9-16-11. Delta smelt cases. Motion to stay.

ROUGH DRAFT

THE CLERK: Court calls item number one. 09-CV-407. The delta smelt consolidated cases. Motion to stay pending appeal.

THE COURT: Will the parties who are appearing in the courtroom please state their appearances.

MR. SIMS: Good afternoon, Your Honor. Steve Sims for Westlands Water District.

MR. O'HANLON: Good afternoon, Your Honor, Daniel O'Hanlon appearing on behalf of the San Luis and Delta-Mendota Water Authority and the Westlands Water District.

MR. MARZ: Good afternoon, Your Honor, Jonathan Marz appearing for Westlands Water District and San Luis and Delta-Mendota Water Authority.

MR. ANDERSON: Good afternoon, Your Honor, Steven Anderson on behalf of the State Water Contractors.

MR. WEILAND: Good afternoon, Your Honor. Paul Weiland on behalf of the Coalition for a Sustainable Delta and Kern County Water Agency.

MR. LEE: Good afternoon, Your Honor. Clifford Lee with the California Attorney General's Office on behalf of plaintiff intervenor California Department of Water Resources.

THE COURT: We're now ready to hear the appearances

of counsel who are appearing telephonically.

MR. SLOAN: Good afternoon, Your Honor, this is William Sloan for the Metropolitan Water District of Southern California. Also on the line is Chief Deputy General Counsel for Metropolitan, Linus Masouredis.

MR. MIDDLETON: Good afternoon, Your Honor, this is Brandon Middleton on behalf of Stewart Jasper Orchard, Arroyo Farms and King Pistachio Grove.

THE COURT: I think we're ready for the federal defendants.

MR. EDDY: Thank you, Your Honor. Ethan Eddy for the federal defendants.

MR. SHAPIRO: Good afternoon, Your Honor, William Shapiro, federal defendants.

MS. STIMMEL: Good afternoon, Your Honor, Ann Stimmel, federal defendants.

MS. POOLE: Good afternoon, Your Honor, this is Kate Poole on behalf of defendant intervenors.

MR. ORR: Good afternoon, Your Honor, this is Trent Orr, also on behalf of defendant intervenors. And Mr. George Torgun is also on the line.

THE COURT: It appears that all parties have now entered their appearances. We are convened to consider the application that the federal defendants and defendant intervenors have made to stay the preliminary injunction

directed to the RPA component 3, Action 4, what we are going to refer to, for convenience of reference in these proceedings, as the fall X2 action.

The Court has received the applications, supporting declarations from the federal defendants. The Court has received the oppositions to the stay filed on behalf of plaintiffs. Has received also the intervenor Department of Water Resources opposition to the motion for stay. There are also supporting declarations by expert witnesses on both sides. We have Mr. Feyrer and Dr. Norris for the federal defendants. And we have declarations on behalf of plaintiffs from Mr. Erlewine, Dr. Burnham, Dr. Deriso, and from Dr. Hanson.

The Court has read, fully considered all the arguments, submissions, evidence and, of course, refers to and incorporates its prior findings of fact and conclusions of law relative to the issuance and justification for the preliminary injunction.

From the Court's perspective, I'm ready to state my decision for the record. You have discussed and treated, in voluminous and minute detail, I think, every conceivable issue that could relate to what is before the Court. And so I will ask if there is anybody who thinks that there is anything left to be said, otherwise I'm ready to state my decision. So I will now ask the plaintiffs what their position on that

question is.

MR. SIMS: Your Honor, we would only make argument if the federal defendants or the defendant intervenors choose to make oral argument.

THE COURT: Thank you. Federal defendants?

MR. EDDY: Thank you, Your Honor. And thank you for accommodating our telephonic appearances. I think we'd be interested to have the Court's ruling. And perhaps thereafter an opportunity to respond to it, or maybe not. But I don't have any preliminary remarks at this time.

THE COURT: Mr. Lee.

MR. LEE: Your Honor, just, I didn't recall you mentioning that the defendant -- that the plaintiff intervenors, Department of Water Resources had submitted a third supplemental declaration of John Leahigh.

THE COURT: I certainly should have.

MR. LEE: And so --

THE COURT: And Mr. Leahigh's declaration has been read and fully considered. Thank you, Mr. Lee, for completing the record.

What's the defendant intervenor's --

MS. POOLE: Your Honor, this is Kate Poole on behalf of defendant intervenors, and we are willing to waive argument if the Court is prepared to rule.

THE COURT: Thank you very much. And as to the

suggestion of the government that there would be some comment post announcement of the statement of decision, I'm going to respectfully suggest that that can be directed to the Court of Appeal rather than here. After the jury goes out to deliberate, we don't usually have argument. Or after the Court announces its decision in a bench trial through findings of conclusions of fact and law, we don't usually have argument.

