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 Protection Agency, and People of the State of
 12 California by and through Xavier Becerra, Attorney
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 13

14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 16

17 **THE CALIFORNIA NATURAL**
RESOURCES AGENCY, THE
 18 **CALIFORNIA ENVIRONMENTAL**
PROTECTION AGENCY, THE PEOPLE
 19 **OF THE STATE OF CALIFORNIA, EX REL.**
CALIFORNIA ATTORNEY GENERAL
 20 **XAVIER BECERRA**

Case No.

**COMPLAINT FOR
 DECLARATORY AND
 INJUNCTIVE RELIEF**

Administrative Procedure Act Case

Plaintiffs,

v.

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

1 as Commissioner of the Bureau of
2 Reclamation; U.S. BUREAU OF
3 RECLAMATION

4 Defendants.

5 INTRODUCTION

6 1. The fish species listed as threatened or endangered under the federal Endangered
7 Species Act (ESA) residing in the Sacramento River and San Joaquin River watersheds of the
8 State of California have declined dramatically in abundance in the past decade. Recognizing this
9 undisputed fact, in 2016, the United States Bureau of Reclamation (Reclamation) reinitiated
10 consultation under Section 7 of the ESA as to the coordinated operations of the federal Central
11 Valley Project and the California State Water Project (the Proposed Action) with the stated
12 purpose of improving conditions for the listed species. However, the result of the reinitiated
13 consultation is contrary to its original stated purpose of responding to, among other things, recent
14 data demonstrating extremely low abundance levels for listed species. On October 21, 2019, the
15 National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS)
16 (together, the Services) issued biological opinions (the 2019 Biological Opinions) under the ESA
17 that, contrary to their findings of “no jeopardy,” actually significantly *reduce* protections for the
18 listed species and their designated critical habitat, thereby increasing the likelihood of their
19 extinction, contravening the requirements of Section 7 of the ESA and the ESA’s conservation
20 purpose.¹ Further, by issuing a Record of Decision adopting these defective biological opinions,
21 Reclamation has violated, and will continue to violate, federal law as described in this complaint.

22 2. California Attorney General Xavier Becerra, acting in his independent capacity as
23 representative of the People of the State of California, the California Natural Resources Agency
24 (Resources Agency), and the California Environmental Protection Agency (CalEPA) (together,
25 California) bring this action to halt these law violations and prevent ongoing and irreparable harm
26 to California’s natural resources.

27 ¹ “Biological Opinion for the Reinitiation of Consultation on the Coordinated Operations
28 of the Central Valley Project and the State Water Project” (USFWS Biological Opinion);
“Biological Opinion on Long-term Operation of the Central Valley Project and the State Water
Project” (NMFS Biological Opinion).

1 the Central Valley steelhead are also located in or adjacent to counties located within this judicial
2 district. 70 Fed. Reg. 52,527 (Sept. 2, 2005).

3 INTRADISTRICT ASSIGNMENT

4 7. This case involves legal challenges to biological opinions under Section 7 of the ESA
5 that adversely affect the Delta smelt, the winter-run salmon, and the Central Valley steelhead.
6 Assignment of this case to the San Francisco Division or the Oakland Division of this judicial
7 district is proper under Civil L.R. 3-2(c) because a significant portion of the critical habitat for
8 these ESA-listed species is located in or adjacent to counties located within this judicial district.

9 PARTIES

10 8. Plaintiff People of the State of California (People) bring this action by and through
11 the Attorney General. The Attorney General of California is the chief law enforcement officer of
12 the State and has the authority to file civil actions to protect public rights and interests, including
13 environmental protection. Cal. Const. art. V, § 13; Cal. Gov't Code §§ 12660–12612. This
14 challenge is brought pursuant to the Attorney General's independent, constitutional, common law,
15 and statutory authority to represent the public interest. The People have an interest in the use and
16 enjoyment of the fishery resources of the State for, *inter alia*, commercial and sport-fishing
17 purposes, as well as an interest in preserving and protecting these resources in their natural state
18 as part of the State's interrelated watershed ecology. *Nat'l Audubon Soc'y v. Superior Court*, 33
19 Cal. 3d 419, 434–435 (1983).

20 9. Plaintiff Resources Agency is one of seven cabinet-level agencies of the California
21 state government. Cal. Gov't Code § 12800. It is headed by a Secretary appointed by the
22 Governor and includes the California Department of Fish and Wildlife (CDFW) and the
23 Department of Water Resources (DWR). Cal. Gov't Code. §§ 12801, 12805. CDFW has the
24 responsibility, along with the California Fish and Game Commission, of administering and
25 enforcing the California Fish and Game Code. Cal. Fish & Game Code § 702. CDFW is
26 California's Trustee Agency for fish and wildlife resources, and holds those resources in trust by
27 statute for all the people of the State. Cal. Fish & Game Code §§ 711.7 (a), 1802; Cal. Pub. Res.
28 Code § 21070; Cal. Code Regs. tit. 14, § 15386(a). CDFW, in its trustee capacity, has

1 jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and
2 habitat necessary for biologically sustainable populations of those species. Cal. Pub. Res. Code
3 § 1802. DWR operates and maintains the State Water Project. Cal. Water Code §§ 123, 11451,
4 12931. Under Section 12850.4 of the California Government Code, the Resources Agency, as a
5 state cabinet agency, “shall exercise the authority vested in the Governor in respect to the
6 functions of each department, office, or other unit within the agency, including the adjudication of
7 conflicts between or among the departments, office, or other units and shall represent the
8 Governor in coordinating the activities of each such department, office, other unit with those of
9 other agencies, federal, state, or local.” Cal. Gov’t Code § 12850.4.

10 10. Plaintiff CalEPA is one of seven cabinet-level agencies of the California state
11 government. Cal. Gov’t Code § 12800. It is headed by a Secretary, appointed by the Governor,
12 and consists of, among others, the State Water Resources Control Board (State Water Board) and
13 the California Regional Water Quality Control Boards (Regional Water Boards). Cal. Gov’t
14 Code § 12812. The State Water Board exercises the adjudicatory and regulatory functions of the
15 state in the field of water resources. Cal. Water Code § 174. The State Water Board’s mission is
16 “[t]o preserve, enhance, and restore the quality of California’s water resources and drinking water
17 for the protection of the environment, public health, and all beneficial uses, and to ensure proper
18 water resource allocation and efficient use, for the benefit of present and future generations.”

19 11. The ESA specifically envisions a critical role for individual states to protect
20 endangered and threatened species. 16 U.S.C. § 1535(a) (“In carrying out the program authorized
21 by this chapter, the Secretary shall cooperate to the maximum extent practicable with the
22 States.”); *see Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (“We consider the States’ interests
23 in conservation and protection of wild animals as legitimate local purposes similar to the States’
24 interests in protecting the health and safety of their citizens.”)

25 12. The State of California is the proprietary owner of all the State’s fish and wildlife and
26 water resources, which the State holds in trust for the benefit of the State’s people. Cal. Water
27 Code § 102; Fish & Game Code §§ 711.7, 1802; *People v. Truckee Lumber Co.*, 116 Cal. 397,
28 399 (1897); *Betchart v. Cal. Dep’t of Fish & Game*, 158 Cal. App. 3d 1104, 1106–07 (1984);

1 *Nat'l Audubon Soc'y*, 33 Cal. 3d 419. California has a sovereign and statutorily mandated
2 interest in protecting species and their habitat within the state from harm. In addition, the State of
3 California has enacted numerous laws concerning the conservation, protection, restoration, and
4 enhancement of the State's fish and wildlife resources, including endangered and threatened
5 species, and their habitat. As the Supreme Court has recognized, state plaintiffs are entitled to
6 "special solicitude" in seeking to remedy environmental harms. *See Massachusetts v. Env'tl. Prot.*
7 *Agency*, 549 U.S. 497, 519–22 (2007).

8 13. California is uniquely harmed by Defendants' actions, which threaten significant
9 harm to the natural resources of the State. Defendants' actions described in this complaint will
10 disrupt the coordinated operations of the State Water Project and Central Valley Project, affecting
11 the imperiled species and habitats in the Sacramento River and San Joaquin River watersheds,
12 including the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta). This
13 disruption will detract from California's efforts and resources to carry out its own programs and
14 impose significantly increased costs and burdens on the State. *See, e.g., California v. Azar*, 911
15 F.3d 558, 571–72 (9th Cir. 2018) (concluding that California had standing in challenge to federal
16 rule due to "economic harm" to the state); *Air All. Houston v. Env'tl. Prot. Agency*, 906 F.3d 1049,
17 1059–60 (D.C. Cir. 2018) ("Monetary expenditures to mitigate and recover from harms that could
18 have been prevented absent the [federal rule] are precisely the kind of 'pocketbook' injury that is
19 incurred by the state itself."); *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (finding
20 that impacts on a state's resources provides a basis for the state to establish standing).

