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14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

16 PACIFIC COAST FEDERATION OF  
17 FISHERMEN'S ASSOCIATIONS, *et al.*,

18 Plaintiffs,

19 v.

20 GINA RAIMONDO, in her official  
21 capacity as Secretary of Commerce, *et al.*,

22 Defendants.

Case No. 1:20-cv-00431-JLT-EPG

**PCFFA PLAINTIFFS' OBJECTIONS TO  
FEDERAL DEFENDANTS' REQUEST  
FOR JUDICIAL APPROVAL OF  
PROPOSED 2023 INTERIM  
OPERATIONS PLAN; REQUEST FOR  
MODIFIED INTERIM OPERATIONS;  
AND PARTIAL OPPOSITION TO  
FEDERAL DEFENDANTS' STAY  
REQUEST**

Hearing date: \*  
Judge: Hon. Jennifer L. Thurston

Courtroom 4, 7th Floor  
2500 Tulare Street  
Fresno, California 93721

27 \* Pursuant to General Order No. 618 and this Court's prior minute orders, all civil motions will be  
28 decided on the papers unless otherwise ordered by the Court.

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1 **INTRODUCTION**

2 “Insanity is doing the same thing over and over and expecting different results.” This  
3 oft-quoted saying captures Federal Defendants’ request that the Court approve an interim  
4 operations plan in 2023 that would allow the U.S. Bureau of Reclamation (“Reclamation”) to  
5 simply continue operating the Central Valley Project (“CVP”) in the same manner it did last  
6 year—and hope that doing so does not drive protected Chinook salmon species and Delta Smelt  
7 extinct—despite far worse impacts to fish this year than Federal Defendants promised.

8 Federal Defendants and *CNRA* Plaintiffs<sup>1</sup> ask the Court to place its imprimatur on this  
9 plan with no evidence whatsoever that it will ensure the survival of the imperiled fish species  
10 currently in the crosshairs. Having operated the CVP in a critically dry year under the terms of  
11 the nearly identical 2022 interim operations plan (“IOP”), one might expect Federal Defendants  
12 to present this Court with an analysis of how protected fish species fared under the 2022 IOP and  
13 what impacts the Court should expect in the coming year, if the terms of the IOP were to be  
14 continued. But they have offered no such evidence.

15 It is little wonder why. Federal Defendants’ operations under the 2022 IOP demonstrate  
16 that they abandoned the promised “targets” for winter-run Chinook habitat within a month of the  
17 Court’s March 2022 order, and almost as quickly reneged on their commitment to operate the  
18 CVP to maximize protection for habitat—refusing to minimize releases from Shasta Reservoir to  
19 conserve cold water for salmon later in the management season. The result, as Plaintiffs’  
20 evidence shows, is that Reclamation lost the ability to control in-stream temperatures by  
21 September 2022, when nearly 80% of winter-run Chinook salmon eggs had yet to emerge, and  
22 endangered winter-run Chinook likely suffered a third consecutive year of almost complete  
23 juvenile mortality.

24 The Court in March 2022 may have been resigned to taking Reclamation at its word that  
25 it would manage water resources to prioritize winter-run Chinook salmon habitat and survival,  
26 but this year, the lessons from the 2022 IOP make clear that additional limits on Reclamation’s  
27

28 <sup>1</sup> Because only Federal Defendants are parties in this case, this brief refers primarily to Federal Defendants, while also addressing *CNRA* Plaintiffs’ separate arguments, where applicable.

1 discretion are necessary—and it would be unreasonable for this Court to endorse a repeat of the  
2 2022 IOP without modifications. Reasonableness is the minimum metric against which Federal  
3 Defendants’ proposed 2023 IOP must be judged.

4       There is no evidence that the proposed 2023 IOP will be any more successful than it was  
5 last year. Federal Defendants do not, for example, offer any facts that would allow the Court to  
6 conclude that Reclamation will ensure adequate habitat for winter-run Chinook eggs in 2023 by  
7 reducing releases to the maximum extent possible. Nor do they analyze the impacts of a  
8 potential *fourth* year of devastating mortality on the species: They do not explain the expected  
9 health of the returning cohort, nor the likely juvenile mortality rate given the anticipated  
10 hydrology for 2023.

11       Because Federal Defendants’ and *CNRA* Plaintiffs’ proposal to simply continue the terms  
12 of the IOP is unreasonable, fails to account for the experience under the 2022 IOP and the  
13 anticipated conditions for the species next year, and is likely to threaten the survival of winter-  
14 run Chinook as well as other listed species, this Court should deny the request to enter their  
15 proposed 2023 IOP as an order of the Court. The Court should instead require modification of  
16 the IOP to ensure: (1) more protective and enforceable requirements for Shasta Reservoir  
17 carryover storage and downstream temperatures, and Reclamation’s commitment to manage  
18 water resources to maximize winter-run Chinook habitat; (2) clear limits on the use of temporary  
19 urgency change petitions (“TUCPs”) to deviate from minimum Delta flow requirements; and (3)  
20 prohibition on the use of the IOP’s “poorly defined” storm flex provision. Only with these  
21 modifications can the Court find that the 2023 IOP is reasonable and consistent with the law.

22       *PCFFA* Plaintiffs also oppose the request that this case be entirely stayed through  
23 December 2023. While *PCFFA* Plaintiffs do not oppose a stay of proceedings with respect to  
24 the lawfulness of the Trump-era Biological Opinions, given the experience under the 2022 IOP,  
25 there should be a limited exception allowing parties to seek injunctive relief if necessary to  
26 address unanticipated harms to the species or a failure to comply with the terms of the IOP.

27 //

28 //

**BACKGROUND**

**I. This Court Approved the 2022 Interim Operations Plan Proposed by Federal Defendants and CNRA Plaintiffs Relying on Those Parties’ Incorrect Assertions That the Plan Would Protect Imperiled Fish Species from the Effects of the Water Project Operations Under the Trump-Era Biological Opinions**

The coordinated operations of the CVP and State Water Project (collectively, “Water Projects”) have a profound effect on the endangered and threatened fish living in the San Francisco Bay Delta. The Bay Delta is home to several fish species listed as threatened or endangered under the federal Endangered Species Act (“ESA”), all of which have precipitously declined since the construction of the Water Projects. Dkt. 82 (Rosenfield Decl.) ¶¶7, 17–18. Nevertheless, in 2019, the Trump administration issued Biological Opinions in which the federal wildlife agencies—the National Marine Fisheries Service (“NMFS”) and U.S. Fish and Wildlife Service (“FWS”)—purported to evaluate the impacts of these operations on protected fish species and concluded that the proposed Water Project operations would *not* jeopardize the continued survival of the species. Because the 2019 Biological Opinions were clearly arbitrary and contrary to all the evidence before the federal agencies,<sup>2</sup> PCFFA Plaintiffs filed suit, and the CNRA Plaintiffs followed with their separate, yet parallel, lawsuit. Dkt. 1; *CNRA v. Raimondo*, No. 1:20-CV-00426-JLT-EPG, Dkt. 1. Federal Defendants have now conceded there is no justification for the flawed 2019 Biological Opinions, telling this Court that they will not defend the Opinions or their “no-jeopardy” findings, and Reclamation has reinitiated consultation to develop new biological opinions on Water Project operations. Dkt. 314 at 28–29; Dkt. 293.

While Federal Defendants refused to defend the 2019 Biological Opinions, they proposed—together with CNRA Plaintiffs—that those Trump-era opinions remain in place pending development of new biological opinions, subject only to certain modifications pursuant to an “interim operations plan” that the federal and state agencies negotiated and asked this Court to approve. Dkt. 314 at 20–23. PCFFA Plaintiffs opposed the federal and state agencies’

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<sup>2</sup> The Trump-era Biological Opinions are unlawful, *inter alia*, because NMFS and FWS ignored evidence of the increasing decline of listed species, *see, e.g.*, Dkt. 85-1 (FWS BiOp) at 210–14, 393; unlawfully allowed near-total mortality of listed species, *see* Dkt. 85-2 (NMFS BiOp) at 801–02; Dkt. 85-1 at 393–96; and were subject to improper political influence, Dkt. 322 at 14 n.3.