So I will -- the plaintiffs have waived oral argument. The defendant intervenors have waived oral argument. And the federal defendants only requested oral argument if the Court thought, as I understand it your position, Mr. Eddy, and I want to be clear I understand it. If the Court thought it would be helpful. And I don't think it would be helpful. I'm ready to rule.

Do you want to be further heard?

MR. EDDY: No, Your Honor. I appreciate that. I'm sorry, I thought I had understood the Court to suggest that Your Honor would be making a tentative ruling.

THE COURT: No.

MR. EDDY: I know that's happened a couple of times previously in this case, where Your Honor announces a tentative decision and --

THE COURT: Yes. When I make a tentative ruling, I make it clear that I am making a tentative ruling inviting the

input from the parties. Here, I have said that I am ready to announce my decision. And I am prepared to do that.

MR. EDDY: In that case, Your Honor, and I apologize. In that case, Your Honor, the federal defendants will also waive argument.

THE COURT: All right. Thank you very much.

As previously indicated, I am incorporating all of the findings of fact and conclusions of law that have been made. Also findings made with respect to the jurisdictional posture of the case in a post-judgment yet provisional remedy status, where continuing operations of the joint projects are at issue and implementation of reasonable prudent alternatives of what has been found to be an unlawful biological opinion and unlawful reasonable prudent alternatives are now before the Court to determine whether or not the fall X2 action, as I have previously defined it, meaning Reasonable Prudent Alternative 3, Action 4, to locate the isohaline line, if you will, at 74 kilometers east of the San Francisco Bay should * be implemented.

It has been preliminarily enjoined so that the fall X2 action would be limited to a distance of 79 kilometers east of the San Francisco Bay. In other respects, particularly information gathering, studying and other aspects of the RPA have not been affected and are not being enjoined.

The Court then will start with the applicable

standard that applies to our consideration of this request for stay. There is argument among the parties as to what the standard is. And the Court starts with the recognition that a stay is not a matter of right, even if irreparable injury might result. Rather, it is addressed to the sound discretion of the Court. And it is a decision made on the unique and specific circumstances of the case at bar.

The factors that are considered in determining whether or not to stay an action include the applicants' showing, and the strength of that showing may be debatable, of likelihood of success on the merits; whether and to what extent irreparable injury will accrue if the action sought to be stayed is not stayed; whether issuance of the stay will substantially injure the adverse parties, thereby, if you will, inviting the balancing of hardships; and where the public interest lies.

And I will note that the defendants have invoked Alliance for Wild Rockies versus Cottrell, C-O-T-T-R-E-L-L, 632 Fed 3d 1127, to say that, in effect, if a serious question is presented that this is, if you will, a surrogate for success on the merits or the establishment of the first element.

More recently in *Leiva Perez*, L-E-I-V-A, Perez, 60 Fed 3d, *versus Holder*, 962 at 965. The party requesting a stay must show irreparable harm. And the serious questions on

the merits is not a stand alone standard, it is not the right standard by which a stay should be judged. It may be part of an overall standard, but the irreparable harm standard likelihood of success on the merits is not diminished or abrogated by that case, which is decided before Leiva Perez. And maybe different panels decided the two cases in the Ninth Circuit, but they're both 2011 cases that address the issue of stay.

And so the Court believes that it has accurately stated, from a legal standpoint, the standard. That is the standard that will be applied. We'll analyze the four factors.

And in my statement of decision, I intend the facts stated to be statements of fact to the extent they can be interpreted as conclusions of law, they're intended to be conclusions of law and reciprocally to the extent that I state what are hybrids that could be interpreted as statements of fact, although they are conclusions of law, they're intended to be either so that we don't have any technical insufficiency in the statement of the decision.

The Court now turns to the first factor, which is irreparability of harm on either side and the extent to which serious questions are raised by the defendants, applicants for the stay, and/or they are showing a likely success on the merits.

And it is important to the Court in this proceeding to note that the federal defendants and the defendant intervenors have very, very specifically and minutely focused on what they believe are -- and assert are errors in analysis, analytic errors by the Court in considering the underlying science and the evidence.

They accuse the Court of using the wrong legal standards, not, in effect, knowing the law, misapplying it, not understanding it. And they suggest that there is no impact because we are in what everybody agrees, I'll use the vernacular, a good water year or a wet year, using the more technical term, it's recognized * check up * by the Bureau of Reclamation as it conducts the joint operations of the projects, which is its eco responsibility and which is the purpose, the long-term operations for which the BiOp was originally created, formulated and published.

And so what we have on the applicants' side is their position that, in effect, no water is going to be lost and even if water is lost, it will be diminimus.

On the other hand, Mr. Leahigh states that in a wet year -- and nobody knows yet what 2011/2012 water year is going to be. We'll be getting into the inception of that year on October 1st, which is approximately two weeks away.

But what Mr. Leahigh, on the State side, and there's no question in this case that federal contractors are not

going to be impacted. The impact here and the harm is to the State Water Contractors and to the state project, which will be losing water. And Mr. Milligan defers to Mr. Leahigh, but has previously analyzed that the 300,000 acre feet is a fair and reasonable estimate.