21 14. Reclamation has harmed California's procedural interests in participating in a legally
22 sound environmental review process that adequately considers the impacts of these operations on
23 California's natural resources and provides appropriate mitigation measures for such impacts.
24 Specifically, Reclamation failed to take a "hard look" at the environmental impacts of adopting
25 and implementing the 2019 Biological Opinions, failed to sufficiently respond to comments on
26 the Proposed Action, and failed to demonstrate that it fully analyzed and will effectively mitigate
27 the full range of the Proposed Action's effects.

28

1 15. Defendant Wilbur Ross is the Secretary of the Department of Commerce and is sued
2 in his official capacity. Secretary Ross is responsible for implementing the ESA for species under
3 the Department of Commerce’s jurisdiction, including species under the jurisdiction of NMFS.
4 Secretary Ross is also responsible for implementing the consultation process set forth in Section 7
5 of the ESA for winter-run salmon, spring-run salmon, steelhead, green sturgeon, and the southern
6 resident population of killer whales. 50 C.F.R. § 402.01(a).

7 16. Defendant Chris Oliver is the Assistant Administrator for Fisheries at the National
8 Oceanic and Atmospheric Administration and is sued in his official capacity. By delegation, Mr.
9 Oliver holds the ESA responsibilities described in Paragraph 15. 50 C.F.R. § 402.01(b).

10 17. Defendant NMFS shares responsibility with the USFWS in administering the ESA.
11 50 C.F.R. § 402.01(b).

12 18. Defendant David Bernhardt is the Secretary of the Department of the Interior and is
13 sued in his official capacity. Secretary Bernhardt is responsible for implementing the ESA for
14 species under the Department of the Interior’s jurisdiction, including species under the
15 jurisdiction of the USFWS. Secretary Bernhardt is also responsible for implementing the
16 consultation process set forth in Section 7 of the ESA for Delta smelt. 50 C.F.R. § 402.01(a).

17 19. Defendant Aurelia Skipwith is the Director of the USFWS and is sued in her official
18 capacity. By delegation, Ms. Skipwith holds the ESA responsibilities described in paragraph 18.
19 50 C.F.R. § 402.01(b).

20 20. Defendant USFWS shares responsibility with the NMFS in administering the ESA.
21 50 C.F.R. § 402.01(b).

22 21. Defendant Reclamation is an agency within the United States Department of the
23 Interior. Reclamation operates the Central Valley Project.

24 22. Defendant Brenda Burman is the Commissioner of the United States Bureau of
25 Reclamation, and is sued in her official capacity.

26 23. Each defendant named in this action is responsible in whole or in part for the claims
27 alleged in the complaint.

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FACTUAL BACKGROUND

I. THE CENTRAL VALLEY PROJECT AND THE STATE WATER PROJECT

24. The Central Valley Project and the State Water Project are the two largest water projects in California. The Central Valley Project consists of 20 dams and reservoirs that deliver water to 29 of California’s 58 counties for agricultural, municipal, and industrial uses, primarily in the Central Valley and the San Francisco Bay Area. The Central Valley Project delivers approximately 5.6 million acre-feet of water a year on average to 270 water supply contractors.

25. DWR operates the State Water Project. The State Water Project’s main storage facilities are Oroville Dam and San Luis Reservoir, which it operates jointly with Reclamation. DWR operates these facilities along with pumping plants, connecting canals, and aqueducts to deliver water to the Feather River Area, North Bay Area, South Bay Area, San Joaquin Valley, Central Coast, and Southern California for agricultural, municipal, and industrial uses. The State Water Project delivers on average 2.6 million acre-feet of water a year to 29 public water agencies.

26. The Central Valley Project harms ESA-listed fish species in the Sacramento River and San Joaquin River watersheds by, for example, directly taking fish at the project’s South Delta pumping facility, redirecting fish from their migratory pathways, and altering the species’ natural habitat. Habitat alterations resulting from project operations include changes to river flow, hydrology, salinity, and water temperature.

II. SPECIES AFFECTED BY THE CENTRAL VALLEY PROJECT

27. The Central Valley Project exports water from “an important habitat for thousands of river and anadromous fish, many of which are endangered.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 980–81 (9th Cir. 2014).

28. Central Valley Project operations impact several fish species that are listed as threatened and endangered under the ESA, including the Delta smelt (*Hypomesus transpacificus*),

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1 the Central Valley winter-run² and spring-run Chinook salmon (*Oncorhynchus tshawytscha*),³ and
2 the Central Valley steelhead (*Oncorhynchus mykiss irideus*).⁴

3 **A. Delta Smelt**

4 29. The Delta smelt is a small fish that typically does not exceed 4.5 inches
5 (approximately 120 mm) in length. The majority of Delta smelt live only one year. Delta smelt
6 generally spawn from February through May in various locations from Suisun Bay and Marsh
7 and eastward into the Sacramento-San Joaquin Delta. Smelt larvae hatch and enter the juvenile
8 life stage by June or early July. Most of the juvenile fish continue to rear in habitats within
9 Suisun Bay and Marsh, while smaller subsets of the population rear in more eastward areas,
10 principally along the Sacramento River-Cache Slough corridor. The fish develop into maturing
11 adults in the fall, at which time their spatial distribution expands.

12 30. USFWS listed the Delta smelt as a threatened species under the ESA on March 5,
13 1993. 58 Fed. Reg. 12,854. USFWS designated critical habitat for the Delta smelt on December
14 19, 1994. 59 Fed. Reg. 65,256. As USFWS has acknowledged, the Delta smelt's relative
15 abundance has reached very low numbers and the species is approaching extinction in the wild.

16 **B. Sacramento River Winter-Run Chinook Salmon**

17 31. Adult winter-run salmon typically migrate upstream through the Sacramento-San
18 Joaquin Delta from November through July, with the peak presence from February through April.
19 The winter-run salmon spawn during the spring and summer months in the upper Sacramento
20 River. Emigrating juvenile winter-run salmon occur in the Sacramento-San Joaquin Delta
21 primarily in November through early May.

22 32. The ocean life cycle of the Chinook salmon lasts between 1 and 5 years. Shasta Dam
23 blocks the winter-run salmon's access to its historical spawning and rearing area in the upper

24 _____
25 ² This term refers to the Sacramento River winter-run evolutionarily significant unit of
26 Chinook salmon, described as winter-run populations in the Sacramento River and its tributaries
27 in California.

28 ³ This term refers to Central Valley spring-run evolutionarily significant unit of Chinook
salmon, including populations of spring-run Chinook salmon in the Sacramento River and its
tributaries such as the Feather River.

⁴ This term refers to the California Central Valley distinct population segment of
steelhead, described as inhabiting the Sacramento and San Joaquin Rivers and their tributaries.

1 Sacramento River. Salmon that had previously spawned upstream of Shasta Dam have been
2 forced to spawn downstream of Keswick Dam on the Sacramento River. The cold-water
3 management of Shasta Dam presently supports a single winter-run salmon population below the
4 dam. NMFS listed the winter-run salmon as a threatened species under the ESA on August 4,
5 1989, 58 Fed. Reg. 32,065, and raised its status to endangered on January 4, 1994. 59 Fed. Reg.
6 440. NMFS designated critical habitat for winter-run salmon on June 16, 1993. 58 Fed. Reg.
7 33,212. The extinction risk for the winter-run Chinook salmon has increased from moderate to
8 high since 2005.

9 **C. Spring-Run Chinook Salmon**

10 33. Adult spring-run salmon typically begin their upstream migration in the Bay-Delta
11 region in January and February and are present in the Sacramento River and its tributaries from
12 March through October. Spawning occurs in the Sacramento River and its tributaries from mid-
13 August through October. Juvenile spring-run salmon generally are found in the Bay-Delta region
14 between December and May but can be present year-round. Like winter-run salmon, the ocean
15 life cycle of the spring-run Chinook salmon lasts between 1 and 5 years.

