubstantiated premise that
20 entrainment at the project pumps has population level effects, and a flawed conclusion based on
21 that premise that the measures in the alternative are necessary to avoid jeopardy or adverse
22 modification of critical habitat. The reasonable and prudent alternative in the 2008 Biological
23 Opinion is not based upon a proper and lawful analysis of the effects of discretionary proposed
24 CVP operations that would be added to the environmental baseline, or upon a proper analysis of
25 whether the effects of discretionary proposed CVP operations would likely jeopardize the
26 continued existence of the delta smelt and adversely modify its critical habitat. The 2008
27 Biological Opinion further fails to explain how and why the reasonable and prudent alternative it
28 identifies will avoid the jeopardy and adverse modification of critical habitat that supposedly

1 would otherwise be caused by discretionary CVP operations. The reasonable and prudent
2 alternative in the 2008 Biological Opinion is therefore arbitrary, capricious, an abuse of
3 discretion, and not in accordance with law.

4 93. The 2008 Biological Opinion fails to make findings or undertake any analysis of
5 whether the reasonable and prudent alternative can be implemented in a manner consistent with
6 the scope of Reclamation's legal authority and jurisdiction. For the reasons described in this
7 Complaint, the reasonable and prudent alternative is contrary to the ESA. According to section 8
8 of the Reclamation Act of 1902, "[n]othing in this Act shall be construed as affecting or intended
9 to affect or to in any way interfere with the laws of any State or territory relating to the control,
10 appropriation, use, or distribution of water used in irrigation, or any vested right acquired
11 hereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall
12 proceed in conformity with such laws, and nothing herein shall in any way affect any right of the
13 State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or
14 from any interstate stream or the waters thereof." (Codified in part at 43 U.S.C. § 383.) One
15 such state law is Article 10, section 2 of the California Constitution. CVP operations to meet the
16 requirements of the reasonable and prudent alternative are contrary to Reclamation's legal
17 authority and jurisdiction because those operations would require the substantial loss of beneficial
18 use of CVP water supplies, while there is no substantial scientific basis to suggest that the
19 operations will likely result in increased delta smelt populations. This use of water is therefore
20 contrary to Reclamation's obligation under Article 10, section 2 of the California Constitution to
21 operate the CVP in a manner that is reasonable and does not waste water.

22 94. In the 2008 Biological Opinion, the FWS Defendants failed to consider important
23 factors relevant to the determination of a reasonable and prudent alternative. The 2008 Biological
24 Opinion fails to make the necessary findings or undertake necessary analysis of whether its
25 reasonable and prudent alternative "can be implemented in a manner consistent with the intended
26 purpose of the action" including:

27 (a) The 2008 Biological Opinion fails to analyze the impacts of the reasonable
28 and prudent alternative on CVP operations, including particularly the CVP's ability to serve the

1 purpose of providing water supply; and

2 (b) The 2008 Biological Opinion makes no attempt to determine how the
3 impacts to CVP operations and resulting loss of water supply compare or relate to the expected
4 benefits to the delta smelt population; and

5 (c) The 2008 Biological Opinion does not consider whether there are less
6 onerous alternatives that will provide comparable likely benefit to delta smelt while better
7 maintaining the CVP's water supply purpose.

8 95. The 2008 Biological Opinion fails to make findings or undertake any analysis of
9 whether its reasonable and prudent alternative is "economically or technologically feasible"
10 including:

11 (a) The 2008 Biological Opinion fails to contain findings or analysis of the
12 economic cost of undertaking the reasonable and prudent alternative or whether that cost is
13 "feasible" for the implementing agencies to undertake;

14 (b) The 2008 Biological Opinion fails to make findings or contain any analysis
15 of whether it is technologically feasible for the CVP/SWP to protect delta smelt and also satisfy
16 its water supply obligations to its contractors; and

17 (c) The 2008 Biological Opinion fails to contain findings or analysis of the
18 economic impact of the reasonable and prudent alternative within the CVP service area including
19 whether the economic impact renders the reasonable and prudent alternative economically
20 infeasible or whether more economically feasible, less costly alternatives exist that would prevent
21 jeopardy with less economic impact.

22 96. The 2008 Biological Opinion, including its reasonable and prudent alternative, is
23 arbitrary, capricious, and an abuse of discretion, and is in excess of statutory jurisdiction,
24 authority or limitations, or short of right in that it fails to comply with the ESA and the
25 regulations promulgated pursuant the ESA by failing to consider the best available science and
26 commercial data, failing to analyze and summarize the basis for its conclusions, failing consider
27 the purpose of the action, failing to consider the agency's legal authority and jurisdiction and
28 failing to consider and balance the economic and technological impacts and feasibility of its

1 proposed reasonable and prudent alternative.

2 97. A judicial declaration is necessary and appropriate at this time under the
3 circumstances in order that the Plaintiffs may ascertain their rights and the Defendants'
4 obligations pursuant to the ESA and the ESA regulations. Unless such a declaration is issued, the
5 Plaintiffs will suffer a loss and/or impairment of their rights and property in violation of the law.