The applicants have also suggested that this would be an exercise in futility because there is no storage capacity, nor is there any basis for use of the water that would be stayed by the injunction that the Court has issued, where the Court has used both aspects of the law that has been violated here by the federal defendants. They haven't just violated the Endangered Species Act in producing an unlawful BiOp and unlawful and reasonable and prudent alternatives, they've also violated NEPA, which, in effect, prevented any rational, any what the Court would believe to be informed, competent and considerate reflective analysis of the human health and safety impacts, impacts on the State of California water supply and related impacts by not performing a NEPA analysis, not preparing an EIS and not following the law in any regard to that extent.

And so the Court is satisfied, based on Mr. Erlewine's prior declarations and his most recent declarations, that Metropolitan Water District of Southern California and the Kern County Water Agency, as State Water Contractors both have capacity, they have uses and that for

the purposes of recharge, to protect against land subsidence, overdraft on the groundwater supply, to conserve energy, to provide other benefits that the storage of water produces, that there is, the evidence preponderates, a substantial likelihood that the loss of this water will create those injuries, which are protectable. The Court has found that they are protectable before. And that the location of the isohaline line, if you will, at 79 kilometers, which is the modified and prohibitory limit that is effected by the Court's preliminary injunction, that a stay of the injunction, and so that it doesn't operate in any but a wet year, will produce that irreparable injury.

Now, there is one aspect of the evidence that's before the Court factually that needs to be stated for the record. The Court accepts and believes the testimony of Mr. Leahigh that X2 isn't going anywhere in September. It's either at 73, it's not more than 74, it's not going to be more than 74. And that is something, to use the vernacular, again, we can take to the bank. There is absolutely no evidence, there isn't a scintilla, there isn't a suggestion, there isn't a gleam in anybody's eye of an expectancy that X2 is not going to be at or below, meaning closer to the west, to the San Francisco Bay, through the month of September.

In October, there's an indication that there could be a two to three kilometer movement east, where it could be in

the 75 to 77 kilometer range. And there is not a specification as to when and to what extent that will occur. And so since that is more than the 74 that the reasonable prudent alternative in dispute commands, we're going to analyze what the effect is based on what the federal defendants have given us by way of science, by way of analysis and by way of testimony. So that we can determine to what extent the harm that is sought to be prevented by this stay is.

The Court also rhetorically wonders, and it doesn't appear to be capable of definition with more precision as to when this movement eastward would occur in October. There is some suggestion, as the Court has read it, that at least up to the 15th of October, there may be no impact and there may be no need to do anything. And if we could establish that with certainty, then, of course, we wouldn't need an injunction through the 15th of October because there isn't any need for an X2 action.

Now, let us go to the evidence that has been placed before the Court and the analysis and critique of the Court's decision to show that there would be likely success on the part of all defendants on their appeal.

We will start with the -- having made the irreparable injury finding, we will start with the position, I believe, of the defendants that there will be no water cost for foregone

pumping or storage opportunities until at least October 15th of 2011. And that, as I've already find, I made a finding of fact, is at least affected by the likelihood that until sometime in October, there's no need for the fall X2 action, at least in terms of its water loss effects to be implemented.

What the Court is now, having reviewed the parties' papers, definitively satisfied is that there will be no irreparable injury by maintaining fall X2 at 79 kilometers. And there are a number of reasons. And for the record, I'm going to identify and analyze every one of them. So that there is no issue and no question about the basis for the decision.

The Court believes that the testimony of Mr. Feyrer, Bureau of Reclamation's expert, and Dr. Norris, the Fish & Wildlife Service's expert, are -- and I'm going to be making findings that are going to be justified by specific factual instances. Their testimony is riddled with inconsistency.

The Court finds that Dr. Norris' testimony, as it has been presented in this courtroom and now in her subsequent declaration, she may be a very reasonable person and she may be a good scientist, she may be honest, but she has not been honest with this Court. I find her to be incredible as a witness. I find her testimony to be that of a zealot. And I'm not overstating the case, I'm not being histrionic, I'm not being dramatic. I've never seen anything like it. And

I've seen a few witnesses testify.

Mr. Feyrer is equally inconsistent. Self and internally contradictory. I -- and most of you, some of you have been in these cases for 20 years. I have never seen anything like what has been placed before this Court by these two witnesses. And the suggestion by Dr. Norris that the failure to implement X2 at 74 kilometers, that that's going to end the delta smelt existence on the face of our planet is false, it is outrageous, it is contradicted by her own testimony, it is contradicted by Mr. Feyrer's testimony, it's contradicted by the most recent adaptive management plan review, it's contradicted by the prior studies, it is -- candidly, I've never seen anything like it.