1 proposed interim operations plan for Water Year 2022, including because expert testimony  
2 demonstrated that the plan would allow devastating effects on winter-run and spring-run  
3 Chinook salmon caused by excessively warm in-stream water temperatures (which are directly  
4 affected by the amount and timing of Reclamation’s water releases from Shasta Reservoir), and  
5 pumping that kills and injures Delta Smelt. Dkt. 322 at 6–7; Dkt. 325 (Supp. Rosenfield Decl.)  
6 ¶¶28, 29, 33–34, 40, 45.

7 *PCFFA* Plaintiffs also warned that the 2022 IOP was not sufficiently protective because  
8 it lacked any clear commitments: The in-stream water temperatures and Shasta Reservoir  
9 carryover storage goals were expressed as mere “targets,” subject only to a stated commitment to  
10 operate the Water Projects to maximize the amount of time that suitable habitat for Chinook  
11 salmon could be maintained. *See, e.g.*, Dkt. 320 at 27; Dkt. 313-1 ¶¶12(i)(b), 15, 16(ii).  
12 Plaintiffs proposed alternative injunctive relief, which would have included a requirement that  
13 Federal Defendants demonstrate that they had used best efforts and reduced water allocations to  
14 the extent feasible before deviating from more protective water temperature commitments, water  
15 storage goals, and other measures designed to improve the chances that Water Project operations  
16 would not jeopardize ESA-listed fish species. Dkt. 322; Dkt. 378; Dkt. 378-1 at 5.

17 While the previously assigned judge expressed concern that the agencies were asking  
18 him to trust that they were “truly [] doing the very best they can” despite the fact that the interim  
19 operations plan did not have any explicit “good faith” requirement, the judge determined to treat  
20 the proposed interim operations plan as a quasi- (and temporary) settlement of the *CNRA*  
21 Plaintiffs’ claims.<sup>3</sup> Dkt. 389 (Transcript of 2022 Hearing) at 60:13–22 (“[I]s there some notion  
22 that under the IOP, you’re obligated to proceed in good faith . . . Where is that?”).

23 The 2022 IOP approved by the Court had addressed Shasta Reservoir operations and  
24 established a “priority” of water uses,<sup>4</sup> stating that Reclamation would manage releases from the

25 \_\_\_\_\_  
26 <sup>3</sup> Of course, any agreement among the parties in the *CNRA* matter does not bind *PCFFA* Plaintiffs,  
27 who are not parties in that case. The Court, however, declined to enter *PCFFA* Plaintiffs’ more  
28 protective injunctive relief in this case. Dkt. 322; Dkt. 394 at 119.

<sup>4</sup> As became clear at the February 2022 hearing on interim operations, the federal agencies only  
intended to apply their “order of priorities” to so-called “stored water,” which they define as water  
that has been in Shasta Reservoir for more than 30 days. *See* Dkt. 389 at 69:15–23. In other

1 reservoir to “meet . . . daily average temperatures” of 55° F at Clear Creek Gauge downstream of  
2 Shasta Dam in critically dry years, or 54° F at the gauge in dry years. Dkt. 313-1 ¶15.  
3 Additionally, it established “potential end of September Shasta carryover storage range  
4 volumes,” including 1.2–1.8 million acre-feet (“MAF”) in a critically dry year,<sup>5</sup> which would be  
5 subject to change until Reclamation developed, and NMFS approved, a “temperature  
6 management plan” in May 2022, *id.* ¶16. The IOP further provided that “[i]f Reclamation is  
7 unable to meet habitat criteria [daily average temperatures] for the entire period” of May 15 to  
8 October 31, “then the agencies will agree on an operation to provide sufficient habitat for the  
9 longest period possible.” *Id.* ¶12(i)(b). The IOP also imposed certain operational provisions on  
10 the massive Water Project pumps in the Delta, including requirements for how much those  
11 pumps can cause Old and Middle Rivers (“OMR”) to flow backwards, most notably “OMR  
12 Flexibility During Delta Excess Conditions,” which allows for increased pumping during so-  
13 called “storm events,” *id.* ¶¶6, 7 (the “storm flex” provision).

14 **II. Operations Under Federal Defendants’ and CNRA Plaintiffs’ 2022 IOP Failed to**  
15 **Protect ESA-Listed Species from the Harmful Effects of Water Project Operations**

16 Reclamation failed to meet many of the operational targets identified in the 2022 IOP. And  
17 while not all of the effects of 2022 Water Project operations on listed fish species are yet known,  
18 the information currently available shows that endangered winter-run Chinook salmon, threatened  
19 spring-run Chinook, and Delta Smelt are all inching closer to extinction after 2022 operations.

20 //

21  
22 words, Reclamation intended that “passthrough” water could be released from Shasta Reservoir  
23 with complete disregard for the IOP’s priorities, thereby defeating the purpose of the purported  
24 prioritization of fish habitat. *Id.* at 130:25-131:22 (Court asking Federal Defendants’ witness “Do  
25 you know why [“passthrough” water is] not controlled by the IOP?” and opining “It doesn’t make a  
26 heck of a lot of sense to me, because that water, it seems to me, still has to play a role in  
temperature management. So I don’t know why it’s not considered in the IOP just because it’s not  
being stored in Shasta.”). The federal and state agencies have now proposed to make this loophole  
even more explicit. *See* Dkt. 406-2 ¶12(i)(c).

27 <sup>5</sup> Shasta carryover storage targets are important because Reclamation must have enough water  
28 stored behind Shasta Dam to operate its temperature control device and manage downstream  
temperatures to ensure sufficient habitat for winter-run to spawn and survive to the fry stage. Dkt.  
325 (Supp. Rosenfield Decl.) ¶¶40–41.

1           **A. The 2022 IOP, Shasta Reservoir Operations, and Species Impacts**

2           Shasta Reservoir operations, which this past water year were subject to the Court-ordered  
3 IOP, have significant and direct impacts on ESA-listed species. Releases from Shasta affect in-  
4 stream temperatures in the Sacramento River below the Reservoir, which can mean the difference  
5 of life or death for Chinook salmon eggs. Dkt. 325 (Supp. Rosenfield Decl.) ¶¶29–33. The amount  
6 of water released for diversions and deliveries affects Shasta Reservoir storage, freshwater  
7 outflows, and Reclamation’s ability to use its temperature control device later in the season.

8                   **1. 2022 Operations Did Not Meet the IOP “Targets” Nor Did They Adhere to the**  
9                   **IOP’s Commitments**

10           Water Year 2022 was a critically dry year. Dkt. 389 at 129:21–23. Under the 2022 IOP,  
11 Federal Defendants and CNRA Plaintiffs agreed that in critically dry years, Reclamation “will  
12 meet” daily average temperatures of 55° F at the Clear Creek Gauge from May 15 to October 31.  
13 Dkt. 406-2 ¶15(i)(a). This Court included that temperature requirement in its order adopting the  
14 IOP in March 2022. Dkt. 394 at 88. Yet only a month later, the agencies admitted that they were  
15 not planning to meet this requirement. Chisholm Decl., Exh. A at 5.

16           Instead, Reclamation decided to manage daily average temperatures at the State Highway  
17 44 Gauge, which is several miles upstream from the Clear Creek Gauge, reducing the amount of  
18 potential suitable habitat available for winter run spawning and egg incubation. Dkt. 406 at 13;  
19 Chisholm Decl., Exh. B at 8. As a result of Reclamation’s decision, daily average temperatures  
20 downstream at the Clear Creek Gauge were warmer, and frequently exceeded 55° F during the  
21 temperature management season when Chinook salmon eggs are present. *See* Chisholm Decl.,  
22 Exh. C at 3 (monthly average of 55.4° F at Clear Creek for August 2022, with a maximum daily  
23 average of 55.9° F); *id.*, Exh. D at 3 (monthly average of 55.9° F for September, with a maximum  
24 daily average of 57.2° F); *id.*, Exh. E at 3 (monthly average of 57.0° F for October, with a  
25 maximum daily average of 57.5° F).<sup>6</sup>

26  
27  
28           <sup>6</sup> Daily *average* temperatures, of course, fail to capture points during the day in which the river  
temperature is higher than the average, and thus likely underestimate species’ exposure to  
dangerously high temperatures. *See* Dkt. 325 (Supp. Rosenfield Decl.) ¶32.

