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THE HONORABLE LAWRENCE J. O'NEILL
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY; WESTLANDS WATER DISTRICT, Plaintiffs, v. SALLY JEWEL *et al.*, Defendants. and THE HOOPA VALLEY TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES and YUROK TRIBE, Defendant-Intervenors.	Case No. 13-1232-LJO-GSA PCFFA'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; CROSS-MOTION FOR SUMMARY JUDGMENT Judge: Hon. Lawrence J. O'Neill Courtroom: No Hearing Set Hearing Date: No Hearing Set Time: No Hearing Set

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INTRODUCTION

Defendant-intervenors Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources ("PCFFA") respectfully submit this opposition to plaintiffs' motion for summary judgment, and cross-motion for summary judgment. In the interests of streamlining the briefing, PCFFA focuses on plaintiffs' National Environmental Policy Act ("NEPA") and Endangered Species Act ("ESA") claims, and joins with and adopts the arguments made by other defendant-intervenors on the remaining issues.

I. PLAINTIFFS' HAVE NOT DEMONSTRATED THAT THE BUREAU VIOLATED NEPA.

A. NEPA Does Not Require an EIS for Ongoing Management of Pre-NEPA Projects Within Their Original Authority.

The applicability of NEPA to the ongoing management of water resource projects whose construction predates the enactment of NEPA has been the subject of considerable discussion by the courts—in many cases, specific to the particular projects involved in this case. The appropriate standard was first laid out by this Court in *Cnty. of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977), in which the Court concluded that the Bureau did not need to perform an Environmental Impact Statement ("EIS") for a water management decision that would adversely affect the County. *Id*. at 1388 ("defendants do not appear to dispute that the actions significantly affect the environment"). The question for the Court in *Trinity* was not whether the actual reservoir drawdown had precedent prior to the enactment of NEPA, but whether such operation was "within the originally authorized limits" of the project. *Id*. The answer to that question, the Court held, was yes:

> The Bureau has neither enlarged its capacity to divert water from the Trinity River nor revised its procedures or standard for releases into the Trinity River and the drawdown of reservoirs. It is simply operating the Division within the range originally available to the authorizing statute, in response to changing environmental conditions.

Id. at 1388-89 (emphasis added); *see also Westlands Water Dist. v. U.S.*, 850 F. Supp. 1388

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(E.D. Cal. 1994) ("To some extent, the finding is based on whether the proposed agency action and its environmental effects were within the contemplation of the original project when adopted or approved"), *citing Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979).

Many other cases look at whether the proposed action has historical precedent, i.e., whether a proposed change in flows of a water management project is within the range of historical operations of that facility. *See Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990). This question of whether a proposed water allocation or flow rate has previously occurred has been the focus of a number of cases. *See, e.g., Consol. Salmonid Cases*, 688 F. Supp. 2d 1013 (E.D. Cal. 2010). But the *County of Trinity* case reveals that such a question—which was discussed by this Court in its TRO order—is a relevant but not dispositive consideration. Dkt. #62 at 7. There was no examination by the Court in *County of Trinity* whether the precise action under review had occurred previously. Rather, the question was whether such action was within the range authorized by statute and consistent with the procedures and standards for such operation. Indeed, the language excerpted above was cited with emphasis by the Ninth Circuit in the *Upper Snake River* case. 921 F.2d at 235. Similarly, in *Kandra v. U.S.*, 145 F. Supp. 2d 1192 (D. Or. 2001), the District Court relied on *County of Trinity* to find that no EIS was required even though the change in irrigator water deliveries and likely harm to water users was, in the Court's words, "unprecedented." *Kandra*, 145 F. Supp. 2d at 1205; *see also id*. (distinguishing *Westlands* because it "did not involve a short term annual water plan prepared under drought conditions").

Part of the reasoning behind these rulings is useful here: requiring an EIS—which takes many months to prepare—would effectively foreclose an agency's ability to make short-term emergency releases where environmental conditions require it. In *County of Trinity*, the Court observed that requiring an EIS on continuing operations would mean that "the Bureau and most other federal agencies would be condemned to an endless round of paperwork…. For projects

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such as the Trinity River Division which have an annual planning cycle, an EIS would virtually always be in process." *Id.* at 1389. Similarly, in *Kandra v. U.S.*, 145 F. Supp. 2d at 1205, the District of Oregon ruled that the "implementation of a short-term annual water plan prepared under drought conditions" did not require an EIS. Because the plan was implemented in response to facts that only became apparent a short time in advance of the actions required to respond to them, completion of an EIS would be "impossible." *Id.* ("It makes no sense to impose upon Reclamation a requirement it can never fulfill."). While PCFFA agrees that such situations should arise rarely, the facts of this case are such that an EIS would have effectively foreclosed implementation of the proposed action. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, No. 11-15871 (Mar. 13, 2014), slip op. at 140-44 (discussing NEPA implementation for long-term operations plans).[1]