I'm going to start with Mr. Feyrer, and I'm going to go issue by issue, point by point. Because, candidly, I'm going to be making a finding in this case of agency bad faith. There is simply no justification. There can be no acceptance by a court of the United States of the conduct that has been engaged in in this case by these witnesses. And I am going to make a very clear and explicit record to support that finding of agency bad faith because, candidly, the only inference that the Court can draw is that it is an attempt to mislead and to deceive the Court into accepting what is not only not the best science, it's not science. There is speculation. There is primarily, mostly contradicted opinions that are presented

that the Court not only finds no basis for, but they can't be anything but false because a witness can't testify under oath on a witness stand and then, within approximately a month, make statements that are so contradictory that they're absolutely irreconcilable with what has been stated earlier. And the Court draws the inferences of knowledge and draws the inference of intent. Because those are intentional misstatements, they can't be anything else. And they're made for only one purpose, they're made for the purpose of attempting to influence the Court to decide in a way that is misleading, confusing and the detail and the factual complexity of this case obviously requires close scrutiny and great effort. And if anybody had been just, quite frankly, a little bit inattentive or a little bit less diligent than digging into and trying to get to the bottom of every one of these assertions, it would be very easy to simply accept these opinions with these record citations. And when the record says the opposite of what you cite the record for, or when the record doesn't say what you cite the record for, there's simply an absence of the data, then that is a further misleading of the Court. That is a further, if you will, distortion of the truth.

Now, we are going to start with the overview that at 79, which is now in Mr. Feyrer's declaration that there's going to be no benefit, there's going to be no expansion of

the habitat, that the smelt are going to be imperiled, that they're going to be jeopardized because they won't have the range, the turbid water, meaning less clear, cloudy, that they won't have the water quality in terms of its lower salinity that they need.

But every piece of evidence in Feyrer's testimony, before we get to this last declaration, is that either at 80 or 81 kilometers east of San Francisco Bay, that you're going to have an improvement in habitat, that you're going to access Cache Slough, the Ship Channel, the related areas. That you're going to have that expansion. And suddenly, Grizzly Bay, Honker Bay. And suddenly, we now have the opinion from Mr. Feyrer that, oh, no, if you're at 79, they're not going to have any -- access to any of those areas. They're not going to have that habitat.

So this contradicts his sworn testimony that west of the confluence -- and the confluence of the Sacramento and San Joaquin rivers is at 80 kilometers. 79 kilometers is west of that confluence. And he testified that when X2 is west of that confluence, that opens up the low salinity zone and delta smelt habitat to the broad shoals in Suisun Bay and other areas. And I'm quoting, "So there's just a lot more, a lot more suitable habitat for smelt."

And he also testified that Grizzly and Suisun Bays would be available habitat and used by the delta smelt when X2

is at 79 kilometers or above the confluence of the Sacramento and San Joaquin Rivers. And there's a transcript reference on July 28th, starting at page 122, lines 9 to 16, page 213, lines 8 to 19. And so it simply -- this isn't an explainable inconsistency, this isn't a resolvable, if you will, conflict in the witness' own testimony. This is impossible. You can't have it both ways. It's as simple as that.

And, in terms of deciding the credibility of the statement, when for the first time do we hear, oh, no, there's going to be no habitat? After the Court has decided and ruled against the X2 standard. All of this testimony, all of the interpretations of the studies, all the it will work at 80, it works west of the confluence, all of that was before, quite frankly, the Court made any decision.

And so, in terms of who has the self-serving motive now to change the game and to misrepresent the facts and to, without explanation, contradict and destroy the prior opinion given by the same witness, that is classic impeachment, self-impeachment and contradiction.

And it's the first brick in having the wall come down that the -- every witness steps on to the witness stand, not with the presumption, but certainly with the Court's open-minded evaluation and expectation of hearing truthful and consistent testimony. So nobody comes in to this courtroom having to do more or less to persuade or convince the Court.

The force, the effect, the competence, the consistency of testimony is what gives it credit and makes it worthy of belief.

The next subject is in his declaration now submitted, where he says if X2 is set at 79 or 80 kilometers, most of the delta smelt population will not align with the shallow biologically productive turbid water of Suisun Bay, Grizzly Bay and Honker Bay, thus positioning X2 at 79 or 80 kilometers would provide far less of sufficient quality or habitat.

And Mr. Feyrer's testimony during the hearing, at page 125, line 23 to 126, line 9, he testified under oath, "When X2 is located downstream of approximately 80 -- he didn't have the kilometers, downstream. Confluence of the Sacramento-San Joaquin Rivers, X2 in low salinity zones are in those vast shallow bays, those shoals of Suisun Bay, Grizzly Bay and Honker Bay and so there's a lot of area there. That's why the habitat index is bigger. And when you move upstream, above 80 approximately, and up into river channels, those river channels are obviously a lot smaller, a lot less area."