1           While the 2022 IOP contemplated that Reclamation might not be able to meet the  
2 temperature “targets”—which was one of the bases on which *PCFFA* Plaintiffs objected to the  
3 IOP—it did include a commitment that, if temperature targets could not be met, the federal and  
4 state agencies would agree on operations to “provide sufficient habitat *for the longest period*  
5 *possible.*” Dkt. 395 ¶12(i)(b) (emphasis added); *see also* Dkt. 313-1 ¶12(i)(b) (explaining that  
6 winter-run “habitat criteria” are the temperature requirements set out in IOP ¶15). Despite this  
7 express commitment, Reclamation did not prioritize providing Chinook salmon habitat for the  
8 longest period possible; rather, it chose and implemented a “compromise” proposal. Specifically,  
9 Reclamation allowed for releases of **4,500** cubic feet per second (“cfs”) from Keswick Dam from  
10 May through August 2022, despite the agency’s own modeling showing that releases of **4,000** cfs  
11 was both feasible and more protective for ESA-listed species. Chisholm Decl., Exh. F at 5–7  
12 (showing lower temperature-dependent mortality (“TDM”) and higher carryover storage with  
13 4,000 cfs releases).

14           Thus, Shasta operations this past year did *not* comport with the 2022 IOP’s commitment to  
15 manage releases to ensure “sufficient habitat for the longest period possible.” Dkt. 395 ¶12(i)(b);  
16 Dkt. 313-1 ¶12(i)(b). *PCFFA* Plaintiffs repeatedly raised concerns with the agencies regarding the  
17 decision to permit releases of 4,500 cfs, noting that—in light of Reclamation’s own modeling—  
18 decreasing releases to 4,000 cfs would reduce Chinook salmon temperature-dependent mortality  
19 and improve Shasta end-of-September carryover storage. Chisholm Decl., Exh. G at 3; *id.*, Exh. H  
20 at 3. Plaintiffs’ concerns were ignored.

21           By September 21, 2022, Reclamation had depleted Shasta Reservoir so much with its  
22 excess releases that that water level fell below the amount needed to access the gates that allow  
23 Reclamation to closely manage in-stream temperatures through use of the temperature control  
24 device. Dkt. 406-6 (Grober Decl.) ¶28. As a result, Reclamation was unable to prevent a  
25 significant rise in water temperatures in the Sacramento River, leaving more than a month in the  
26 winter-run temperature management season in which temperatures have climbed as high as 57.5° F  
27 at the Clear Creek Gauge. *Id.*; Chisholm Decl., Exh. E at 3.

28

## 2. Chinook Salmon Continued to Suffer Unacceptable Losses in 2022

Winter-run. Headed into the 2022 water year, winter-run Chinook salmon had faced two consecutive years of devastating losses. Dkt. 325 (Supp. Rosenfield Decl.) ¶¶17–18. The species generally lives for only three years, and now can only spawn in the wild in the stretch of the Sacramento River below Shasta and Keswick Dams. Dkt. 82 (Rosenfield Decl.) ¶¶136, 149–51. Earlier this year, NMFS acknowledged that winter-run are “at high extinction risk.” Chisholm Decl., Exh. I at 28, 60–61.

Previous testimony in this case has established that winter-run eggs, which typically incubate between May and October, require cold water to survive, and that when Sacramento River temperatures exceed 53.5° F, the fish experience increasing levels of TDM. Dkt. 82 (Rosenfield Decl.) ¶¶138, 162; *see also* Dkt. 325 (Supp. Rosenfield Decl.) ¶¶13–14 (winter-run experienced 75% TDM in 2021, which “contributed to the very low egg-to-fry survival rates”), 16, ¶32 fig.2. That is why *PCFFA* Plaintiffs previously proposed temperature *requirements* of 53.5° F for a dry year and 54.5° F for a critically dry year, which are supported by a multitude of biological evidence. Dkt. 325 (Supp. Rosenfield Decl.) ¶¶32–34.<sup>7</sup> Indeed, the previously assigned judge requested *PCFFA* Plaintiffs’ expert testify earlier this year about the specific impact a difference of half a degree would make on winter-run eggs, and Dr. Rosenfield explained that TDM increases “rapidly, exponentially with increasing temperatures” above 53.5° F—including by more than 10% between 54.5° and 55° F. Dkt. 389 at 157:8-158:2, 159:14-160:21. The Court concluded that the requirements *PCFFA* Plaintiffs proposed “are biologically justified and would help ensure (if met) very low temperature dependent mortality,” but ultimately approved the IOP’s higher temperatures—54° F for a dry year and 55° F for a critically dry year—because it determined the lower temperatures were not feasible for 2022 due to low reservoir storage at the time. Dkt. 394 at

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<sup>7</sup> The Pacific Fishery Management Council, which includes a representative from NMFS, similarly concluded in a September 2022 letter that “the best available science now confirms that winter-run Chinook salmon egg TDM is in a non-linear relationship with specific temperature thresholds; that TDM rates increase very rapidly at daily average temperatures above 53.5°F (11.94°C) (Martin et al. (2016) and (2020)); and that TDM can be expected to be above 70 percent when eggs are incubated at constant temperatures of 55° F (~12.8° C) or higher.” Chisholm Decl., Exh. J at 8.

1 87. Without appropriate cold-water habitat, fewer eggs survive to incubate and hatch to migrate  
2 through the Delta as juveniles.

3 In the wake of operations under the 2022 IOP, the evidence shows that a catastrophically  
4 low number of winter-run Chinook have successfully hatched from eggs and survived to the  
5 juvenile life stage this year. Each year, FWS estimates the number of juvenile salmon that migrate  
6 past Red Bluff Diversion Dam on the Sacramento River. Chisholm Decl., Exh. K at 3 (showing  
7 annual data of fish counted in screw traps at Red Bluff). These estimates are published biweekly.  
8 *Id.* at 1. Historically, the majority of surviving winter-run juvenile fish will have migrated past  
9 Red Bluff Diversion Dam by mid-October. *Id.* (explaining that in the past 20 years, average  
10 passage of winter-run at Red Bluff was 73% by October 21).

11 This data is used to calculate the percentage of eggs that survive and successfully migrate  
12 as juveniles (fry) past Red Bluff Diversion Dam, known as “egg-to-fry” survival; this metric  
13 includes mortality from all sources and reflects species productivity and potential for long-term  
14 survival. Dkt. 82 (Rosenfield Decl.) ¶170. In 2020 and 2021, under the 2019 Biological Opinions,  
15 winter-run experienced two consecutive years of historically low egg-to-fry survival. Dkt. 325  
16 (Supp. Rosenfield Decl.) ¶¶13, 16. The most recent data indicate that in 2022, winter-run have  
17 experienced a *third* consecutive year of extremely low egg-to-fry survival.

18 As of October 21, 2022, Red Bluff passage was the lowest it has been in more than a  
19 decade. Chisholm Decl., Exh. K at 3 (graphs showing that 122,677 winter-run juveniles migrated  
20 past Red Bluff, lower than any year since 2009). Researchers estimate that this year will see the  
21 fewest number of juvenile winter-run pass Red Bluff in the past fifteen years, indicating  
22 catastrophically low egg-to-fry survival. *Id.*, Exh. L (predicting, as of October 25, that 168,042  
23 juvenile winter-run will migrate past Red Bluff in 2022, the lowest annual total since 2007). While  
24 a mid-October presentation from NMFS’s Southwest Fisheries Science Center estimates an overall  
25 egg-to-fry survival rate of 14%, assuming background survival of 36%, *id.*, Exh. M at 13, other  
26 agencies in the meeting warned background mortality could be much higher this year, which  
27 “could be an explanation for why the counts are so low at the RBDD.” *Id.*, Exh. N, at 6–7.

28



1           Assuming this 14% egg-to-fry survival estimate is accurate (despite the extremely low  
2 numbers passing Red Bluff), even the inadequate Trump-era Biological Opinion recognized that  
3 this rate of survival was catastrophically low. The 2019 opinion imposed an “incidental take” limit  
4 that provided that, after two years of less than 15% egg-to-fry survival of winter-run, which was  
5 the case going into 2022, operations in the third year must not result in less than a 21% egg-to-fry  
6 survival rate. *See* Dkt. 85-2 (NMFS BiOp) at 801; Dkt. 325 (Supp. Rosenfield Decl.) ¶¶13, 16  
7 (noting record-low egg-to-fry survival of 11.5% in 2020 and approximately 2% in 2021); Chisholm  
8 Decl., Exh. O at 6 (estimating 2.6% egg-to-fry survival in 2021); *see also* Dkt. 406 at 16 (CNRA  
9 Plaintiffs acknowledging that “winter-run Chinook Salmon experienced very low survival in 2020  
10 and 2021”). This three-year threshold is vitally important for a species with a three-year life span  
11 because it means there is no healthy cohort to keep the population going—all three years have  
12 suffered serious declines. *See* Dkt. 394 at 51 (quoting Dr. Herbold); Dkt. 325 (Supp. Rosenfield  
13 Decl.) ¶¶ 17-18.