6 98. Plaintiffs have no plain, speedy and adequate remedy in the course of law, and
7 absent immediate judicial intervention, Plaintiffs will suffer irreparable injury.

8 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

9 **FOURTH CLAIM FOR RELIEF**

10 **(Term and Condition 1 In The 2008 Biological Opinion's Incidental Take Statement Is**
11 **Arbitrary, Capricious, And Contrary To Law)**

12 99. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every
13 allegation contained in the foregoing paragraphs of this Complaint, and further allege as follows.

14 100. ESA section 7(b)(4) requires that a biological opinion include an incidental take
15 statement that identifies the level of take expected to result from a federal agency action. In the
16 incidental take statement, FWS must also identify reasonable and prudent measures to minimize
17 take, and terms and conditions to implement those measures. The regulations further mandate
18 that reasonable and prudent measures, along with the terms and conditions that implement them,
19 cannot alter the basic design, location, scope, duration, or timing of the action and may involve
20 only minor changes. 50 C.F.R. § 402.14(i)(2).

21 101. Term and Condition 1 of the incidental take statement in the 2008 Biological
22 Opinion provides that "[t]he Service shall have the final decision on the operation of the"
23 permanent gates to be constructed and installed as part of the South Delta Improvements
24 Program. Term and Condition 1 in the incidental take statement violates the consultation
25 regulations because the FWS Defendants claim the authority to dictate the operations of the
26 permanent gates in the South Delta without regard to whether the changes required thereby would
27 be major changes prohibited by law.

28 102. A judicial declaration is necessary and appropriate at this time under the

1 circumstances in order that the Plaintiffs may ascertain their rights and the Defendants’
2 obligations pursuant to the ESA and the ESA regulations. Unless such a declaration is issued, the
3 Plaintiffs will suffer a loss and/or impairment of their rights and property in violation of the law.

4 103. Plaintiffs have no plain, speedy and adequate remedy in the course of law, and
5 absent immediate judicial intervention, Plaintiffs will suffer irreparable injury.

6 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

7 **FIFTH CLAIM FOR RELIEF**

8 **(Failure to Comply with NEPA Prior To The Preparation And Issuance Of The 2008
9 Biological Opinion)**

10 104. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every
11 allegation contained in the foregoing paragraphs of this Complaint and further allege as follows.

12 105. The FWS is a federal agency subject to the National Environmental Policy Act
13 (“NEPA”), 42 U.S.C. section 4321, *et seq.* The 2008 Biological Opinion constituted a major
14 federal action significantly affecting the quality of the human environment.

15 106. The reduction in water supply to Authority member agencies, including
16 Westlands, resulting from implementation of the 2008 Biological Opinion, including its
17 reasonable and prudent alternative and incidental take statement, will have significant adverse
18 environmental effects on the quality of the human environment, including those described and
19 alleged in this Complaint, and requires a substantial change to CVP and SWP operations outside
20 the range of historical project operations.

21 107. There is no exemption or exclusion from NEPA applicable to the FWS
22 Defendants’ actions under the ESA, including preparation and issuance of the 2008 Biological
23 Opinion. In violation of NEPA, the FWS Defendants did not prepare an environmental impact
24 statement, finding of no significant impact, environmental assessment or exemption prior to
25 adopting and releasing the 2008 Biological Opinion.

26 108. A judicial declaration is necessary and appropriate at this time under the
27 circumstances in order that the Plaintiffs may ascertain their rights and the Defendants’
28 obligations pursuant to the ESA and NEPA. Unless such a declaration is issued, the Plaintiffs

1 will suffer a loss and/or impairment of their rights and property in violation of the law.

2 109. Plaintiffs have no plain, speedy and adequate remedy in the course of law, and
3 absent immediate judicial intervention, Plaintiffs will suffer irreparable injury.

4 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiffs pray as follows:

7 1. For a judicial declaration that the 2008 Biological Opinion is arbitrary, capricious,
8 and abuse of discretion, not in accordance with law, and is in excess of statutory jurisdiction,
9 authority or limitations;

10 2. For an order remanding the 2008 Biological Opinion to the FWS Defendants
11 without vacatur so that the FWS Defendants may reconsider it based on the Court's findings and
12 rulings, and for preparation of a new biological opinion in a manner consistent with the ESA,
13 NEPA, and other requirements of law;

14 3. For temporary, preliminary and permanent injunctive relief directed to the FWS
15 Defendants and Reclamation Defendants to continue CVP operations consistent with the Court's
16 findings and rulings, including relief from the pumping restrictions and other aspects of the
17 reasonable and prudent alternative in the 2008 Biological Opinion, pending completion of a new
18 consultation and biological opinion;

19 4. For an award of reasonable attorneys fees and costs of suit; and

20 5. For such other and further relief as the Court deems just and proper.

21 Dated: March 3, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

22
23
24 By: /s/ Daniel J. O'Hanlon

Daniel J. O'Hanlon
Attorneys for Plaintiffs
SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY; WESTLANDS WATER DISTRICT