And going on, at page 27, starting at line 10 to 15, page 29, lines 12 to 15, in respond to the Court's question, Mr. Feyrer testified, when the Court asked, what if you were to use a less water intensive application of this X2 model? For instance, at 79 kilometers, where you would get areas that we discussed yesterday within the scope of the ultimate

objective, but not require as much water to do it. Would the same purpose be accomplished?

Mr. Feyrer said, "With the above normal year standard, 81, 81 is pretty much near the bottom of the ascending limb of the curve and that's the minimum point you get out of that lower tier of habitat conditions."

He was then asked, at page 193, starting at line 4, when Mr. Sims asked the question, "So when the -- what the data demonstrates then is that when X2 is below the confluence, that opens up Suisun and Grizzly, right?"

Mr. Feyrer said, "Yes. As depicted in those habitat maps."

And he was asked "If X2 was maintained at 79 kilometers, would Grizzly and Suisun Bays still be available habitat?"

He answer under oath, "Yes."

Next question: "If X2 is above 80 kilometers, smelt still use Suisun Bay; don't they?"

"Answer: Yes."

There is no reconciling those answers. There's no consistency. There is no explanation. And in his pre-hearing declaration, Mr. Feyrer opined, taking his Feyrer 2011 study, when X2 is located downstream of the confluence, there is a larger area of suitable habitat because the low salinity zone encompasses the expanse of Suisun and Grizzly Bay, which

result in a dramatic increase of the habitat index. In contrast, when X2 is located upstream of the confluence, habitat is restricted to the smaller river channels.

And in the adaptive management plan, Mr. Feyrer authored that plan and states at page 10 of the plan, "This range in X2 corresponds to a geographic area that straddles the confluence of the Sacramento and San Joaquin Rivers, which is located approximately 80 kilometers. When X2 is located downstream of the confluence, there is a larger area of suitable habitat because of the" -- I'm sorry -- "because the low salinity zone encompasses the expanse of Suisun and Grizzly Bays and Suisun Marsh, which results in a dramatic increase."

And very simply, he was asked the questions. The Court asked the question. Counsel asked the question. And if it were true, and if the answers he gave weren't true, first of all, he never should have given the answers under oath. And secondly, he should have explained it.

And the one thing his new declaration does is it does not in any way explain the mountain of contrary and contradictory evidence that he's the author of in studies and that he stated under oath. It's unacceptable.

Now -- and before the late surfacing declarations, we did not hear that 79 is impossible, that fall X2 at 79 is going to basically extinguish the existence of the delta

smelt. Now that's Dr. Norris' opinion, an opinion previously unexpressed by any witness in this case ever or under any circumstance.

And Dr. Burnham's analysis essentially is that when Mr. Feyrer testified that the delta smelt were -- and then there's a question of not or they were habitat limited, we have the two factors of salinity and water transparency which defined his habitat, meaning Feyrer's habitat index. Mr. Feyrer did not believe that the smelt were currently habitat limited. Mr. Nobriga, also a government expert, agreed the delta smelt are not currently habitat limited from a two variable perspective. But Mr. Feyrer's habitat only uses two abiotic habitat variables. It was his methodology that he chose. And so salinity and turbidity are what he used.

And so, as pointed out, what's the scientific basis, then, if they're not habitat limited by salinity or turbidity, for him to say that the vast areas of salinity and turbidity conditions that he believes are necessary and important. It's simply unexplained.

And the Figure 2 discussion that was in the declaration now, the late surfacing declaration, saying that at 79 kilometers the habitat index is approximately 5600, that the habitat index values under the fall midwater trawl abundance indices in earlier years were at 899, 864, 756, those were in the years '95, '99 and 2000. And based on that,

Dr. Burnham opines that there will not be a constraint on the habitat for delta smelt if X2 is located at 79.

Then we go through the criticisms of the Court's decision by Mr. Feyrer. Starting with the extinction scenarios, where the Court found he was inconsistent concerning a flaw on his 2008 model which predicted, in almost all cases, negative smelt abundance. And the Court did not accept his testimony because of its apparent inconsistency.

And Dr. Deriso, now, in evaluating the latest declaration by Mr. Feyrer, opines that Mr. Feyrer definitely predicted negative smelt abundance as an extinction scenario where he was asked when the model runs into a negative abundance, that would be a potential extinction scenario. He answered yes.

But in his 2008 study, Feyrer rejected that negative abundance values were an extinction scenario. And rejected -- when it tested whether that was possibly the case, after the analysis, Feyrer said no in his 2008 study. Increasing the initial number of adult fish in the fall, even to 1,000, as opposed to 29, did not noticeably affect the probabilities.

The second issue was correlation of the fall midwater trawl to the habitat index. And here, we said you're loading comparable values on to the same axis. And so you're going to have, in effect, built in bias and you're not going to get either a statistically reliable nor a scientifically reliable,

using best available science, index and interpretive results from this modeling. Mr. Feyrer says that the Court's criticism isn't valid because the variables are constructed with different data. One abundance data, the other water quality.