14           Federal Defendants’ brief in support of the 2023 IOP attempts to paint a far rosier picture of  
15 the impact of this past year’s operations, based solely on incomplete information about TDM and  
16 failing to account for the high overall mortality for winter-run in 2022. *See* Dkt. 406 at 13 (arguing  
17 that operations were “outperforming” predicted TDM); Dkt. 406-4 (Marcinkevage Decl.) ¶15. But  
18 the measure of impact to the species is how many juveniles survive. And NMFS’s own declarant  
19 admits the incompleteness of Federal Defendants’ information, noting that as of September 2022,  
20 “80% of winter-run eggs ha[d] yet to emerge,” and “it is unclear how a historic heat wave in early  
21 September 2022 could impact egg incubation conditions.” *Id.* ¶16. Although the full extent of the  
22 harm is not yet known, late-season losses of temperature control have previously exacerbated  
23 temperature-dependent mortality, including in 2021. Dkt. 325 (Supp. Rosenfield Decl.) ¶40.  
24 Federal Defendants also point to other causes of low egg-to-fry survival rates, such as thiamine  
25 deficiency. *See* Dkt. 406-4 ¶17. While thiamine deficiency is indeed a factor, the key fact is that  
26 overall low egg-to-fry survival, for a third consecutive year, puts the species in grave risk of harm  
27 and is likely to violate the incidental take limit. The impacts of thiamine deficiencies make  
28 controlling the factors Reclamation can control—water temperatures—all the more important.

1           Because this is a species with a three-year lifecycle, the biological viability of the species  
2 turns both on whether a sufficient number of juveniles survive to migrate out to sea, and on  
3 whether that cohort then returns to spawn. The cohort return ratio—which compares the number of  
4 returning adult fish in a particular year to the number of fish that returned in its parent generation  
5 three years earlier, Dkt. 325 (Supp. Rosenfield Decl.) ¶¶17—is likely to show a declining population  
6 (be less than 1.0) for 2022, Chisholm Decl., Exh. P (comparing the small number of winter-run  
7 carcasses counted in 2022 to those counted 2019). In 2023, the returning cohort will be the fish  
8 that survived to be juveniles in 2020, when egg-to-fry survival was only 11.5%. Dkt. 325 (Supp.  
9 Rosenfield Decl.) ¶¶13, 16. This indicates that the cohort returning in 2023 is in a particularly  
10 precarious position.

11           Spring-run. Spring-run Chinook salmon also have a three-year lifecycle and are adversely  
12 affected by high in-stream water temperatures. After catastrophically low survival in 2021, Dkt.  
13 325 (Supp. Rosenfield Decl.) ¶¶20–22 (describing estimated loss of 92.5% of that year’s spawning  
14 spring-run population on Butte Creek), NMFS concluded earlier this year that spring-run’s  
15 “extinction risk may have increased, and is likely to increase over the next few years if there are  
16 not significant habitat and flow improvements.” Chisholm Decl., Exh. I at 61. Spring-run Chinook  
17 salmon generally spawn in the Sacramento River mainstem, Clear Creek, and the Feather River  
18 between mid-August and early October, below Water Project dams and other infrastructure. Dkt.  
19 82 (Rosenfield Decl.) ¶¶202, 211. Therefore, the high temperatures observed in September and  
20 October are likely to have profound impacts on the species.

### 21           **B. Waiver of Water Quality Standards Further Harmed ESA-Listed Species**

22           Water quality standards, such as minimum flow requirements, provide baseline protection  
23 for listed fish that is important for their survival. *See* Dkt. 325 (Supp. Rosenfield Decl.) ¶70  
24 (explaining that “the damage to protected species as a result of these prior temporary urgency  
25 changes is well-documented”). The 2022 IOP was silent on whether Reclamation would seek a  
26 waiver of water quality standards through a TUCP and, despite *PCFFA* Plaintiffs’ objections, did  
27 not impose any preconditions on Reclamation’s seeking such a waiver. Dkt. 322 at 28–29; Dkt.  
28 394 at 117–18; Dkt. 395.



1 In this past water year, Reclamation and the California Department of Water Resources  
 2 (“DWR”) sought, and were granted, a TUCP order for April 1 through June 30, 2022.<sup>8</sup> Chisholm  
 3 Decl., Exh. Q. *PCFFA* Plaintiffs objected to this TUCP on the basis that it would unreasonably  
 4 harm fish and wildlife, including Chinook salmon, steelhead, and Delta Smelt, because it allowed  
 5 Reclamation to reduce flows through the Delta beyond the minimum deemed necessary for  
 6 migrating salmonid and Delta Smelt survival, all without improving Shasta Reservoir storage. *Id.*,  
 7 Exh. R at 3–7. While Reclamation claimed the TUCP was necessary to “preserve upstream storage  
 8 for release later in the summer” and “preserve cold water in Shasta Lake and other reservoirs to  
 9 manage river temperatures for various runs of Chinook salmon and steelhead,” *id.*, Exh. S at 11,  
 10 Reclamation has now admitted that this year’s TUCP did not improve Shasta storage, *id.*, Exhs. T–  
 11 V, and its modeling shows that TUCPs generally do not do so. *Id.*, Exh. W at 8, 12, 24.

12 And yet the damage is done. The April-June 2022 TUCP had a detrimental impact on Delta  
 13 Smelt and other ESA-listed species. *Id.*, Exh. Q at 23–24, 40. In particular, the 2022 TUCP added  
 14 to the stressors on the Delta Smelt, a fish species with a one-year lifecycle endemic to the San  
 15 Francisco Bay estuary, which is among the most endangered species in the world. Dkt. 82  
 16 (Rosenfield Decl.) ¶¶29–30. Delta Smelt are threatened by low flows of fresh water out of the  
 17 Delta, the result of increased CVP exports out of the watershed. *Id.* ¶65. Indeed, Reclamation  
 18 acknowledged that the TUCP it sought for summer 2022 was likely to diminish Delta Smelt habitat  
 19 and survival. Chisholm Decl., Exh. S at 1-21, 2-45.

20 Delta Smelt are currently at historically low abundance levels. Despite the release of tens  
 21 of thousands of hatchery-produced Delta Smelt in late 2021, *id.* at 2-39 (describing “experimental  
 22 releases” of Delta Smelt), monitoring data show FWS<sup>9</sup> counted no Delta Smelt between September  
 23 26 and October 20, and currently estimates that the total Delta Smelt population is zero. Chisholm  
 24

25  
 26 <sup>8</sup> The agencies initially submitted a TUCP for February through April 2022, and then withdrew it  
 27 in January, recognizing that the TUCP would not provide any storage benefit for Shasta Reservoir.  
 Dkt. 369-3.

28 <sup>9</sup> Despite collecting such data regularly, FWS has not submitted any declaration accompanying the  
 request for approval of the 2023 IOP.

1 Decl., Exh. X. Reclamation and DWR’s 2022 TUCP exacerbated the already precarious condition  
2 of this species.

3 **III. Water Project Operations in 2023 Will Continue to Harm Protected Fish Species**

4 Water Year 2023 is likely to be another dry or critically dry year. Chisholm Decl., Exh. Y  
5 at 13 (showing DWR is planning for “a fourth consecutive dry year”); Dkt. 406 at 5. As in  
6 previous critically dry years, including 2022, the impacts of the Water Projects on species include  
7 lethal in-stream temperatures below Shasta Dam, lower flows and degraded water quality in the  
8 Delta if Reclamation and DWR seek TUCPs to violate the minimum standards, and high rates of  
9 pumping in the Delta, including during storm events.