These holdings reflect an appropriate caution about the use of NEPA to prevent government decisions taken for the purpose of benefiting or protecting the environment. As the Ninth Circuit recently affirmed, "We are cognizant of our commitment to avoid 'making NEPA more of an 'obstructionist tactic' to prevent environmental protection than it may already have become." *Id.*, slip op. at 152-53. Agencies appear to have greater leeway under NEPA to implement actions that benefit, rather than harm, the environment. *Id*. at 147; *Drakes Bay Oyster Co. v. Jewell*, 729 F.3d 967, 984 (9th Cir. 2013). While PCFFA agrees that there is, and should be, no *per se* rule that actions that involve both benefits and adverse effects to the environment are exempt from NEPA, it notes that courts treat NEPA claims that seek to prevent environmentally beneficial actions more skeptically.

B. The Bureau Does Not Need to Perform an EIS on Single-Year, Emergency Flow Augmentation.

Pursuant to *County of Trinity*, the appropriate starting point for determining whether an

[1] A copy of this recent opinion is available at the Ninth Circuit webpage: http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/13/11-15871%20web%20revised.pdf.

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EIS was required for the Bureau's flow augmentation plan is the Congressional authorization of the project itself. If the proposed action is within the range of what was contemplated by Congress, this weighs in favor of finding that such action is a component of the ongoing management of the reservoir and not subject to NEPA. Pub. L. No. 84-386, 69 Stat. 719 (1955), resolves the question: the Bureau is explicitly authorized and directed to manage the Trinity reservoir for "the preservation and propagation of fish and wildlife." AR 04249. This authority includes maintenance of a minimum (but not maximum) instream flow level (now known to be greatly inadequate for the needs of the species) and an additional *minimum* 50,000 acre-feet to be released annually "and made available to Humboldt County and downstream water users." *Id*.

As discussed in the briefs of the other defendant-intervenors and the government, the flow augmentation program in 2013 was adopted pursuant to that authority. Because the Bureau was acting through the authority granted to it by Congress to take measures for the "preservation and propagation" of fish and wildlife—which includes Klamath River fall chinook—the increase in flows constitutes the Bureau "simply operating the Division within the range originally available pursuant to the authorizing statute," meaning that no EIS was required. *Cnty. of Trinity*, 438 F. Supp. at 1389. As in *County of Trinity*, the Bureau is not changing its capacity to divert water from the Trinity (or anything else for that matter), or revising its procedures or standards for releases. *Id*. Rather it is simply carrying out Congress' command to take measures for the protection of fish and wildlife, and doing so in response to short-term and urgent conditions, including a drought water year and an unprecedented return run of fall chinook that together threatened an environmental and economic disaster without additional flows.

While it is not the law that the Bureau must demonstrate a precise historical analogue in order to be exempt from NEPA, it is nonetheless relevant that the Bureau releases flows from the reservoir to the Trinity River regularly, in different amounts, for various durations, and for a variety of reasons. For example, the Bureau releases water for the ceremonial "boat dance"

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flows without developing an EIS. AR 20 (boat dance flows are part of the "no action" alternative, and it is "customary" that they occur every other year). The record reveals that such flows, while of shorter duration than the summer 2013 flow augmentation, involved much higher flow rates. AR 22. The Bureau similarly releases water to ensure the safety of dams. *See, e.g.*, AR 28 (safety of dams releases occurred in 2012 and 2013); AR 120; 129 ("safety releases can represent substantial volumes of water (20,000 to 50,000 acre feet…"). Compliance with NEPA prior to taking such actions is neither necessary, since it is within the range of the original authorization, nor advisable, since it would effectively foreclose responses to urgent situations like dam safety or critically low flows and other environmental conditions. *See, e.g.*, *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1022 (9th Cir. 2012) (decision that NEPA does not apply to annual operating plans "is also reinforced by . . . pragmatic and realistic concerns").[2]

In its TRO Order, this Court reasoned that since the TRROD required consideration under NEPA, it followed that any additional departure from historical operations would also be subject to NEPA. Dkt. #62 at 7 n.3. But the TRROD constituted far more than a short-term adjustment of flows in the Trinity Reservoir within the bounds of Congressional authorization. Rather, the TRROD was adopted in response to an explicit Congressional command to develop a comprehensive plan to restore Trinity River fisheries, and the EIS looked at numerous alternative ways in which such restoration could be accomplished. AR 67-68, 64. The TRROD and EIS looked at multiple actions beyond simple management of the reservoir, including physical channel rehabilitation, sediment management, watershed restoration, and infrastructure improvements. AR 3005. The TRROD is a specific restoration plan, carried out pursuant to

[2] The Ninth Circuit's recent decision in *Jewell* is not to the contrary. There, the issue was implementation of a *long-term and comprehensive* plan that would have dramatically altered the Bureau's operation of the Central Valley project, and included non-flow related actions to protect and restore species habitat. Slip op. at 37. It cannot be fairly compared to a short-term pulse in augmented flows in order to respond to emergency conditions.