And the variables, as Dr. Burnham analyzes, are not constructed from two entirely separate and independent data sources as Mr. Feyrer now suggests. Rather, the habitat index, which is the X axis, uses a probability of occurrence calculation using the same abundance data that the fall midwater trawl abundance index uses on the Y axis. Therefore, they are using similar or identical data.

And in his statement under oath, where Mr. Feyrer says the two axes are derived from different water quality and abundance data, the abundance data isn't different.

And so either Mr. Feyrer is, as suggested by the defendants, not understanding his own indices that he is the architect of, or he is, quite frankly, either misleading or misstating anybody who would read his current criticism of the analysis is that has been done.

The next statement by Mr. Feyrer is that regardless of any criticisms of his plot, which was the graph of the fall midwater trawl index against the habitat index, there's no impact on reliability of the habitat index because this is just one of the input variables in the plot and doesn't depend

on conclusions drawn from the plot. But Mr. Feyrer and the Service premised their claim about the habitat index both as to its usefulness and its significance, to explain delta smelt abundance.

And Dr. Burnham opines that finding this correlation between the habitat index and the fall midwater trawl abundance index inevitably results from an induced correlation derived from the data structure, which is essentially using the same data on both axes. And it impacts the reliability of the habitat index.

And again, nothing that Mr. Feyrer says changes or in any way diminishes the analysis of the error in his methodology and science that the Court found.

Next is that when the Court found that the critique of scientific impropriety in Mr. Feyrer taking and linking the results of multiple modeling without any statistical analysis of the margin of error introduced as each link is added. Mr. Feyrer says that he did in his 2011 study, and that he provided several figures and tables to explicitly demonstrate the statistical uncertainty associated with every analysis in his paper.

Dr. Burnham opines that this is simply a false statement because there's no page reference. There's no data set. There is nothing that is either identified or referred to where an accounting for statistical uncertainty was

performed. And the NRC report, which is cited when it helps but ignored when it doesn't, didn't find any uncertainty analysis by Mr. Feyrer because it concluded that the examination of uncertainty in the derivation of the details of this action lacks rigor. And that's at page 41.

Next, the turbidity index, the Court found that that didn't provide a basis for calculating the amount of variation in the delta smelt abundance index attributable to salinity as a stand alone variable. Mr. Feyrer says the Court's wrong because his 2007 and his 2011 studies did isolate salinity from turbidity and, quoting the GAM, concluded that salinity accounts for most of the -- for -- I don't know if he means variability. It prints out V-A-R-I-A-I-L-I-T-Y. I didn't have time to check a dictionary. And it's a word I don't recognize. Maybe there is such a word. But it's new to the Court. In the delta smelt catch rather than turbidity.

Again, Dr. Burnham finds this misleading. Because although there is a separate analysis in the 2007 and 2011 Feyrer studies of the proportionate variation in absence or presence of delta smelt related to turbidity and salinity, the model that calculates the habitat index did no such separate analysis. And that it is simply incorrect to say that salinity accounts for most of the variability in the delta smelt catch rather than turbidity. Rather, 2011, in that study, before his declaration and testimony here, Feyrer

states that the specific conductance, which is a salinity measure, and Secchi depth, which is the turbidity measure, accounted for roughly the same amount of variability, ergo include both the variables in the model. Neither accounted for the most, in quotes, variability. Certainly it wasn't the salinity as being the dominant principal.

So, again, the Court is untroubled by Mr. Feyrer's criticisms of the Court's analysis.

Now, use of core stations and tidal mixing. And we did go around with Mr. Feyrer on these issues. Where we have undeniable findings of smelt populations in Cache Slough, Liberty Island, the Sacramento Deep Water Ship Channel. And the Court found that while he testified that the map depicting the habitat index encompassed those areas, when he was questioned about it under oath at the hearing, the evidentiary hearing, he stated that the core stations he used to develop the habitat index were downstream of all those sites. And the Court said, well, that sure seems to be inconsistent, how can you say that you're using other core stations for your measurements rather than these areas which are not these core stations.

The Court found that it's at the least inconsistent, so it's inaccurate to state what the full extent of the habitat of the smelt was relative and relevant to the reliability of the justification to push X2 down to 74.

And Dr. Burnham did some calculations and opines that if you had included those, if you will, separated populations in those areas, it would have a significant effect on the habitat index, the habitat variables related to smelt presence or absence, and there, because those are in predominantly fresh water area, there would be a much lower correlation between salinity and smelt presence.

And so the next issue is the title of mixing justification where Feyrer opined that water quality measures at core sampling stations are accurate measurements of water quality Cache Slough, Liberty Island and the Sacramento Deep Water Channel. Yet Mr. Feyrer testified he made no such definitive statements. He said that water quality measurements at the core stations were probably really similar to those areas. Obviously those areas hadn't been tested, they hadn't been observed and there was no basis for such a comparison.