10 Reclamation lost the ability to manage in-stream temperatures below Shasta Dam in  
11 September 2022, Dkt. 406-6 ¶28, and given “considerable uncertainty” about the coming year, Dkt.  
12 406 at 5, there is a danger that Reclamation will again choose to release too much water too early  
13 in the season, creating temperatures that are not survivable for incubating Chinook salmon eggs  
14 later in the season. And, as discussed above, Reclamation’s propensity to seek TUCPs in dry years  
15 harms Delta Smelt and other listed species, Chisholm Decl, Exh. Q at 23–24, 40, and it is  
16 reasonable to expect similar effects in 2023.

17 Yet, in terms of Shasta storage, Reclamation is better positioned entering the 2023 water  
18 year than it was in 2022. At the end of September 2022, Reclamation had 1.5 MAF of water in  
19 Shasta Reservoir. Dkt. 406-3 (Conant Decl.) ¶10. This represents an increase of 400,000 acre-feet  
20 from end-of-September storage in 2021, Dkt. 406-6 ¶20, meaning that Reclamation starts Water  
21 Year 2023 with increased potential to properly manage both temperatures and storage. Dkt. 325  
22 (Supp. Rosenfield Decl.) ¶¶40–42; Dkt. 394 at 54–55.

23 Additionally, while 2022 operations did not exercise the IOP’s “storm flex” provision, any  
24 implementation of this provision in 2023 would cause significant harm to ESA-listed species.  
25 Excessive pumping in the Old and Middle Rivers in the Delta produces large negative, or reverse,  
26 flows that are dangerous to ESA-listed fish species. Dkt. 325 (Supp. Rosenfield Decl.) ¶48.  
27 Indeed, one of the primary threats to Delta Smelt survival is entrainment in the Water Projects’  
28 infrastructure, which is often caused by pumping at high rates that create these reverse flows. Dkt.

1 82 (Rosenfield Decl.) ¶¶37, 41, 49–50. The 2022 IOP incorporated the “storm flex” provision  
 2 from the State’s CESA incidental take permit, which allows OMR flows as negative as -6,250 cfs  
 3 during undefined “storm events,” Dkt. 406-2 ¶7, despite evidence that such high-velocity reverse  
 4 OMR flows carry a high risk of entrainment for threatened and endangered fish species, Dkt. 325  
 5 (Supp. Rosenfield Decl). ¶¶48, 49. The proposed 2023 IOP also includes this “storm flex”  
 6 provision, effectively allowing federal and state agencies to pump in amounts for which there is no  
 7 biological justification. Dkt. 406-2 ¶7; *see also* Dkt. 394 at 98, 100 (Court noting that provision is  
 8 “poorly defined” and acknowledging expert’s “legitimate concerns” that 2022 IOP’s storm flex  
 9 provision risked “large entrainment events”).

10 For all of the above reasons, it is reasonable to expect that operations under the proposed  
 11 2023 IOP will replicate—and worsen—the harms to the Bay Delta’s threatened and endangered  
 12 fish species that occurred in 2022 if this Court does not strengthen the proposed 2023 IOP.

### 13 ARGUMENT

#### 14 I. Legal Standard Applicable to Federal Defendants’ Request for Judicial Approval of 15 the Proposed 2023 IOP

16 Federal Defendants ask the Court to enter the 2023 proposed IOP as an order of the Court,  
 17 which would leave the 2019 Biological Opinions in place except as modified by the plan proposed  
 18 by the federal and state agencies and, further, would allow the Water Project operations to harm  
 19 listed fish species so long as operations were consistent with that plan. *See* Dkt. 406-1.

20 In early 2022, this Court held that it was appropriate to adopt the initial IOP as quasi-  
 21 consent decree or stipulated injunction. Dkt. 394 at 71, 74. *PCFFA* Plaintiffs argued that any  
 22 interim relief was subject to the well-established standard for an injunction. Dkt. 387 at 2. The  
 23 Court, however, cited to cases involving consent decrees.<sup>10</sup> Dkt. 394 at 71–74. Under that  
 24 caselaw, the judicial inquiry turns on whether the proposed terms are reasonable and consistent  
 25

26  
 27 <sup>10</sup> Federal Defendants wrongly suggest that *PCFFA* Plaintiffs have agreed the consent decree  
 28 standard is the “law of the case.” Dkt. 406 at 9 (citing Dkt. 404 at 6). *PCFFA* Plaintiffs have not  
 so agreed and maintain their position that the injunctive relief standard applies. Moreover, “[t]he  
 law of the case doctrine does not preclude a court from reassessing its own legal rulings in the  
 same case.” *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018).

1 with law. *Id.* Thus, to enter the proposed 2023 IOP as a consent decree, this Court must find that  
 2 the IOP is “fair, reasonable and equitable and does not violate the law or public policy.” Dkt. 394  
 3 at 72 (quoting *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 672 F.3d 1160, 1165  
 4 (9th Cir. 2012)). Federal Defendants bear the burden of establishing that their proposal meets the  
 5 standard. *See United States v. Daimler AG*, No. 20-2564 (EGS), 2021 WL 878894 at \*4 (D.D.C.  
 6 Mar. 9, 2021) (in the context of a consent decree, government bore burden to show that terms were  
 7 fair, reasonable, and in the public interest).

8 Fairness must be evaluated with respect to both parties *and* nonparties to the proposed  
 9 “decree.” *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 834 F. Supp. 2d 1004,  
 10 1016 (D. Haw. 2011). And “the court must ‘be satisfied that the [IOP] represents a reasonable  
 11 factual and legal determination.’” *Id.* at 1009 (quoting *United States v. Oregon*, 913 F.2d 576, 581  
 12 (9th Cir. 1990)). The ESA’s prohibition against agencies jeopardizing listed species, *see* 16 U.S.C.  
 13 §§1538(a)(1)(B), 1539(a)(2), is relevant to the consideration of both whether the proposed IOP is  
 14 consistent with law and whether the IOP is reasonable. *See* Dkt. 394 at 67–69 (March 11, 2022  
 15 order holding that “jeopardy is relevant to the court’s evaluation” and the court must “incorporate  
 16 into its harm/reasonableness analyses relevant evidence presented to it regarding the impacts upon  
 17 the viability and recovery of species”).<sup>11</sup>

18 The Court need not adopt wholesale the injunctive terms proposed by Federal Defendants.  
 19 Pursuant to its equitable authority and its obligation to ensure that the relief is reasonable,  
 20 consistent with law, and fair, the Court may modify a proposed consent decree if it provides  
 21 appropriate findings of fact and notice to the parties. *See Fed. Trade Comm’n v. Enforma Nat.*  
 22 *Prod., Inc.*, 362 F.3d 1204, 1218 (9th Cir. 2004); Dkt. 394 at 73–74 (discussing *Enforma*).  
 23 Accordingly, this Court has invited the parties to brief any “alternative requests for relief,” Dkt.  
 24 407, and provided an opportunity for all parties to respond to the alternative proposals.<sup>12</sup>

25 \_\_\_\_\_  
 26 <sup>11</sup> *PCFFA* Plaintiffs contend that in addition to being a factor in considering whether requested  
 27 relief is reasonable, as recognized by this Court (Dkt. 394 at 67–69), avoiding jeopardy to listed  
 28 species is a requirement for any interim relief ordered in an ESA case. *See* Dkt. 387 at 3; *Nat’l*  
*Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 929–31 (9th Cir. 2008).

<sup>12</sup> Alternatively, if the Court deems it necessary, *PCFFA* Plaintiffs’ proposed alternatives may be  
 treated as a request for injunctive relief. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161,

1 **II. Federal Defendants Fail to Demonstrate That the Proposed 2023 IOP Is Reasonable or**  
 2 **Consistent with Law**

3 Federal Defendants ask this Court to continue a nearly identical interim operations plan to  
 4 the one the Court adopted last year, and yet fail utterly to present evidence that might assure the  
 5 Court that continuing those operational parameters is reasonable and consistent with the ESA.  
 6 Contrary to the Federal Defendants' contentions, Dkt. 406 at 10, 14, the sole fact that the Court  
 7 approved a similar IOP last year does not automatically mean it would be reasonable, fair, and  
 8 lawful to approve those operations again this year. Federal Defendants must independently make  
 9 that showing in the context of the upcoming water year. This they cannot do. The evidence  
 10 demonstrates that it would be patently unreasonable and inconsistent with law to continue the IOP  
 11 as proposed, given the drastic, irreparable harm to listed species that occurred under the IOP last  
 12 year (and would occur again this year); the increasingly imperiled state of the species; and  
 13 improvements in water storage conditions at the start of this water year.