16 34. NMFS listed the spring-run salmon as threatened under the ESA on September 16,
17 1999, 64 Fed. Reg. 50,394, and reaffirmed that status on June 28, 2005. 70 Fed. Reg. 37,160.
18 NMFS designated critical habitat for spring-run salmon on September 2, 2005. 70 Fed. Reg.
19 52,488. The spring-run salmon is at a moderate risk of extinction, although there is concern that
20 certain spring-run salmon strongholds will deteriorate into high extinction risk in the coming
21 years, a fact that NMFS acknowledges.

22 **D. Central Valley Steelhead**

23 35. The majority of the Central Valley steelhead originate in the Sacramento River basin,
24 although a small population exists in tributaries to the San Joaquin River. Spawning adult
25 steelhead generally enter the San Francisco Bay estuary and Delta from August through April.
26 Spawning occurs from December through April. In the Sacramento River, steelhead generally
27 migrate to the ocean from early winter to early summer, but can be present year round. In the San
28 Joaquin River, emigration of steelhead generally occurs from February to June.

1 36. NMFS listed the Central Valley steelhead as threatened on March 19, 1998, 65 Fed.
2 Reg. 13,347, and reaffirmed that status on January 5, 2006, 71 Fed. Reg. 834. NMFS designated
3 critical habitat for the Central Valley steelhead on September 2, 2005. 70 Fed. Reg. 52,488. The
4 natural-origin steelhead population is at a high risk of extinction.

5 STATUTORY AND REGULATORY FRAMEWORK

6 I. THE ENDANGERED SPECIES ACT

7 37. Congress enacted the ESA over 46 years ago in a bipartisan effort “to halt and reverse
8 the trend toward species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S.
9 153, 184 (1978). The ESA constitutes “the most comprehensive legislation for the preservation
10 of endangered species ever enacted by any nation.” *Id.* at 180. The ESA’s fundamental purposes
11 are to “provide a means whereby the ecosystems upon which endangered species and threatened
12 species depend may be conserved, [and] to provide a program for the conservation of such
13 endangered species and threatened species” 16 U.S.C. § 1531(b). The ESA declares “the
14 policy of Congress” to be “that all Federal departments and agencies shall seek to conserve
15 endangered species and threatened species and shall utilize their authorities in furtherance of the
16 purposes of [the ESA].” *Id.* § 1531(c)(1). The ESA defines “conserve” broadly as “to use and
17 the use of all methods and procedures which are necessary to bring any endangered species or
18 threatened species to the point at which the measures provided pursuant to this chapter are no
19 longer necessary.” *Id.* § 1532(3). In pursuing these goals, the ESA further declares “the policy of
20 Congress” to be “that Federal agencies shall cooperate with State and local agencies to resolve
21 water resource issues in concert with conservation of endangered species.” *Id.* § 1531(c)(2).

22 38. Section 9 of the ESA prohibits any “person” from “taking” any endangered fish or
23 wildlife species. *Id.* § 1538(a)(1)(B), (G). “Person” is defined in the ESA to include “any officer,
24 employee, agent, department, or instrumentality of the Federal Government . . .” and therefore
25 includes federal agencies such as Reclamation. *Id.* § 1532(13). “Take” is defined as to “harass,
26 harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such
27 conduct.” *Id.* § 1532(19). “Harass” means “an intentional or negligent act or omission which
28 creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly

1 disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or
2 sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife,”
3 and may include “significant habitat modification or degradation where it actually kills or injures
4 wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or
5 sheltering.” *Id.*

6 39. Section 7 of the ESA requires all federal agencies to “utilize their authorities in
7 furtherance of the purposes of [the ESA] by carrying out programs for the conservation of
8 endangered species and threatened species” 16 U.S.C. § 1536(a)(1). It also requires all
9 federal agencies to ensure that any actions they authorize, fund, or carry out are “not likely to
10 jeopardize the continued existence of any listed species or destroy or adversely modify their
11 designated critical habitat.” *Id.* § 1536(a)(2).

12 40. “Jeopardize the continued existence of” an endangered species “means to engage in
13 an action that reasonably would be expected, directly or indirectly, to reduce appreciably the
14 likelihood of both the survival and recovery of a listed species in the wild by reducing the
15 reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

16 41. “Destruction or adverse modification means a direct or indirect alteration that
17 appreciably diminishes the value of critical habitat for the conservation of a listed species. Such
18 alterations may include, but are not limited to, those that alter the physical or biological features
19 essential to the conservation of a species or that preclude or significantly delay development of
20 such features.” Interagency Cooperation—Endangered Species Act of 1973, as Amended;
21 Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7,214-01
22 (Feb. 11, 2016).⁵

23 42. In practice, any federal agency proposing an action that may affect a listed species
24 must consult with either NMFS or USFWS, depending on the species involved. The relevant
25 Service then reviews the proposed action and prepares a biological opinion that evaluates whether

26 ⁵ On August 27, 2019, the Services published a final rule (84 Fed. Reg. 44,976-01) to
27 revise portions of the regulations that implement Section 7 of the ESA. The rule became effective
28 on October 28, 2019, a week after the 2019 Biological Opinions were issued on October 21,
2019. *See* 84 Fed. Reg. 50,333-01 (2019). The relevant version of the regulations is the version
that was in effect when the opinions were issued.

1 and how the action will impact the species. *Turtle Island Restoration Network v. U.S. Dep't of*
2 *Commerce*, 878 F.3d 725 (9th Cir. 2017) (citing 16 U.S.C. § 1536(b); 50 C.F.R. § 402.12). If the
3 opinion finds species jeopardy or adverse habitat modification, then the opinion must include
4 additional species-protective measures known as reasonable and prudent alternatives. 16 U.S.C.
5 § 1536(b)(3). If the biological opinion finds that the proposed action would not jeopardize the
6 listed species' continued existence, the Services can issue a statement permitting the incidental
7 "taking" of a certain number of protected animals. 16 U.S.C. § 1536(b)(4). The incidental take
8 statement must specify the impact of the incidental take on the species and include protective
9 measures to minimize those impacts as the Services deem necessary or appropriate. 16 U.S.C. §
10 1536(b)(4)(C).

11 **II. THE NATIONAL ENVIRONMENTAL POLICY ACT**

12 43. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq. "is our
13 basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Congress
14 enacted NEPA in 1969 "to create and maintain conditions under which man and nature can exist
15 in productive harmony, and fulfill the social, economic, and other requirements of present and
16 future generations of Americans." 42 U.S.C. § 4331(a). NEPA has two fundamental purposes:
17 (1) to guarantee that, before taking an action, federal agencies take a "hard look" at the
18 consequences of those actions, ensuring that "the agency, in reaching its decision, will have
19 available, and will carefully consider, detailed information concerning significant environmental
20 impacts;" and (2) to ensure that "the relevant information will be made available to the larger
21 audience that may also play a role in both the decisionmaking process and the implementation of
22 that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

23 44. To achieve these dual purposes, NEPA requires the preparation of a detailed
24 environmental impact statement for any "major Federal actions significantly affecting the quality
25 of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations broadly
26 define such actions to include "new or revised agency rules, regulations, plans, policies, or
27 procedures." 40 C.F.R. § 1508.18(a). In preparing environmental impact statements, federal
28 agencies must consider all of the direct, indirect, and cumulative impacts of their proposed

1 actions. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8(a), (b); *City of Carmel-By-The-Sea v. U.S. Dep't*
2 *of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997); *Neighbors of Cuddy Mountain v. U.S. Forest*
3 *Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998).

4 45. The “heart of the environmental impact statement” is its analysis of alternatives to the
5 agency’s proposed action. 42 U.S.C. § 1502.14. Agencies must “[r]igorously explore and
6 objectively evaluate all reasonable alternatives,” including by presenting “the environmental
7 impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues
8 and providing a clear basis for choice among options by the decisionmaker and the public.” 40
9 C.F.R. § 1502.14; *League of Wilderness Defs./Blue Mountains Biodiversity Project v. U.S. Forest*
10 *Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (*Wilderness Defs. 2012*).

11 46. NEPA also requires agencies to consider measures to “mitigate adverse
12 environmental impacts.” 40 C.F.R. § 1502.16(h). An environmental impact statement must
13 discuss such mitigation measures “with sufficient detail to ensure that environmental
14 consequences have been fairly evaluated,” including by addressing whether the measures “can be
15 effective” at reducing environmental impacts. *S. Fork Band Council of W. Shoshone of Nev. v.*
16 *U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (quoting *Robertson*, 490 U.S. at 348).