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explicit Congressional direction: it is not a precedent that the Bureau needs to do an EIS every time it makes an adjustment to its ongoing operation of the project within the bounds of its original authorization, particularly where it is being done to prevent an environmental disaster comparable to the 2002 fish kill.

In sum, given the short-term, emergency nature of this additional flow, the significant environmental and economic harms it was intended to avoid, the very minor amount of the pulse flow as compared to what was well within normal operational variability, and the clear underlying purpose of NEPA to protect public trust environmental resources, a full-blown EIS was unnecessary. Plaintiffs have not provided this Court with a single case in which an EIS was required for a short-term, emergency water allocation, nor has it explained to this Court why it should be the first to order something that is essentially impossible and that would preclude the very environmental protection that NEPA seeks to promote. The Bureau plainly considered all of the environmental impacts allegedly of concern to plaintiffs, and concluded that they were not significant enough to warrant an EIS. No additional purpose would be served by an EIS except blocking this environmentally beneficial action. This Court should deny plaintiffs' motion for summary judgment, and grant PCFFA's on the NEPA claims.

C. Even If a Long-Term EIS on Trinity Reservoir Water Management Is Required, the Bureau Should Not Be Enjoined From Implementing Emergency Augmentation in the Interim.

Whether required or not, PCFFA agrees that the public notice and comment period, and consideration of alternatives, that accompany a NEPA process can result in better agency decisions and greater accountability to the public. PCFFA has shared the plaintiffs' frustration at the Bureau's practice of making last-minute water decisions in reaction to immediate conditions, instead of preparing long-term water resources plans. These concerns are validated by the Bureau itself, AR 451 ("We fully realize that addressing flow augmentation needs on a year-specific basis is ineffective, and we plan to develop a long-term strategy.") and have also been

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acknowledged by the Courts. *Kandra*, 145 F. Supp. 2d at 1206 ("I am disturbed, however, that Reclamation has failed to complete an EIS analyzing the effects and proposed alternatives of a long-term plan…. Reclamation is avoiding its duties under NEPA by relying on annual plans to which NEPA cannot realistically apply."). PCFFA is unaware of any effort by the Bureau to see through its commitment to commence such long-term planning on the Trinity. AR 1204.

Accordingly, even if not required by NEPA, PCFFA believes that a long-term water management plan that gives the Bureau greater flexibility to take measures for fish and environmental needs—and analysis of reasonable alternatives, and the environmental impacts thereof in an EIS—is in the public interest and will help reduce the litigation and division around these important actions. Accordingly, in the event that this Court finds any violation of NEPA, the appropriate response is to direct the Bureau to commence preparation of such a plan and review its impacts and alternatives in an EIS.

What would not be appropriate would be to enjoin the Bureau from making necessary emergency flow adjustments to protect salmon pending the completion of such a plan. Indeed, the Court recognized as much in its denial of the requested preliminary injunction. Dkt. #91 at 12 ("it is not appropriate to issue injunctive relief where doing so would cause more environmental harm than good"), *citing Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962 (9th Cir. 1983); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 n.16 (9th Cir. 1984) (NEPA injunction should not be issued where "enjoining government action allegedly in violation of NEPA might actually jeopardize natural resources."); *Alpine Lakes Prot. Soc'y v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975). Such emergency flow augmentation is supported by fisheries managers, tribes, and expert biologists to avoid catastrophic fish kills. Similarly, this Court has recognized that even in the case of a violation of NEPA, an injunction should not issue where it would cause a violation of some other law. *Consol. Salmon Cases*, 717 F. Supp. 2d 1021 (E.D. Cal. 2010). If the Bureau were prohibited from taking emergency measures to protect chinook

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salmon, it would violate its duties to protect tribal trust resources.