14 First, the meager evidence that was submitted by the agencies falls far short of satisfying  
 15 even the consent decree standard, which is already more lenient than the typical injunctive relief  
 16 standard. Although this Court has already held that impacts on species are a critical consideration  
 17 in evaluating reasonableness, Dkt. 394 at 67–69, and the agencies provide no analysis of the IOP's  
 18 potential impacts on ESA-listed species, Dkt. 406 (in contrast to the extensive briefing submitted to  
 19 purportedly support the initial IOP, Dkt. 394 at 16). There is no declaration from FWS, the agency  
 20 that protects Delta Smelt, at all. The NMFS declaration does not address any potential impacts on  
 21 winter-run, spring-run, or steelhead under the 2023 IOP, except to say that “[t]he need for  
 22 prioritization [of winter-run habitat] is further amplified by Thiamine Deficiency Complex  
 23 (TDC)[.]” Dkt. 406-4 ¶17. Although the *CNRA* Plaintiffs submitted a declaration opining that  
 24 operations under the 2022 IOP were beneficial, Federal Defendants remarkably expressly disavow  
 25 this declaration and the State's associated arguments. *See* Dkt. 406 at 13, 16–17. The agencies  
 26 have refused to provide meaningful evidence even though *PCFFA* Plaintiffs expressly identified

27  
 28 

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 1184–85 (9th Cir. 2011) (discussing showing necessary for granting injunctive relief, including  
 irreparable harm absent injunction, balance of burdens on parties, and public interest).

1 the need for this evidence in the September Joint Status Report. Dkt. 404 at 5–6. It would be  
2 unreasonable to enter the requested relief based on the evidence provided by Federal Defendants.

3 Moreover, the available data concerning the performance of the IOP this year, submitted  
4 by *PCFFA* Plaintiffs concurrent with this brief, *see* Background Section II.A, *supra*, demonstrates  
5 that it would be manifestly unreasonable and contrary to law for the Court to approve continuing  
6 the same operations plan for another critically dry year. Operations pursuant to the 2022 IOP this  
7 year had devastating effects on listed species. *Id.* Winter-run Chinook salmon most likely suffered  
8 extremely low egg-to-fry survival for the third straight year. *Id.* As a result, Federal Defendants  
9 are likely to violate even the woefully inadequate take limit in the Trump-era Biological Opinion—  
10 and thus violate the ESA.<sup>13</sup> *See* Background Section II.A.2, *supra* (explaining that a year of less  
11 than 21% egg-to-fry survival after two years of less than 15% violates the incidental take limit).

12 As *PCFFA* Plaintiffs predicted, Dkt. 320 at 27, the unenforceable terms of the IOP failed to  
13 protect Chinook salmon, as Reclamation chose not to meet the Sacramento River temperature  
14 “targets” at Clear Creek, and then blatantly disregarded the IOP’s requirement to “provide  
15 sufficient habitat for the longest period possible,” Dkt. 395 ¶12(i)(b); *see* Background Section II.A,  
16 *supra*, making excessive Shasta releases that resulted in higher river temperatures and mortality  
17 and an ultimate loss of the ability to maintain suitable cold-water habitat during the critical months  
18 of the winter-run Chinook rearing season, *see* Background Section II.A.1, *supra*.

19 Similar to winter-run, the spring Chinook salmon run’s extinction risk likely increased  
20 during 2022, following a year of catastrophically low survival in 2021. Dkt. 325 (Supp. Rosenfield  
21 Decl.) ¶¶20–22; Chisholm Decl., Exh. I at 61. And FWS currently estimates the Delta Smelt  
22 population as zero, despite releasing tens of thousands of hatchery Delta Smelt last year, due in part  
23 to harms caused by the Federal Defendants’ TUCP. Chisholm Decl., Exh. S at 1-21, 2-45, 71; *id.*,  
24 Exh. X. These documented harms to winter-run Chinook salmon, spring-run Chinook salmon, and  
25

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26 <sup>13</sup> The 2019 Biological Opinion’s take limit applies because Federal Defendants failed to operate  
27 pursuant to the terms of the IOP relating to temperature control, as set forth in Background Section  
28 II.A.1, *supra*. *See* Dkt. 394 at 120 (Reclamation avoids take liability under the Biological Opinions  
only “so long as Reclamation operates the CVP consistent with the terms of the IOP”). Even if the  
2019 take limit did not apply, the failure of Reclamation to manage the CVP to even that  
insufficient limit demonstrates the abject failure of the IOP to protect listed species.



1 Delta Smelt constitute unlawful jeopardy and irreparable harm. *See* 50 C.F.R. §402.02  
2 (“*Jeopardize the continued existence of* means to ... reduce appreciably the likelihood of both the  
3 survival and recovery of a listed species ... by reducing the reproduction, numbers, or distribution  
4 of that species”); *S. Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, 804 F. Supp. 2d  
5 1045, 1055 (E.D. Cal. 2011) (“the irreparable harm that the court is obligated to prevent is jeopardy  
6 to the very survival of the species”).

7 Like 2022, Water Year 2023 is expected to be another critically dry year. Chisholm Decl.,  
8 Exh. Y at 13. Repeating and exacerbating this year’s harms to species is what the Court can expect  
9 if it signs off on Federal Defendants’ proposed IOP. But knowing what the Court now knows  
10 about the effects of operations under the IOP, it would be plainly unreasonable to approve another  
11 year of similarly destructive water project operations. *See S. Yuba River Citizens League*, 804 F.  
12 Supp. 2d at 1055. That is particularly so given that the species will be starting the water year from  
13 an even more precarious position.

14 Finally, although last year the Court was concerned that more protective requirements were  
15 not “feasible” given the storage conditions and hydrology, Dkt. 394 at 113, the 2023 water year has  
16 begun with appreciably more water stored in Shasta Reservoir, *see* Dkt. 406-6 ¶20. It would also  
17 be unreasonable for the Court to approve the demonstrably insufficient IOP terms from last year  
18 when there is more water available that can be used to improve temperature protection for Chinook  
19 salmon and avoid the need for a TUCP.

20 **III. The Court Should Only Adopt the Proposed 2023 IOP with Modifications Designed to**  
21 **Ensure That the Mistakes of 2022 Are Not Repeated**

22 Federal Defendants’ failure to support their proposed court-ordered operations plan with  
23 evidence is understandable, given that the state and federal agencies’ data show that operations  
24 under the 2022 IOP were harmful to and continued to jeopardize the existence and recovery of  
25 listed species—and most likely will do so again in 2023, resulting in irreparable harm. *See*  
26 Background Section III, *supra*. Current information about species impacts makes clear that the  
27 operations plan as proposed cannot be approved as reasonable and lawful, but rather should be  
28 modified in a few critical ways to provide better temperature protection in the Sacramento River

1 and flow protection in the Delta. Specifically, the Court should make the following targeted  
2 modifications to the 2023 IOP, as reflected in the accompanying proposed order and redlined  
3 document (*see* Exhs. 1, 2):

- 4 (1) Require Reclamation to meet 1.9 MAF end-of September Shasta storage if 2023 is a  
5 critically dry year, or 2.2 MAF if 2023 is dry.
- 6 (2) Set temperature targets downstream of Shasta Reservoir at Clear Creek Gauge to 54.5°  
7 F for a critically dry year and 53.5° F for a dry year.
- 8 (3) If temperature targets cannot be met, require Reclamation to publicly document its plan  
9 for operating to provide sufficient habitat for the longest period possible and to seek and  
10 obtain approval of the plan from NMFS.
- 11 (4) Prohibit the use of OMR storm flex.
- 12 (5) Require Reclamation to take all actions within its discretion to reduce water deliveries  
13 and diversions before seeking TUCPs to violate Delta water quality standards.

14 As explained below, these additional protections are the bare minimum necessary to  
15 prevent irreparable harm and jeopardy to the Bay Delta’s threatened and endangered fish species.  
16 They also serve the public interest in ensuring the survival of ESA-listed species.<sup>14</sup> *See Sierra*  
17 *Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987), *abrogated on other grounds by Cottonwood*  
18 *Env’tl L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). Only with these  
19 modifications can the Court find the proposed 2023 IOP reasonable and consistent with the ESA.