Now, Dr. Burnham refers to it as hypocrisy, I'm not going to use an editorial or even a pejorative potentially word like that in tolerating extreme imprecision for what it is. But what it is is testimonial inconsistency, it's contradictory testimony, it's opining without a basis. So the law calls that speculation. And it is unjustified.

Now, life cycle modeling. And Mr. Feyrer claimed that the Maunder and Deriso, the Thompson and MacNally, refers

to 2008, Maunder and Deriso 2011, Thompson 2010, MacNally 2010. He comes back in his supplemental declaration, after the hearing, after the Court's decision and says, none of those studies contradict my papers. My studies, my opinions. But rather, they're entirely consistent. His words. And basically, what those studies, all of them found, contrary, diametrically contrary to his finding that there was a meaningful, significant and close relationship between the fall X2 and delta smelt abundance. Rather, all of those studies found no relationship that was scientifically significant between the location of X2 and the presence and abundance of the smelt.

And what is the justification for the difference Mr. Feyrer offers is that, first of all, the models looked over the entire history of the data set going back, I believe it was 60 to 70 years, when only wet and above normal years should have been looked at. And yet, in his 2007 study, his 2008 study and his 2011 study, Mr. Feyrer used all the data sets. So he didn't limit them to the wet years that he now says discredit all the other expert's studies.

And so, again, does the Court reasonably accept? Does the Court reasonably rely on this kind of analysis? What the Court uses as the term to describe it is it is opportunistic. It is an answer searching for a question. It is an ends/means equation, where the end justifies the means

no matter how you get there. Whether you use science, whether you use statistics, whether you use anything that is objective or not.

I'm going to tell you again. I have spent my life in courtrooms. Trial is my life. I have never seen anything like this.

Next, Mr. Feyrer claims that his 2008 study is the only modeling effort that modeled the effects of implementing Action 4. Again, Dr. Deriso says this is false. 2008 does not model his Feyrer study, the effects of implementing Action 4. Rather, it evaluated four scenarios, none of which purported to analyze or effect Action 4. Further, it did not model the effect of implementing the action only during wet or above normal years, it did not model the projected effects of maintaining X2 at 74 kilometers or at 81 kilometers. And the Court does not change its prior finding and it is adding, by the record that is now being made to its findings of Mr. Feyrer's absolute incredibility, his absolute unreliability, and finally, the most significant finding, the Court finds him to be untrustworthy as a witness.

And I will note that he is a government agent. He represents the United States. And the United States, as a sovereign, has a duty not only in dealing with the Court, but in dealing with the public to always speak the truth, whether it's good or bad. It's never about winning or losing, it's

always about doing justice. And in the final analysis, protecting endangered species is crucially important. It's a legislative priority. And even the plaintiffs don't dispute that. But when it overwhelms us to the point that we lose objectivity, we lose honesty, we're all in a lot of trouble. Serious, serious trouble.

And so I am unaffected, in fact, I am sad. I feel remorse for our justice system for what has been placed before the Court. It's unacceptable. It's unprecedented.

Now let's go to Dr. Norris. As I said, I believe, in my findings, Dr. Norris is that unique witness who no matter how you change the facts hypothetically and ask her a question, she never varies from her answer because she is a true believer. And she never -- there is nothing that will shake her belief. There is nothing that will move her to an answer except that justifies the result and the end that is sought to be achieved. And so although she never stated it in her testimony under oath in trial, now we have X2 at 79 extinguishing the species. In other words, now we have the opinion that, yes, if X2 is at 79, the species will be irreparably injured. Although what I had heard in other testimony was that this gave us a great opportunity in a wet water year to expand the range, to give the species a good and an optimistic opportunity to expand its abundance, to reproduce. Although there's no direct correlation or data

that increasing the habitat in this time of the year will do that. But let us now look at Dr. Norris' testimony so that we have it clearly specified for the record.

Her testimony was that if we don't have X2 at 74, this may represent, I'm quoting, the last opportunity to prevent extinction of a species unique to California. X2 at 79 places the delta smelt at greater risk of extinction, will worsen the jeopardy condition of the species.

And we start with the threat to the extinction of the delta smelt. In the fall months, according to Dr. Hanson, the location of X2 during September and October, don't have any biological or scientific relation to productivity of the species, its abundance or the availability of its preferred food sources. When, at most, under the injunction as it is currently in effect, you can't go more than five kilometers east of the ideal, of the perfect standard at 74.

And based on the daily tidal cycle, X2 moves several kilometers west and east in the natural ebb and flow that is caused by tidal cycles. And the shift would have been, in terms of the graphing and the charting of the data, evident. It was not.

And I've already found that Mr. Leahigh has testified -- nobody disputes it -- that in September, there's going to be a zero effect on X2 under the current conditions. And there is, therefore, going into October, to mid October,

and then you have 45 days that the action continues left until the end of November.