17 47. NEPA also requires an agency, when preparing an environmental impact statement,
18 to include a discussion of “[p]ossible conflicts between the proposed action and the objectives of”
19 state and local laws, plans, and policies. 40 C.F.R. §§ 1502.16(c), 1506.2(d); *see also* 43 C.F.R.
20 § 1610.3-2.

21 **III. THE ADMINISTRATIVE PROCEDURE ACT**

22 48. The APA governs the procedural requirements for agency decisionmaking and
23 provides the standard of review for a federal agency’s compliance with NEPA and the ESA.
24 Under the APA, a “reviewing court shall ... hold unlawful and set aside” agency action, findings,
25 or conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in
26 accordance with law,” “in excess of statutory jurisdiction, authority, or limitations, or short of
27 statutory right,” or “without observance of procedure required by law.” 5 U.S.C. § 706. An
28 agency action is arbitrary and capricious under the APA when the agency (1) has relied on factors

1 which Congress has not intended it to consider; (2) entirely failed to consider an important aspect
2 of the problem; (3) offered an explanation for its decision that runs counter to the evidence before
3 the agency; or (4) is so implausible that it could not be ascribed to a difference of view or the
4 product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*
5 *Ins. Co.*, 463 U.S. 29, 43 (1983).

6 49. “Agencies are free to change their existing policies,” but they must “provide a
7 reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125
8 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82
9 (2005)). While an agency need not show that a new policy is “better” than the rule it replaced, it
10 still must demonstrate that “it is permissible under the statute, that there are good reasons for it,
11 and that the agency *believes it to be better*, which the conscious change of course adequately
12 indicates.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in
13 original). Further, an agency must “provide a more detailed justification than what would suffice
14 for a new policy created on a blank slate” when “its new policy rests upon factual findings that
15 contradict those which underlay its prior policy,” “or when its prior policy has engendered serious
16 reliance interests that must be taken into account.” *Id.* Any “[u]nexplained inconsistency” in
17 agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change
18 from agency practice.” *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981.

19 THE 2019 USFWS AND NMFS BIOLOGICAL OPINIONS

20 I. CONSULTATION HISTORY OF THE BIOLOGICAL OPINIONS

21 50. Reclamation’s ordinary operation of the Central Valley Project results in incidental
22 take of listed species, which is illegal without incidental take authorization. Reclamation and
23 DWR have obtained incidental take authorization through the consultation process set forth in
24 ESA Section 7 for the coordinated operation of the Central Valley Project and the State Water
25 Project. *See* 16 U.S.C. § 1536.

26 51. On December 15, 2008, USFWS issued a biological opinion on the coordinated
27 operation of the Central Valley Project and the State Water Project. The 2008 USFWS opinion
28

1 found that the proposed project operations would likely jeopardize the continued existence of the
2 Delta smelt and would adversely modify Delta smelt critical habitat.

3 52. On June 4, 2009, NMFS also issued a biological opinion on the coordinated
4 operations of the Central Valley Project and the State Water Project. The 2009 NMFS opinion
5 found that the proposed project operations would likely jeopardize the continued existence of the
6 federally listed Sacramento River winter-run salmon, the Central Valley spring-run salmon, the
7 Central Valley steelhead, the North American green sturgeon, and the Southern Resident killer
8 whales, and would adversely modify the critical habitat for the winter-run salmon, the spring-run
9 salmon, and the steelhead.

10 53. In light of these findings, and in an attempt to avoid ongoing jeopardy to these listed
11 species and destruction or adverse modification of designated critical habitat resulting from the
12 coordinated operations of the Central Valley Project and the State Water Project, both the 2008
13 USFWS opinion and the 2009 NMFS opinion contained reasonable and prudent alternatives that
14 imposed new fishery protection measures on the Central Valley Project and State Water Project
15 that were not part of the projects' original plan of operations.

16 54. As discussed above, populations of the affected listed species have continued to
17 decline since 2008 and 2009, prompting Reclamation and DWR to request reinitiation of Section
18 7 consultation pursuant to 50 C.F.R. § 402.16.

19 55. On August 2, 2016, Reclamation and DWR requested reinitiation of consultation with
20 both USFWS and NMFS on the coordinated operations of the Central Valley Project and the State
21 Water Project due to new information related to the ongoing drought and recent data showing
22 extremely low population levels of Delta smelt and winter-run Chinook salmon. New
23 information was also then available based on the ongoing work of collaborative science
24 processes.

25 56. On August 3, 2016, the USFWS accepted Reclamation's request to reinitiate
26 consultation regarding operations of the Central Valley Project and State Water Project under the
27 2008 USFWS biological opinion. USFWS's acceptance letter stated, "We recognize that this new
28 information is demonstrating the increasingly imperiled state of the Delta Smelt and its

1 designated critical habitat, and that emerging science shows the importance of outflows to all life
2 stages of Delta Smelt and to maintaining the primary constituent elements of designated critical
3 habitat.”

4 57. On August 17, 2016, NMFS accepted Reclamation’s request to reinitiate consultation
5 regarding project operations under the 2009 NMFS biological opinion. NMFS’s acceptance letter
6 stated, “We agree that reinitiation is required under the terms of the 2009 Biological Opinion and
7 ESA regulations (50 CFR 402.16). Reasons for the reinitiation include new information related
8 to the effects of multiple years of drought, recent data demonstrating extremely low abundance
9 levels for endangered Sacramento River winter-run Chinook salmon and threatened Central
10 Valley spring-run Chinook salmon, and new information resulting from ongoing scientific
11 collaboration.”

12 58. In an August 30, 2016 memorandum, Interior Secretary Sally Jewell stated, “The
13 reinitiation process will likely lead to new or amended biological opinions that will increase
14 protections for” the Delta smelt and winter-run Chinook salmon. She further stated, “The
15 timeframe being contemplated should allow the new Administration to establish itself before new
16 biological opinions are issued that could lead to further reductions in water availability south of
17 the Delta.” In Secretarial Order No. 3343, issued on January 3, 2017, Secretary Jewell confirmed
18 the decline in listed species in the Delta, stating: “The population of Delta Smelt, an annual
19 species found only in the Delta, is at an all-time low. The Spring Kodiak Trawl Index for Delta
20 Smelt has continued a downward slide and is 90 percent lower in 2016 than the previous historic
21 low.” Order No. 3343 further states: “Winter-run Chinook salmon populations are also at very
22 low levels. Over the last 10 years of available data (2003–2013), the abundance of spawning
23 Winter-run Chinook salmon adults ranged from a low of 738 in 2011 to a high of 17,197 in 2007,
24 with an average of 6,298. This is in stark contrast to an average abundance of 87,000 spawning
25 adults in the late 1960s.”

26 59. Order No. 3343 further notes that in 2016, Reclamation released the “Sacramento and
27 San Joaquin Rivers Basin Study” (Basin Study) assessing the potential effects of climate change
28 on the Delta. Order No. 3343 identifies the following three key findings in the Basin Study: (1)

1 temperatures are projected to increase steadily during the century, with changes generally
2 increasing from about 1.6 degrees Fahrenheit (°F) in the early 21st century to almost 4.8°F in the
3 Sierra Nevada Mountains late in the 21st century; (2) snowpack will likely decline considerably
4 due to warming, particularly in the lower elevations of the mountains surrounding the Central
5 Valley, affecting timing and amount of runoff; and (3) sea levels are expected to rise.

6 60. On December 29, 2017, Reclamation published in the Federal Register a Notice of
7 Intent to Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-
8 Term Operation of the Central Valley Project and State Water Project, and Related Facilities,
9 noting that it “propose[d] to evaluate alternatives that maximize water deliveries and optimize
10 marketable power generation.” 82 Fed. Reg. 61,789.

11 61. On October 19, 2018, President Donald J. Trump issued a presidential memorandum
12 entitled “Presidential Memorandum on Promoting the Reliable Supply and Delivery of Water in
13 the West.” 83 Fed. Reg. 53,961. The memorandum directed the Secretary of the Interior and the
14 Secretary of Commerce to take steps “to minimize unnecessary regulatory burdens and foster
15 more efficient decision-making so that water projects are better able to meet the demands of their
16 authorized purposes” and urged the expedited completion of the reinitiation of consultation under
17 the 2008 and 2009 biological opinions. The memorandum required completion of the final
18 biological opinions for the long-term coordinated operations of the Projects by June 15, 2019. *Id.*

19 62. On January 31, 2019, Reclamation issued a “Biological Assessment for the
20 Reinitiation of Consultation on Coordinated Long-Term Operation of the Central Valley Project
21 and State Water Project,” which set forth Reclamation’s Proposed Action. Subsequent revisions
22 to the Proposed Action occurred in April, July, and October 2019.