20 **A. The IOP Must Include More Protective and Biologically Justifiable Shasta**  
21 **Temperature and Storage Requirements**

22 As this Court previously acknowledged, *PCFFA* Plaintiffs’ proposed downstream  
23 temperature requirements of 53.5° F (dry year) or 54.5° F (critically dry) “are biologically justified  
24 and would help ensure (if met) very low temperature dependent mortality.” Dkt. 394 at 87. This

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25  
26 <sup>14</sup> For the same reasons, *PCFFA* Plaintiffs’ proposed modifications meet the standard for injunctive  
27 relief. The experience under the 2022 IOP, with unlawful take of winter-run Chinook that flows  
28 from Reclamation’s failure to comply with the 2022 IOP, establishes a likelihood of success; and  
the balance of equities clearly weighs in favor of requiring Federal Defendants to take actions  
within their discretion to prevent a fourth devastating year for this species. *See Winter v. Nat. Res.*  
*Def. Council*, 555 U.S. 7, 20 (2008).



1 year, reducing temperature-dependent mortality is even more critical to protecting winter-run  
2 Chinook salmon than it was last year. *See* Background Section II.A.2, *supra*. Federal Defendants  
3 and *CNRA* Plaintiffs do not and cannot show that their higher temperature targets would be  
4 sufficiently protective of the species, nor have they attempted to: NMFS’s declarant remarkably  
5 offered no opinion on the appropriate temperature for winter-run in 2023. *See* Dkt. 406-4.

6 On the record before it in early 2022, the Court decided that the *PCFFA* Plaintiffs’  
7 requirements “[were] unlikely to be achievable,” and so declined to impose them. Dkt. 394 at 88.  
8 But conditions are different this year. The 2023 water year is starting out with 400,000 more acre-  
9 feet in Shasta storage. Despite that increase in carryover storage, Federal Defendants have made  
10 no showing that the more protective, biologically justified 53.5° F/54.5° F requirement is not  
11 attainable *this year* given the changed conditions. It would be unreasonable not to require the  
12 agencies to use that water to protect listed species. Given the precarious state of the species and  
13 the improved storage conditions, the agencies’ operations plan should aim to meet the biologically  
14 justified requirements of 53.5° F for a dry year or 54.5° F for a critically dry year, which are  
15 reasonable and would support compliance with the ESA. Dkt. 325 (Supp. Rosenfield Decl.) ¶34.

16 For the same reasons, any IOP should require Reclamation to aim for higher carryover  
17 storage at the end of September 2023. *PCFFA* Plaintiffs have shown that storing at least 1.9 MAF  
18 by the end of September is critical to meeting adequate protective downstream water temperatures  
19 in the following water year. Dkt. 325 (Supp. Rosenfield Decl.) ¶43. In dry years Reclamation  
20 should be required store at least 2.2 MAF to maintain Chinook salmon habitat throughout the  
21 following year and thus reduce temperature-dependent mortality. *Id.*

22 Last year, the Court concluded that in light of then-current hydrological conditions, *PCFFA*  
23 Plaintiffs’ proposed higher carryover storage requirements, while biologically justified, were not  
24 feasible for the 2022 water year. Dkt. 394 at 55, 113. This year, despite starting with more  
25 carryover storage, the agencies propose the same inadequate storage targets from last year. That is  
26 clearly unreasonable. This year, Reclamation increased storage by 400,000, Dkt. 406-6 ¶20, and  
27 the agencies make no argument why 1.9 MAF end-of-September storage would not be feasible in a  
28 water year beginning with 1.5 MAF end-of-September Shasta storage.

1           **B. The IOP Must Include Oversight and Accountability for Reclamation Maintaining**  
2           **Winter-Run Chinook Habitat Protections to the Maximum Extent Feasible**

3           As *PCFFA* Plaintiffs predicted, Dkt. 320 at 24, the 2022 IOP’s provisions allowed  
4 Reclamation to deviate from the purported Sacramento River temperature “targets” and other  
5 criteria in the IOP with no meaningful oversight or repercussions. *See, e.g.*, Dkt. 322 at 23; Dkt.  
6 406-1 §12(b). Not only did Reclamation not meet these “targets,” but Reclamation violated the  
7 IOP’s requirement to undertake “temperature management that provides sufficient habitat for the  
8 longest period possible” if the agency is unable to meet the temperature targets for the entire  
9 period. Dkt. 406-1 §12(b); *see* Background Section II.A.1, *supra* (Reclamation chose releases of  
10 4,500 cfs even though modeling showed that limiting releases to 4,000 cfs provided more habitat  
11 for longer). *PCFFA* Plaintiffs objected at the time and requested Reclamation’s justification for  
12 not managing to the longest period possible, but received no substantive response. *See* Chisholm  
13 Decl., Exhs. G, H.

14           The Court should therefore impose meaningful checks and balances on Reclamation’s  
15 operations in the event the IOP’s temperature targets are not achievable, in order to ensure that the  
16 agency actually operates to provide sufficient habitat for the longest period possible. The Court  
17 previously expressed concern with exercising an ongoing oversight role, Dkt. 389 at 26:12–16, but  
18 the experience of the past year demonstrates that any reasonable IOP must impose *some* kind of  
19 accountability on Reclamation to operate according to the IOP’s terms.

20           That accountability need not enmesh the Court in management decisions and can come  
21 from public transparency and increased oversight by the expert federal fisheries agency, NMFS.  
22 Specifically, *PCFFA* Plaintiffs propose that, if Reclamation is unable to meet the IOP’s  
23 temperature targets for the entire temperature management season, Reclamation must provide a  
24 public document explaining why it is unable to meet the targets, and setting forth and providing  
25 justification for Reclamation’s plan for operating to provide “sufficient habitat for the longest  
26 period possible”—*i.e.*, the commitment in the IOP that Reclamation proposes to continue, but  
27 which was violated in 2022. That plan should also be subject to approval by NMFS.

28

1           Currently, the proposed IOP does not require any explanation or documentation by  
 2 Reclamation of why temperature targets are not achievable. And although the IOP currently  
 3 provides that a “Shasta Planning Group” of six state and federal agencies will consult and “agree”  
 4 on operations if the temperature targets cannot be met, Dkt. 406-1 §12(b), that fails to ensure any  
 5 transparency regarding the justification for the decisions and provides an outsize role to agencies  
 6 with other priorities besides protecting wildlife species. *PCFFA* Plaintiffs’ proposal addresses all  
 7 three of those shortcomings without burdening the Court or unduly burdening Reclamation.<sup>15</sup>

8           There is substantial precedent for a process like *PCFFA* Plaintiffs propose. Under NMFS’s  
 9 2009 Biological Opinion, for example, Reclamation was required to obtain NMFS’s concurrence  
 10 on its draft Shasta temperature management plan before submitting the plan to the State Water  
 11 Resources Control Board, ensuring that its proposed operations are consistent with the ESA and  
 12 operative biological opinions. Dkt. 85-18 (2009 NMFS BiOp) at 602. The 2023 IOP should  
 13 implement a similar process when Reclamation seeks to deviate from the IOP’s temperature  
 14 targets. Continuing the IOP without any such oversight and accountability would be unreasonable  
 15 and leaves Reclamation free to violate the winter-run habitat commitments of the IOP with  
 16 impunity, as it did this year.

### 17           **C. The IOP Must Prevent the Use of OMR Storm Flex**

18           Although it is well-established that highly negative flows in the Delta’s Old and Middle  
 19 Rivers are dangerous to ESA-listed fish species, Dkt. 325 (Supp. Rosenfield Decl.) ¶¶48-49, the  
 20 proposed 2023 IOP would again allow OMR flows as negative as -6,250 cfs during “storm events.”  
 21 Dkt. 406-2 ¶7. As *PCFFA* Plaintiffs previously explained, more restrictive limits—specifically,  
 22 prohibiting OMR flows more negative than -5,000 cfs—are necessary to avoid entrainment and  
 23 irreparable harm to listed species. Dkt. 325 (Supp. Rosenfield Decl.) ¶¶46, 50.