Plaintiffs have not asked for an injunction, or indeed any remedy at all, in the event that the Court finds a violation of NEPA.[3] In order to qualify for any injunction, plaintiffs would need to make a showing of likely irreparable harm—which is currently not possible to establish because there is no plan to conduct flow augmentation in the future. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008) (standard for "harm" in permanent injunction same as preliminary injunction).[4] Moreover, as this Court has held, the balance of equities militate against enjoining the Bureau from releasing additional flows to prevent another catastrophic fish kill. The Court found credible and relied on intervenors' expert witness, Dr. Joshua Strange, to find that an injunction presented "potential and enormous risk to the fishery." Order Lifting TRO, Dkt. #91 at 19. Accordingly, in the event that the Court finds any violation of NEPA, the remedy should be limited to declaratory relief only.

II. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THE BUREAU VIOLATED THE ENDANGERED SPECIES ACT

Unlike plaintiffs' other claims, their ESA claim arises not under the APA but rather the citizen suit provision of the ESA. 16 U.S.C. § 1541(g). The Ninth Circuit has observed that the APA standard of review nonetheless applies to ESA citizen suits. *See Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1989). Accordingly, plaintiffs must demonstrate with

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[3] Plaintiffs in the beginning of their brief ask the Court to issue "permanent injunctive relief" but nowhere identify what specific relief they wish, or make any effort to show they are entitled to it. Fed. R. Civ. P. 65(d) (injunctions must "describe in reasonable detail" what and who is to be restrained).

[4] Plaintiffs make sweeping allegations of harm to their interests, *see, e.g.*, Plaintiffs' Memo. at 1-2, but fail to support those allegations with evidence of any kind. To the contrary, the record is clear that flow augmentation did not impact 2013 allocations, and it remains completely unclear whether future allocations will be effected. *See, e.g.*, AR 47 ("Reclamation has not identified any specific impacts to water allocations or available power available for CVP power customers as a result of the flow augmentation action in 2012."). This is particularly true given the relatively modest amount of water that was ultimately involved. As PCFFA explained in the preliminary injunction, there is no obvious reason why plaintiffs would receive any water if the flow augmentation had not proceeded. Dkt. #48 at 16-18.

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citation to the record that the Bureau's actions were arbitrary, capricious, or otherwise contrary to law. *Id*. PCFFA agrees that § 7 of the ESA applies to the Bureau's management of the Trinity Reservoir but disagrees that plaintiffs are entitled to summary judgment on their ESA claim.[5]

Plaintiffs raise two arguments with respect to ESA. First, plaintiffs allege that the 2013 flow augmentation will adversely affect listed coho salmon in the Klamath Basin, and that the Bureau should have consulted with NMFS prior to implementing the flow augmentation plan. But it is undisputed that this action was undertaken in part to protect coho salmon. Although the 2002 event on the Klamath resulted in massive numbers of dead fall chinook salmon, it also killed 344 coho—a number that is highly significant in light of the coho's imperiled status. AR 52. Moreover, plaintiffs are flatly incorrect that the "record is devoid of any document" evidencing consultation with NMFS, because the record demonstrates that the flow augmentation was planned in collaboration with NMFS. AR 40 ("NMFS representatives were involved in development of the recommendations that formed the basis of the Proposed Action."). While it is true that consultation is required on beneficial as well as harmful actions, NMFS has previously agreed that flow augmentation meets the standards of the ESA for Klamath basin coho. AR 61.

Trinity Reservoir operations are part of the 2008 biological assessment the Bureau used to initiate consultation on the Central Valley Project, and the record reveals that NMFS intends to issue a coho-specific biological opinion on the basis of that BA. AR 53. Section 7(d) of the ESA authorizes the Bureau to operate the Trinity Reservoir while consultation is ongoing, as long as it does not represent an irreversible or irretrievable commitment of resources. 16 U.S.C. § 1536(d). Plaintiffs have not even tried to show how flow augmentation designed to benefit

[5] Notably, plaintiffs have no demonstrated interest in protecting endangered species in either the Klamath River or the Central Valley. Nor have they sought to explain how the alleged failure to engage in ESA consultation with NMFS caused any injury they have suffered, or how any remedy that this Court could impose—including ordering ESA consultation in the future—would redress any injury. Plaintiffs have asserted only commercial interests in this case.

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both listed and unlisted species would run afoul of § 7(d). AR 54. Moreover, plaintiffs ignore that implementing regulations authorize some departure from normal consultation standards in emergencies. 50 C.F.R. § 402.05. Given the universal support for flow augmentation to protect Klamath basin fish species among NMFS, fisheries managers, and the Tribes, the Bureau met its ESA § 7 obligations to "ensure" that its actions did not jeopardize Klamath basin coho. Plaintiffs' hyper-technical reading of the regulations—and effort to play "gotcha" with perceived paperwork transgressions for an environmentally beneficial action—should be rejected.