23 63. On or about June 6, 2019, USFWS completed its draft biological opinion for the
24 Delta smelt. On or about July 1, 2019, NMFS completed its draft biological opinion for the
25 salmonid species. The draft NMFS biological opinion found jeopardy and adverse modification
26 of critical habitat for winter-run Chinook salmon, spring-run Chinook salmon, Central Valley
27 steelhead, and southern resident killer whales, and included “reasonable and prudent alternatives”
28 designed to avoid jeopardizing the species.

1 64. On July 12, 2019, Reclamation issued a Draft Environmental Impact Statement (Draft
2 EIS), which set forth Reclamation's analysis of the potential effects associated with long-term
3 operations of the Central Valley Project and State Water Project. Reclamation received
4 approximately 1,030 comments on the Draft EIS.

5 65. On August 21, 2019, CDFW submitted its "Comments on the Reinitiation of
6 Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State
7 Water Project Draft Environmental Impact Statement."

8 66. CDFW's comments described key concerns regarding Reclamation's Draft EIS.
9 These included, but were not limited to, that the Draft EIS: (1) performed no quantitative analysis
10 to support its conclusion that increased flows in the Sacramento River under Alternative 1 may
11 offset the impacts associated with increased entrainment risk of Sacramento River origin fall-run
12 Chinook salmon; (2) did not recognize the effects of reduced Keswick Dam flows downstream of
13 Shasta Dam on incubating fall- and spring-run Chinook salmon eggs and embryos due to
14 increased water temperatures near redds, lowered velocities resulting in lower dissolved oxygen,
15 and de-watering of redds resulting in suffocation of eggs and stranding of emergent alevins/fry in
16 the Sacramento River; (3) proposed temperature management in the upper Sacramento River that
17 did not protect the winter-run or spring-run Chinook salmon; (4) assigned final decisionmaking
18 authority over real-time operations of Old and Middle River flows not to the agencies responsible
19 for issuing take authorization under the federal and state endangered species acts, USFWS,
20 NMFS and CDFW, but to the project operators; and (5) acknowledged that reduced winter-spring
21 Delta outflow and increased entrainment risk associated with Alternative 1 may impact the
22 CESA-listed longfin smelt, but included no proposed minimization or mitigation measures to
23 avoid or minimize such adverse environmental impacts.

24 67. On September 25, 2019, the State Water Board submitted to Reclamation its
25 "Comments on Draft Environmental Impact Statement for the Reinitiation of Consultation on the
26 Coordinated Long-Term Operation of the Central Valley Project and State Water Project." The
27 State Water Board's comments included, but were not limited to, the following: (1) the Proposed
28 Project increases water deliveries and exports, increases reverse flows, and decreases Delta

1 outflows, but available scientific knowledge indicates that decreasing freshwater flows in the
2 Bay-Delta watershed and increasing exports and associated reverse flows in the interior Delta is
3 expected to have a negative impact on the survival and abundance of native fish species,
4 including threatened and endangered species; (2) the science supporting the State Water Board's
5 updated flow objectives in the Bay-Delta Plan supports not reducing existing (baseline) spring,
6 winter, and fall flows as proposed in the Preferred Alternative, but increasing them; (3) the
7 Preferred Alternative proposes changes to operations that would require changes to Reclamation's
8 existing water right requirements or the implementation of those requirements contained in State
9 Water Board Decision 1641, Decision 1422, and Order 90-5; (4) the Preferred Alternative
10 proposed Sacramento River operations, including Shasta Dam operations affecting the
11 Sacramento River, that appear to further degrade conditions for listed species; and (5) operations
12 under the Preferred Alternative would reduce Delta outflows, which are important to all life
13 cycles of Delta smelt, with the result that the Preferred Alternative would adversely affect the
14 Delta smelt population through increased predation and entrainment, decreased food availability,
15 and decreased size and location of low salinity habitat.

16 68. On October 21, 2019, USFWS issued the USFWS Biological Opinion at issue in this
17 litigation in response to an August 2, 2016, request for reinitiation of consultation. Contrary to
18 the 2008 USFWS biological opinion, the new USFWS opinion now concludes that the proposed
19 operations of the Central Valley Project and the State Water Project are not likely to jeopardize
20 the continued existence of the Delta smelt and are not likely to destroy or adversely modify the
21 Delta smelt's critical habitat.

22 69. On October 21, 2019, NMFS issued the NMFS Biological Opinion at issue in this
23 litigation, also in response to Reclamation's August 2, 2016 request for reinitiation of
24 consultation. Also contrary to the 2009 NMFS biological opinion, the new NMFS Biological
25 Opinion now concludes that the proposed operations of the Central Valley Project and the State
26 Water Project are not likely to jeopardize the continued existence of the Sacramento River winter-
27 run salmon, the Central Valley spring-run salmon, the Central Valley steelhead, the North
28 American green sturgeon, and the Southern Resident killer whales, and is not likely to destroy or

1 adversely modify the critical habitat for the winter-run salmon, the spring-run salmon, and the
2 steelhead.

3 70. On December 19, 2019, Reclamation issued its final environmental impact statement
4 proposing to adopt the 2019 Biological Opinions.

5 71. On January 17, 2020, the Attorney General, the Resources Agency, and CalEPA
6 submitted a joint comment letter to Reclamation regarding the Final EIS. These comment letters
7 incorporated the comment letters submitted by CDFW and the State Water Board and noted that
8 the Final EIS did not adequately respond to the comments submitted on the Draft EIS. The
9 January 17, 2020 comment letter also noted a number of defects that appeared in the Final EIS
10 that the public was afforded no previous opportunity to comment on, including but not limited to
11 that: (1) Reclamation's Final EIS presents a revised Proposed Action and Preferred Alternative
12 that is not within the range of alternatives described in the Draft EIS. Critically, although
13 Alternative 1 is the Proposed Action described in the January 2019 Biological Assessment, the
14 Final EIS introduces a revised Alternative 1 that is based on a revised Proposed Action presented
15 in the final October 2019 Biological Assessment without including either a comprehensive
16 summary of the modifications to the Proposed Action and Alternative 1 or a meaningful
17 discussion of how these modifications affect the environmental analysis and proposed mitigation;
18 (2) Appendix F1, which includes the revised Alternative 1 sensitivity analysis, contains over
19 2,500 pages of information that was not available to the public commenting on the Draft EIS; and
20 (3) the public and other agencies have also not had a chance to comment on the updated climate
21 change modeling included in the Final EIS.

22 72. On or about February 19, 2020, Reclamation issued its final Record of Decision on
23 the Coordinated Long-Term Operation of the Central Valley Project and State Water Project
24 (Record of Decision), adopting the 2019 Biological Opinions.

25 **II. DEFICIENCIES IN THE 2019 BIOLOGICAL OPINIONS**

26 73. The 2016 request for reinitiation sought to update the operating criteria for the entire
27 Central Valley Project/State Water Project coordinated system to account for new information
28 regarding both impacts to the listed species and designated critical habitat and available measures

1 to avoid, minimize, and mitigate those impacts. Given those purposes, an updated biological
2 opinion might reasonably have included a prominent role for expert fish agencies in guiding
3 updated coordinated project operations, clear guardrails for those operations, and definite
4 measures to enhance species health. Instead, the 2019 Biological Opinions are heavily caveated
5 and include many unbounded off-ramps, making it impossible to know how, if at all, project
6 operations will avoid further harm to the species.

7 74. The 2019 Biological Opinions are also fatally defective in numerous other regards.
8 The following is a non-comprehensive list of those deficiencies.

9 75. First, the analysis of effects of the Proposed Action in the 2019 Biological Opinions
10 violates Section 7 of the ESA by failing to evaluate whether the Proposed Action will jeopardize
11 the continued existence of the species or adversely affect their critical habitat. The opinions
12 instead improperly compare the effects of the Proposed Action to the Current Operating Scenario
13 under the 2008 and 2009 biological opinions. This is not the proper standard. The law requires
14 the Services to evaluate whether the Proposed Action is likely to jeopardize the listed species'
15 survival and recovery or destroy or adversely modify designated critical habitat, not to simply
16 compare the effects of the Proposed Action to the effects of the Current Operating Scenario. In
17 addition, this analysis fails to account for the existing baseline when evaluating the effects of the
18 Proposed Action, as expressed in the August 3, 2016 USFWS response to the request for
19 reinitiation of consultation (including that "new information is demonstrating the increasingly
20 imperiled state of the Delta Smelt and its designated critical habitat, and that emerging science
21 shows the importance of outflows to all life stages of Delta Smelt and to maintaining the primary
22 constituent elements of designated critical habitat") and the August 17, 2016, NMFS response to
23 the request for reinitiation of consultation (including "recent data demonstrating extremely low
24 abundance levels for endangered Sacramento River winter-run Chinook salmon and threatened
25 Central Valley spring-run Chinook salmon . . .").