24           The Court previously agreed with *PCFFA* Plaintiffs that the IOP’s storm flex provision was  
 25 “poorly defined” because “no duration is specified, nor is the concept of a ‘storm event’ defined,”  
 26 Dkt. 394 at 98, and therefore may “risk large entrainment events,” *id.* at 100, that cause substantial

27 \_\_\_\_\_  
 28 <sup>15</sup> Such modifications to the proposed IOP would leave in place provisions allowing Reclamation  
 to consult with the Shasta Planning Group and coordination with the “Meet and Confer Group”  
 described in the 2019 NMFS Biological Opinion. Dkt. 406-1 §12(b).

1 harm to species. In March 2022, the Court declined to impose *PCFFA* Plaintiffs’ limits “for now”  
2 in reliance on Federal Defendants’ and *CNRA* Plaintiffs’ representations that the provision was  
3 unlikely to be used that year. *Id.*; *see* Dkt. 389 at 49:20-22 (*CNRA* Plaintiffs’ witness: “the period  
4 for stormflex is ... coming to an end.”); *id.* at 129:1-3 (Federal Defendants’ witness: “[I]t’s  
5 extremely unlikely that the stormflex would come into play this year.”).

6 Despite the Court’s concerns that the ambiguous OMR storm flex provision risked harm to  
7 listed species, Dkt. 394 at 98, 100, Federal Defendants have again included the provision in the  
8 proposed 2023 IOP. Dkt. 406-2 ¶7. The only change is to add a brief sentence identifying three  
9 “[f]actors considered in the decision” to implement storm flex, namely: “habitat conditions,”  
10 “potential effects,” and the Trump-era Biological Opinions’ take limits. Dkt. 406 at 14–15. That  
11 vague list does nothing to clarify when and for how long harmful storm flex flows may be used.  
12 This is unreasonable and continues to risk irreparable harm to ESA-listed species during so-called  
13 storm events.

14 But unlike the record for the prior IOP in early 2022, there is no evidence that storm flex is  
15 unlikely to be used during the 2023 water year. Indeed, the main storm flex period (January and  
16 February) still lies ahead. There is no reasonable basis to re-approve the poorly defined storm flex  
17 provision. Based on the significant potential harms to endangered species, and weighed against the  
18 complete lack of any proffered evidence of the benefits of storm flex, this Court should modify the  
19 proposed IOP to prevent the use of OMR storm flex through December 2023.

20 **D. The IOP Must Include a Commitment That Reclamation Will Not Seek Permission**  
21 **to Violate Delta Water Quality Standards Unless and Until It Has Taken All**  
22 **Available Measures to Reduce Water Deliveries and Diversions**

23 “[T]he damage to protected species as a result of ... temporary urgency changes is well-  
24 documented.” *See* Dkt. 325 (Supp. Rosenfield Decl.) ¶70. That damage continued under the 2022  
25 IOP: Reclamation’s April–June TUCP had a detrimental impact on Delta Smelt and other ESA-  
26 listed species. *See* Background Section II.B, *supra*. Yet despite claiming the TUCP would  
27 improve water storage in Shasta and temperature control for salmon, Chisholm Decl., Exh. S at 11,  
28 Reclamation has now admitted that this year’s TUCP did not improve Shasta storage, *id.*, Exhs. T–  
V; and Reclamation’s modeling shows that TUCPs generally do not do so, *id.*, Exh. W at 8, 12, 24.

1 Given those facts, it is unreasonable to continue allowing Reclamation to submit TUCPs without  
2 limitation. Rather, as part of interim operations through December 2023, the Court should modify  
3 the IOP to require Reclamation to first take all available actions to reduce water diversions and  
4 deliveries<sup>16</sup> before submitting a TUCP seeking to deviate from minimum Delta flow requirements.

5 **IV. If the Court Continues the Stay in This Case, It Should Do So with Limited Exceptions**  
6 **for Seeking Injunctive Relief**

7 Time is of the essence for the survival of these imperiled fish species. Accordingly, it  
8 would be prejudicial and unreasonable to grant Federal Defendants’ request for a stay of all  
9 litigation through December 2023. If the Court continues the stay in this case, it should provide for  
10 limited exceptions to allow parties to seek interim injunctive relief based on imminent harm to  
11 ESA-protected species or a failure to comply with the IOP’s terms.

12 A party seeking a stay “must make out a clear case of hardship or inequity in being required  
13 to go forward.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Here, it is Federal Defendants’  
14 burden to demonstrate that a stay is warranted. *Center for Biological Diversity v. NOAA Fisheries*,  
15 No. 4:21-cv-00345-KAW, 2021 WL 3771784, at \*2 (N.D. Cal. Aug. 23, 2021) (citing *Clinton v.*  
16 *Jones*, 520 U.S. 681, 708 (1997)). In other cases, courts have rejected lengthy stays during the  
17 reinitiation of consultation due to potential risks to listed species and corresponding harms to  
18 environmental plaintiffs. *See, e.g., id.* at \*2–3. The Court should do so here, particularly since the  
19 only function of a stay at this point, now that Federal Defendants refuse to defend the merits of the  
20 Trump-era Biological Opinions, is to prevent parties from seeking injunctive relief while Federal  
21 Defendants reinitiate consultation.

22 If the Court is inclined to grant some stay of proceedings, the Court should exercise its  
23 inherent authority to provide for exceptions to allow parties to seek temporary or interim injunctive  
24 relief in response to changes in hydrology and imminent, irreparable harm to protected fish species,  
25 or to address the agencies’ failure to comply with the terms of the IOP. *See Landis*, 299 U.S. at  
26 254 (describing a court’s “inherent” power to manage proceedings); *see also Whatley v. Nike Inc.*,

27 \_\_\_\_\_  
28 <sup>16</sup> However, any reductions should exclude water deliveries necessary for human health and safety,  
as defined in section 878.1 of title 23 of the California Code of Regulations. *See Cal. Code Regs.*,  
tit. 23, §878.1; Dkt. 322 at 26 & n.10.

1 No. CV 98-963-AS, 2000 WL 370529, at \*3 (D. Or. Feb. 8, 2000) (describing discretion to fashion  
2 “partial stay” that would allow some issues to proceed). As Federal Defendants concede, “there is  
3 considerable uncertainty regarding anticipated hydrology for Water Year 2023.” Dkt. 406 at 5.  
4 For example, a storm event this winter could bring the “storm flex” provision into play, despite the  
5 federal and state agencies’ assurances that it would not be used in 2022. Or, as was the case in  
6 Water Year 2022, Reclamation and DWR might submit a TUCP in late winter or early spring,  
7 asking to violate Delta water quality standards. For the reasons discussed above, the status of the  
8 Bay Delta’s ESA-listed species is precarious. It is simply untenable to require parties to wait more  
9 than a year to seek relief if operations under the IOP turn out to be even more harmful to these  
10 species than predicted—particularly given the lack of evidence and analysis to support the  
11 proposed 2023 IOP, and Reclamation’s demonstrated failure to comply with the IOP last year.

## 12 CONCLUSION

13 For the foregoing reasons, the Court should decline Federal Defendants’ and *CNRA*  
14 Plaintiffs’ request to enter the IOP on the same terms as in 2022, should approve the IOP for  
15 2023 only with the protective modifications set forth herein and in the accompanying proposed  
16 order, and should enter a limited stay that permits motions for necessary injunctive relief.

17  
18 Dated: October 31, 2022

Respectfully submitted,

19 /s/ Barbara J. Chisholm

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Dated: October 31, 2022

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**PROOF OF SERVICE**

CASE: *Pacific Coast Federation of Fishermen's Associations, et al. v. Raimondo, et al.*

CASE NO: U.S. Dist. Ct., E.D. Cal., Case No. 1:20-cv-00431-JLT-EPG

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. I hereby certify that on October 31, 2022, I electronically filed the following with the Clerk of the Court for the United States District Court for the Eastern District by using the CM/ECF system:

***PCFFA* PLAINTIFFS' OBJECTIONS TO FEDERAL DEFENDANTS' REQUEST FOR JUDICIAL APPROVAL OF PROPOSED 2023 INTERIM OPERATIONS PLAN; REQUEST FOR MODIFIED INTERIM OPERATIONS; AND PARTIAL OPPOSITION TO FEDERAL DEFENDANTS' STAY REQUEST**

All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 31st day of October 2022, at Berkeley, California.

/s/ Barbara J. Chisholm  
Barbara J. Chisholm