Next, plaintiffs complain that the Bureau did not consult on the impacts of the emergency flow augmentation plan on Central Valley salmonids. But there already is a biological opinion governing the operation of the Central Valley project, and that BiOp already considers the export of water out of the Trinity Reservoir in amounts far exceeding the total water-year volume for 2013. *See* Declaration of Jan Hasselman, Ex. 1 at 72 ("proposed action" includes exported water from the Trinity); 229-32 (discussing how to meet temperature objectives in light of Trinity releases). Plaintiffs argue that the 2013 augmentation flows were not part of the "action" consulted on in that biological opinion, Plaintiffs' Memo. at 40-41, but they are simply incorrect. The "action" in that consultation includes the storage, diversion and delivery of water from all CVP project facilities, which includes the Trinity. Hasselman Decl., Ex. 1 at 72. Naturally, the BiOp did not forecast every conceivable situation that might arise and so does not discuss specific volumes for specific purposes. But no such requirement exists for a multi-year BiOp on the operation of a complex facility: the Bureau's ability to operate the Trinity Reservoir for fishery purposes has long been part of its "operations" of the Central Valley project as a whole and was part of the background against which effects of the project on Central Valley salmonid species were measured.

Certain attributes of the 2009 BiOp were found unlawful by Judge Wanger, and remanded to NMFS for further consideration. *Consol. Salmon Cases*, 791 F. Supp. 2d 802 (E.D.

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Cal. 2011).[6] However, that opinion also upheld NMFS's jeopardy determination and did not enjoin any aspect of ongoing project operations under the 2009 BiOp during the remand process. *Id*. That process is proceeding and a new biological opinion expected in 2016. As noted, the Bureau determined that ongoing operation of the Trinity Reservoir and implementation of emergency flows to protect salmon were consistent with the limits of § 7(d). Plaintiffs unsurprisingly make no effort to challenge that determination substantively. Rather, they promote a formalistic interpretation of § 7(d) under which it is inapplicable until a final biological assessment is submitted. While this is normally the appropriate standard, the ESA process for the Central Valley is anything but normal: the Bureau is operating under a Court order to improve its ESA compliance, in a decision that is under appeal, on what may well be the single most complicated ESA consultation in the nation. Order Lifting TRO, Dkt. #91 at 4 (CVP is "one of the largest and most complex water distribution systems in the world"). As noted, NMFS has been closely involved in the process to date, and plaintiffs have never explained how there was any harm to the species arising from the alleged transgressions.[7]

In sum, plaintiffs advance a hyper-technical reading of the ESA that has no basis in law or common sense; they have not established even that they are appropriate plaintiffs to bring such claims; and they have not challenged the Bureau's determination that short-term flow augmentation was consistent with the limits of § 7(d), which controls where consultation is ongoing. The Court should see plaintiffs' ESA arguments for what they are: a gambit to abuse

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[6] Judge Wanger's decision is currently on appeal. Recently, the Ninth Circuit overturned Judge Wanger's closely related decision finding unlawful and remanding the smelt biological opinion. *See Jewell, supra*.

[7] Plaintiffs' complaint that the process is taking too long is surprising, as they have been supporters of a lengthy "collaborative" process to develop new science in the project. This Court has permitted that effort as "a solid step away from the pattern of litigation that has burdened the parties in recent years." Order re Motion to Extend Remand Schedule, *Consol. Salmonid Cases*, 09-cv-01052 LJB BAM (Dkt. #753, filed Mar. 5, 2014) at 2. Plaintiffs themselves have agreed that an extension of that process is warranted. *Id*. at 4 n.1.

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the protections of the ESA in order to prevent actions that benefit species and thereby increase the possibility that some additional water will be made available for plaintiffs' commercial uses. In the event that the Court does find a technical violation of the ESA, the only appropriate remedy is to remand to the Bureau to initiate consultation. Plaintiffs have not asked for, and are not entitled to, any further remedy, including injunctive relief on future flow augmentation needs to protect Klamath River salmon. While this Court has already found that the balance of harms weighs in favor of protecting the Klamath fish species with additional flow, case law governing the ESA demonstrates that plaintiffs' commercial concerns cannot be weighed in any remedy involving the ESA. *See Jewell*, *supra,* slip op. at 26 ("The law prohibits us from making 'such fine utilitarian calculations' to balance the smelt's interests against the interests of the citizens of California.").

CONCLUSION

For the foregoing reasons plaintiffs' motion for summary judgment should be denied, and PCFFA's cross-motion for summary judgment should be granted.

Respectfully submitted this 21st day of March, 2014.

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