26 76. Second, the 2019 Biological Opinions fail to "articulate a satisfactory explanation" of
27 how the comparative modeling and other analyses in the Biological Opinions support the
28 opinions' no-jeopardy conclusion as required by the APA. *See Greenpeace v. Nat'l Marine*

1 *Fisheries Serv.*, 80 F. Supp. 2d 1137, 1147 (W.D. Wash. 2000). “[E]ven where baseline
2 conditions already jeopardize a species, an agency may not take action that deepens the jeopardy
3 by causing additional harm.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917,
4 930 (9th Cir. 2008). The opinions’ no-jeopardy conclusions are unlawful because they are not
5 based on an analysis of the Proposed Action in its “actual context” of a decade-long decline in the
6 listed species. *See id.*

7 77. Third, in numerous significant respects, the 2019 Biological Opinions do not consider
8 the relevant factors, and “entirely fail to consider ... important aspect[s] of the problem.” *Motor*
9 *Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 43. For example, the NMFS Biological Opinion
10 acknowledges the high extinction risk for winter-run Chinook salmon. NMFS, however, then
11 permits changes in South Delta exports and Old and Middle River (OMR) flows that will
12 indisputably result in more entrainment and other harm to listed salmon. NMFS allows this
13 activity and result based solely on an unsupported finding that this increased pumping presents
14 risks comparable to the risks faced by the species under the 2009 opinion. Not only is this an
15 improper comparison, for the reasons described above, but the conclusions based on that
16 comparison are unsupported by scientific evidence and run counter to the scientific evidence that
17 was before the agencies. The USFWS Biological Opinion suffers from the same deficiencies,
18 concluding without basis that entrainment impacts on Delta smelt resulting from increased
19 reverse OMR flows are minimal because the risks are purportedly no greater than the risks that
20 would occur under the 2008 Biological Opinion. But even putting aside, once again, the
21 improper comparison with the Current Operating Scenario, this conclusion ignores the severe
22 decline in Delta smelt abundance that has occurred since 2008, which USFWS acknowledges is a
23 “relevant” factor in determining whether the Proposed Project will jeopardize the continued
24 existence of the Delta smelt, as required under Section 7 of the ESA. Failing to consider this
25 material decline in the development of measures in the 2019 Biological Opinion thus does not
26 consider “all relevant” factors.

27 78. Fourth, to avoid a jeopardy determination, the 2019 Biological Opinions rely on
28 operational criteria and conservation measures that are not reasonably certain to occur, or which

1 significantly post-date implementation of the Proposed Action. For example, the Proposed
2 Action does not offer any certainty on whether the Delta Cross-Channel gates will be open or
3 closed in the event that fish are outmigrating but the interior Delta water quality is too low.
4 Instead, NMFS relies on the project operator’s “risk assessment” of certain measures with only a
5 minimal role for expert fish agencies in that assessment. Further, the approach to managing water
6 temperatures from Shasta Dam in the NMFS Biological Opinion eliminates previously required
7 measures designed to preserve cold water storage for downstream fish flows, substituting
8 measures that are uncertain while also eliminating carryover storage targets that would otherwise
9 assist in preserving cold water necessary for winter-run Chinook salmon reproduction in the
10 Sacramento River below Shasta Dam. The USFWS Biological Opinion is similarly defective,
11 allowing essentially unlimited pumping during undefined “storm-related events” and relying on
12 an untested, uncertain smelt supplementation program.

13 79. Sixth, the 2019 Biological Opinions fail to analyze important components of the
14 Proposed Action, specifically a proposal to raise the height of Shasta Dam, which violates the
15 Section 7 requirement that the scope of the proposed agency action to be analyzed in a biological
16 opinion must be broadly defined, and that a biological opinion must consider both the short-term
17 and long-term effects of a proposed action. *See Conner v. Burford*, 848 F.2d 1441, 1457 (9th Cir.
18 1988); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 522–23, 525 (9th Cir. 2010).

19 80. Seventh, the 2019 Biological Opinions do not adequately consider the listed species’
20 recovery as well as survival prospects. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. For species
21 on the brink of extinction, as here, the agency must determine “when the tipping point precluding
22 recovery . . . is likely to be reached,” and then determine whether it will be reached “as a result”
23 of the proposed action. *Wild Fish Conservancy*, 628 F.3d at 527. Given the undisputed fact that
24 the affected listed species are on the brink of extinction and that even the Current Operating
25 Scenario is failing to adequately protect these species and their critical habitat, it is virtually
26 certain that this tipping point will be reached as a result of the far less restrictive Proposed Action.

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28

FIRST CLAIM FOR RELIEF

**Violation of the ESA, 16 U.S.C. § 1531 *et seq.*, and the APA, 5 U.S.C. § 706
(By all Plaintiffs Against Defendants Wilbur Ross, Chris Oliver, and the National Marine
Fisheries Service)**

81. California realleges, as if fully set forth here, each and every allegation contained in the preceding paragraphs.

82. The NMFS Biological Opinion is a final agency action that is subject to judicial review under Section 704 of the APA.

83. Defendants Ross, Oliver, and NMFS are responsible for the issuance of the NMFS Biological Opinion as described in paragraphs 15–17 above.

84. Despite acknowledging that the populations of listed species are perilously close to extinction or extirpation, the NMFS Biological Opinion concludes that Reclamation’s Proposed Action will not jeopardize the continued existence of winter-run and spring-run Chinook salmon and Central Valley steelhead and will not result in the destruction or adverse modification of the species’ critical habitat. These conclusions, and NMFS’s decision to adopt the NMFS Biological Opinion, are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

85. The NMFS Biological Opinion fails to analyze whether the effects of the Proposed Action as a whole, when added to baseline conditions, would or would not tip one or more of the listed species into extinction or further deepen the jeopardy to those species, contrary to Section 7(a)(2) of the ESA and the applicable implementing regulations and controlling case law. The Ninth Circuit has explained that “even when baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.” *Nat’l Wildlife Fed’n*, 524 F.3d at 930.

86. The NMFS Biological Opinion fails to articulate the required “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). Even assuming the proper effects analysis is a comparison with the Current Operating Scenario, modeling in the NMFS Biological Opinion indicates a higher risk of

1 extinction under the Proposed Action than under the Current Operating Scenario; in other words,
2 the NMFS Biological Opinion itself contains information indicating that Reclamation's Proposed
3 Action will jeopardize the continued existence of the listed species and destroy or adversely
4 modify their critical habitat, and thus contradicts the "no jeopardy" and "no adverse
5 modification" conclusions in the opinion. In this and other ways, these conclusions are
6 contradicted by the evidence before NMFS, are not rationally connected to facts, and are not
7 supported by reasoned explanations.

8 87. The NMFS Biological Opinion also does not consider all relevant factors, and
9 "entirely failed to consider ... important aspect[s] of the problem." *Motor Vehicle Mfrs. Ass'n of*
10 *U.S., Inc.*, 463 U.S. at 43. For example, the Proposed Action will result in OMR flows that are
11 significantly more negative than observed under the Current Operating Scenario, which poses a
12 significant risk to the survival and recovery of the listed species. The Biological Opinion does
13 not include measures, or otherwise provide evidence, to explain how allowing substantially more
14 negative flows would not lead to jeopardy.

15 88. The NMFS Biological Opinion further does not "use the best scientific and
16 commercial data available" as required by Section 7(a)(2) of the ESA. The opinion violates the
17 statutory requirement to use such data in numerous ways, including but not limited to, failing to
18 take into account the decline in listed species' abundance in the last ten to twelve years. 16
19 U.S.C. § 1536(a)(2).

20 89. The NMFS Biological Opinion also impermissibly relies on operational criteria and
21 other conservation measures that are not reasonably certain to occur, are of questionable
22 effectiveness, or significantly post-date implementation of the Proposed Action, contrary to the
23 requirements of Section 7(a)(2) and controlling case law. *See, e.g., Nat'l Wildlife Fed'n*, 524
24 F.3d at 935–36 n.17. Operations related to the Shasta Cold Water Pool, including the elimination
25 of carryover storage targets, and the Delta Cross Channel Gates are not reasonably certain to
26 occur and are not coupled with any other measures that are certain to occur and would protect the
27 species. Therefore, these actions cannot be relied on by NMFS as enforceable measures that will
28 reduce the adverse effects of the Proposed Action on listed species and designated critical habitat.

1 90. The NMFS Biological Opinion fails to analyze key components of the Proposed
2 Action, including its short-term and long-term and site-specific and watershed-level
3 consequences, such as its proposal to raise the Shasta Dam, in contravention of the requirement
4 that a biological opinion assess all aspects of a project. *See, e.g., Conner v. Burford*, 848 F.2d at
5 1457; *Wild Fish Conservancy*, 628 F.3d at 521–22, 525; *Pac. Coast Fed’n of Fishermen’s Ass’n*
6 *v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1036–37 (9th Cir. 2001).

7 91. The NMFS Biological Opinion ignores the requirement that a biological opinion must
8 consider not just impacts to the continued survival of listed species, but also the potential to
9 reduce appreciably the likelihood of their recovery. *Nat’l Wildlife Fed’n*, 524 F.3d at 917.

10 92. The NMFS Biological Opinion’s incidental take statement also violates the
11 requirements of Section 7(b)(4) of the ESA and is arbitrary and capricious under the APA
12 because those statements allow take at levels that would jeopardize listed species. As a result, the
13 take statement cannot provide a reasoned explanation why those levels would not jeopardize
14 listed species, and does not require reinitiation of consultation until the listed species would be
15 nearly—if not totally—extinct.

16 93. In these and other ways, the analysis, reasoning, and conclusion of the NMFS
17 Biological Opinion, and the actions of Defendants Ross, Oliver, and NMFS described here, are
18 arbitrary, capricious, an abuse of discretion, not in accordance with law, in excess of statutory
19 authority, and without observance of procedure required by law, in violation of the ESA and its
20 implementing regulations and the APA. 5 U.S.C. § 706.

21 94. The Court has the authority to issue the requested declaratory and injunctive relief.
22 28 U.S.C. §§ 2201–2202; 5 U.S.C. §§ 705–706; Fed. R. Civ. P. 65.

23 95. The challenged agency actions are final and subject to judicial review. 5 U.S.C.
24 §§ 702, 704, 706.

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1 **SECOND CLAIM FOR RELIEF**

2 **Violation of the ESA, 16 U.S.C. § 1531 *et seq.*, and the APA, 5 U.S.C. § 706**
3 **(By all Plaintiffs Against Defendants David Bernhardt, Aurelia Skipwith, and the U.S. Fish**
4 **and Wildlife Service)**

5 96. California realleges, as if fully set forth herein, each and every allegation contained in
6 the preceding paragraphs.

7 97. The USFWS Biological Opinion is a final agency action subject to judicial review.

8 98. Defendants Bernhardt, Skipwith, and USFWS are responsible for the issuance of
9 USFWS Biological Opinion, as described in paragraphs 18–20 above.

10 99. Despite acknowledging that the populations of listed species are perilously close to
11 extinction or extirpation, Defendants Bernhardt, Skipwith, and USFWS conclude in the USFWS
12 Biological Opinion that Reclamation’s Proposed Action will not jeopardize the continued
13 existence of Delta smelt, and will not result in the destruction or adverse modification of the
14 species’ critical habitat. These conclusions, and Defendants Bernhardt, Skipwith, and USFWS’s
15 decision to adopt the USFWS Biological Opinion, are “arbitrary, capricious, an abuse of
16 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

17 100. The USFWS Biological Opinion fails to provide actual analysis of whether the effects
18 of the Proposed Action added to baseline conditions would or would not tip a species into
19 extinction. The Ninth Circuit has explained that “even when baseline conditions already
20 jeopardize a species, an agency may not take action that deepens the jeopardy by causing
21 additional harm.” *Nat’l Wildlife Fed’n*, 524 F.3d at 930.

22 101. The USFWS Biological Opinion fails to articulate the required “rational connection
23 between the facts found and the choice made.” *See Burlington Truck Lines, Inc. v. United States*,
24 371 U.S. 156, 168 (1962). The “no jeopardy” conclusion is contradicted by the evidence before
25 the agencies, is not rationally connected to facts, and is not support by reasoned explanations. For
26 instance, the capability of the proposed Delta Fish hatchery to supplement wild fish populations
27 in a timely manner is uncertain. The USFWS Biological Opinion fails to consider the likely
28 increase in entrainment of Delta smelt resulting from the increase in water exports planned in the

1 Proposed Action, and fails to articulate why it made a “no jeopardy” conclusion despite
2 acknowledged reduction of the Delta smelt’s critical habitat.

3 102. The USFWS Biological Opinion does not consider the relevant factors, and “entirely
4 failed to consider ... important aspect[s] of the problem.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*
5 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The USFWS Biological Opinion
6 essentially fails to consider the material decline of the Delta smelt.

7 103. The USFWS Biological Opinion does not “use the best scientific and commercial
8 data available” in the Biological Opinion, including but not limited to in the Summer-Fall Habitat
9 Action and in its management of Fall X2. 16 U.S.C. § 1536(a)(2).

10 104. The USFWS Biological Opinion impermissibly relies solely on operational criteria
11 and other conservation measures that are not reasonably certain to occur, are of questionable
12 effectiveness, or significantly post-date implementation of the Proposed Action. *See, e.g., Nat’l*
13 *Wildlife Fed’n*, 524 F.3d at 936 n.17. For example, the limitations on storm-related flexibility
14 and smelt population supplementation plan are not reasonably certain to occur nor are they
15 coupled with any other measures that are certain to occur and would protect the species.

16 105. The USFWS Biological Opinion fails to analyze key components of the proposed
17 action, including but not limited to a proposal to raise the height of Shasta Dam, in contravention
18 of the requirement that a biological opinion assess all aspects of a project. *See Conner v. Burford*,
19 848 F.2d at 1457.

20 106. The USFWS Biological Opinion improperly ignores the requirement that a biological
21 opinion consider not just impacts to the continued survival of listed species, but also the potential
22 to reduce appreciably the likelihood of species recovery. *Nat’l Wildlife Fed’n*, 524 F.3d at 931–
23 32.

24 107. The USFWS Biological Opinion’s incidental take statement also violates the
25 requirements of the Endangered Species Act and is arbitrary and capricious under the APA
26 because those statements self-evidently allow take at levels that would jeopardize listed species.
27 As a result, the take statement cannot provide a reasoned explanation why those levels would not
28 jeopardize listed species.

1 public of how changes to the Proposed Action and new modeling information included for the
2 first time in the Final EIS affect the analysis of project impacts. 40 C.F.R. § 1502.9(c); *see*
3 *Wilderness Defs.*, 752 F.3d at 760–67(*Wilderness Defs.* 2014).

4 113. Reclamation’s Final EIS presents a revised Proposed Action (Alternative 1) that
5 includes “substantial changes . . . relevant to environmental concerns.” 40 C.F.R.
6 § 1502.9(c)(1)(i). The Draft EIS analyzes as Alternative 1 a Proposed Action described in the
7 January 2019 Biological Assessment. But the Final EIS introduces a substantially revised
8 Alternative 1 based on the revised Proposed Action set forth in the October 2019 Biological
9 Assessment and which was analyzed in the 2019 Biological Opinions. The changes to the
10 Proposed Action from the Draft to the Final EIS are not minor and are not explained clearly to the
11 public in the Final EIS.

12 114. The Final EIS also includes thousands of pages of additional modeling that amounts
13 to “significant new . . . information relevant to environmental concerns,” triggering NEPA’s
14 requirement to circulate a supplement to the EIS. 40 C.F.R. § 1502.9(c)(1)(ii). Because this new
15 modeling of climate change scenarios and of the Fall X2 action for Delta smelt “raises substantial
16 questions” regarding the project’s impacts, further analysis is required “before allowing the
17 project to proceed.” *Wilderness Defs.* 2014, 752 F.3d at 760; *Klamath Siskiyou Wildlands Ctr. v.*
18 *Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

19 115. Reclamation failed to provide the public with a meaningful opportunity to comment
20 on relevant information about the Proposed Action and potential impacts in direct disregard of
21 NEPA’s informational goal. *See* 42 U.S.C. § 4332(2)(C); *Robertson*, 490 U.S. at 349; *Block*, 690
22 F.2d at 770. Reclamation’s failure to disclose the details of the Proposed Action before issuance
23 of the Final EIS “defeats NEPA’s goal of encouraging public participation in the development of
24 information during the decision making process.” *Half Moon Bay Fishermans’ Mktg. Ass’n v.*
25 *Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). The public and other agencies have also not had a
26 chance to comment on the updated modeling included in the Final EIS.

27 116. The analysis of environmental impacts in Reclamation’s EIS—including, but not
28 limited to, its analysis of impacts to endangered fish and aquatic resources—is inadequate and

1 unlawful. *See, e.g., City of Carmel-By-The-Sea*, 123 F.3d at 1160. Reclamation’s EIS (1)
2 minimizes the findings of expert scientific wildlife agencies, (2) arbitrarily adds limitations to its
3 modeling assumptions that are not contained in the project description and which directly affect
4 the scope and extent of the impact analysis on listed fish species and designated critical habitat;
5 and (3) considers protective measures that are infeasible, while refusing to analyze the impacts of
6 harmful measures that Reclamation itself identified as likely to occur. First, the EIS’s analysis of
7 fish impacts minimizes recent findings by the Services supporting the conclusion that the impacts
8 of the Proposed Action on listed fish species and their critical habitat will be more severe than
9 indicated in the Final EIS. Reclamation instead focuses on the “uncertainty” of the possible
10 effects of the Proposed Action and discounts the potential impacts associated with the Proposed
11 Action, such as the impact that reduced Delta outflow, will have on the listed fish species and
12 their critical habitat. By failing to provide a rational justification for its failure to address these
13 findings, the EIS violates NEPA.

14 117. Second, Reclamation’s modeling relies on assumptions that do not match the project
15 description. For example, while the description of Alternative 1 allows for a combined export
16 rate of 14,900 cubic feet per second, without a time limit during a storm-related flexibility event,
17 Reclamation’s modeling assumes an OMR index of 6,000 cubic feet per second for 7 days in each
18 of January and February during wet, above normal and below normal water years. This
19 unreasonable assumption results in modeling results that do not reflect the permitted operations of
20 the projects and unlawfully minimizes the impacts to aquatic resources that will result from
21 Reclamation’s proposed action.

22 118. Third, Reclamation’s Final EIS improperly credits reductions in the Proposed
23 Action’s impacts to infeasible conservation measures while failing to account for the reasonably
24 foreseeable negative impacts that will result from waivers of conservation measures. For
25 example, the EIS’s assessment of Alternative 1’s impacts on Delta smelt includes the potential
26 benefit from the Fish Conservation and Culture Laboratory’s reintroduction of hatchery-grown
27 smelt that is part of the Proposed Action. As noted by commenters including CDFW, however,
28 the Fish Conservation and Culture Laboratory’s reintroduction program is unlikely to be able to

1 capture sufficient numbers of wild Delta smelt to support the genetic diversity needed for a
2 supplementation program, and may not be able to produce smelt in sufficient numbers soon
3 enough to serve the mitigation effect attributed to it by Reclamation. The Final EIS's
4 characterization of the reintroduction efforts for Delta smelt as a beneficial measure with
5 appreciable positive effects without acknowledging the uncertain efficacy of the measure is
6 arbitrary and capricious.

7 119. Reclamation's EIS fails to analyze the impacts of temporary urgency change petitions
8 that the State Water Board may grant that adjust requirements in Reclamation's water right
9 permits during a prolonged or extreme drought. The EIS acknowledges that climate change will
10 increase the frequency and magnitude of extreme climate events like droughts but fails to take a
11 hard look at the consequences of such events, including the environmental consequences.

12 120. Reclamation's EIS fails to evaluate all reasonable alternatives to the Proposed
13 Action. 40 C.F.R. § 1502.14; *see Wilderness Defs. 2012*, 689 F.3d at 1071 ("The existence of a
14 viable but unexamined alternative renders an environmental impact statement
15 inadequate."). Reclamation's scoping exercise unreasonably excluded components that would
16 have provided for a reduction in the environmental impacts of the coordinated operations of the
17 Central Valley Project and State Water Project. Of the alternatives that Reclamation did include,
18 the EIS fails to objectively evaluate these alternatives as demonstrated by the inadequacies in the
19 analysis identified in comments on the Draft EIS filed by CDFW and the State Water Board. *See*
20 40 C.F.R. § 1502.14; *see also Wilderness Defs. 2012*, 689 F.3d at 1071 ("NEPA regulations
21 require that an EIS rigorously explore and objectively evaluate all reasonable alternatives.").

22 121. Reclamation's EIS further fails to meaningfully evaluate the cumulative impacts of
23 Reclamation's new management direction for the Central Valley Project (the Proposed Action)
24 with the impacts of other projects in the region. Rather than evaluate and disclose such
25 cumulative impacts, Reclamation's EIS merely provides a list of past, present, and reasonably
26 foreseeable projects in the Central Valley and Bay-Delta and frequently states that the combined
27 impacts of these projects are unknown. *See Final EIS, Appendix Y*. This analysis does not
28

1 comply with NEPA. *See City of Carmel-By-The-Sea*, 123 F.3d at 1160 (holding cumulative
2 impacts analysis unlawful where EIS failed “to provide any useful analysis” of such impacts).

3 122. Reclamation’s EIS also fails to discuss in meaningful detail mitigation measures that
4 might avoid, minimize, or mitigate the significant environmental effects of the Proposed Action,
5 or adequately assess whether the proposed mitigation measures will or are likely to be effective.
6 *See Robertson*, 490 U.S. at 351; *S. Fork Band Council*, 588 F.3d at 727. For example, as CDFW
7 pointed out in its comments on the Draft EIS, the EIS does not propose mitigation measures to
8 avoid or minimize potential adverse impacts to longfin smelt due to reduced Delta outflow and
9 increased entrainment risk. Reclamation’s EIS acknowledges that “[r]eductions in winter/spring
10 Delta outflow under Alternatives 1 through 3 have the potential to negatively affect the
11 population abundance of Longfin Smelt.” Final EIS at 5-72. But the EIS only proposes to
12 *monitor the presence of* longfin smelt in mitigation measure (MM) AQUA-16, which will do
13 nothing to avoid or minimize the harm to the species from reduced outflows and entrainment
14 caused by the Proposed Action. And Reclamation’s response to CDFW’s suggestion of a more
15 substantive mitigation measure is inadequate because it merely points to MM AQUA-16. NEPA
16 requires Reclamation to consider and evaluate the effectiveness of such mitigation measures. *See*
17 *S. Fork Band Council*, 588 F.3d at 727 (holding EIS was unlawful where agency failed to “assess
18 the effectiveness of mitigation measures relating to groundwater”). Further, in its impact
19 analysis, the EIS makes no good faith effort to quantify or otherwise reasonably evaluate the
20 degree of significance of these adverse effects.

21 123. Reclamation’s action would take species that are listed as threatened or endangered
22 under CESA. Reclamation’s EIS does not comply with the requirement of 40 C.F.R.
23 § 1502.16(c) that Reclamation address the inconsistency between, on the one hand, its take of
24 endangered or threatened species, and, on the other hand, California’s statutory protections for
25 endangered species and California’s policy of conserving, protecting, restoring, and enhancing
26 endangered or threatened species and their habitats. Cal. Fish & Game Code § 2052. This failure
27 is arbitrary and capricious and therefore contrary to the requirements of NEPA and the APA.
28

- 1 5. Holding unlawful and setting aside Reclamation’s Final EIS and Record of Decision;
- 2 6. Granting a preliminary and permanent injunction prohibiting the Bureau of
- 3 Reclamation, its agents, and any other federal officers from taking any other actions in reliance on
- 4 Reclamation’s EIS and Record of Decision until the Bureau of Reclamation has complied with
- 5 the National Environmental Policy Act as ordered by this Court;
- 6 7. Granting a preliminary and permanent injunction prohibiting the Defendants, their
- 7 agents, and any other federal officers, from taking any other actions in reliance on the Biological
- 8 Opinions until the Defendants have complied with the Endangered Species Act;
- 9 8. Retaining jurisdiction over this matter until such time as the Secretaries and their
- 10 agents have fully complied with the Court’s order;
- 11 9. Awarding Plaintiffs costs, expenses, and reasonable attorneys’ fees; and
- 12 10. Awarding Plaintiffs such other relief as the Court deems just and proper.

13 Dated: February 20, 2020

Respectfully submitted,
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