The opinion is that a failure to limit will not appreciably reduce abundance or adversely modify its habitat. Well, we've already heard that opinion. That was the dispute that was before the Court. And its extinction rate or effect locating X2 at kilometer 79, if we go into October, there's no prediction where X2 is going to be. But it's not going to be far from kilometer 74, it won't be at kilometer 79 before October 15th. And at that point, we're talking about a maximum of six weeks, best case, drawing every inference in favor of the defendants.

And the shift to the east of a three kilometer, if you will, range or a five kilometer range in that six-week period, there isn't one iota of evidence that has any credibility to it, other than conclusions and dire predictions of catastrophe that supports that there will be any injury to the species.

But more than that, let's go back to Mr. Feyrer. Mr. Feyrer was asked at -- this is on the 29th of July, at page 846, do you disagree with the authors of this plan? He's one of them. The draft adaptive management plan, that the expected effect of fall X2 at kilometer 81 is uncertain? He says, "No."

He was then asked, "Can a biologist render an

reliable opinion as to whether locating fall X2 this year at kilometer 81 will appreciably diminish delta smelt abundance in the fall?"

His answer, "When all is said and done, I would say no."

He and Dr. Norris apparently didn't communicate. Because they're not on the same page.

Mr. Nobriga, the government scientist, based on three published life cycle models, describes 40 years of historical data as not supporting a correlation between the location of fall X2 and delta smelt abundance. His opinion, at page 137 on July 29th, 6 to 9, 140, 11 to 13, 141, 5 to 15, was "I think in terms of the historical data" -- I'm quoting Dr. Nobriga -- "that the three models probably indicate that you're not going to find a correlation out of the historical data."

And we have Mr. Feyrer, at pages 125 and 126, starting at lines 25, going over to line 5, line 25, about when X2 is downstream of 80 kilometers, X2, the confluence of the Sacramento San Joaquin Rivers, X2 in the low salinity zones are those vast large shallow base, those shoals of Suisun Bay, Grizzly Bay, Honker Bay, so there's a lot of area there. That's why the habitat index is bigger."

He didn't say, he never said, not once, he still hasn't said when it's west of 74 kilometers. He's never given

these opinions that he gave over and over at the hearing under oath that this is what happens if X2 isn't at 74.

We have, essentially, the facts and the opinions and the unwillingness of either federal scientist, even accepting the facts and changing them, to give an opinion that is in any way credible on this subject.

And to refute Dr. Norris' extinction scenario that we now have before the Court, the revised adaptive management plan that's filed with the Court August 10th, it's the most up to date analysis by the Service through its scientists and its experts. It states, at page 16, "The use of an 81 kilometer target for fall after above normal years provides about 50 more -- 50 percent more of the abiotic habitat benefits than maintaining X2 at 86 kilometers. And at present, represents a reasonable intermediate action to restore late post reservoir period salinity conditions in the fall."

Now, that came out after the hearing. But even if it was written before the hearing, it was only published after the hearing. That is in diametric opposition to both the prior testimony that we can't be one inch east of 74 and Dr. Norris telling us it's the end of the species, it's likely extinction if you go one inch east of 74.

And the same study of August 10th at page 26 says, some key questions will most efficiently -- will be most efficiently answered by implementing the X2 action in very

different ways within the boundaries of prudence in otherwise similar years and contrasting the results. The best choice from a learning point of view would be an alternative in which the action is not taken at all with X2 instead managed so that it remains in the 84 to 86 kilometer range during the period in which the RPA targets would otherwise be in force."

Respectfully, if it's going to be the end of the species, how could such a suggestion be made by the managers of this reasonable and prudent alternative? That not only defies reason and logic, but, again, it is so fatally inconsistent, so irreconcilable, and given the Court's credibility findings about Dr. Norris, the Court rejects and does not accept her testimony. It is unworthy of belief.

Then, Dr. Norris came back to the National Research Council report of 2010 and claimed that this supported her opinion about the necessity of implementing fall X2 at 74. And took the statement, when the area of highly suitable habitat is defined by the indicators is low, either high or low, FMT indices can occur."

In other words, delta smelt can be successful even when habitat is restricted. More important, however, is that the lowest abundances all occurred when the habitat index was less than 6,000 HA. This could mean that reduced habitat area is a necessary condition for the worst population collapses, but it is not the only cause of the collapse. The

relationship between the habitat and FMT indices is not strong or simple. That's at page 40.

And that is a discussion of the scientific basis, if you will, for the fall X2 axis -- action, I should say, talking about can delta smelt survive when habitat restricted. And they say habitat and abundance data, that relationship is not clear, it's not strong, it's not simple.

And what Dr. Norris did not include was NRC's criticism of the fall X2 action in a number of respects. And in those respects, Dr. Norris simply was asked: "Do any of these criticisms change your opinion?" And her answer, "It did not change my opinion, no."

The next subject concerning what effect considering the Cache Slough areas, the three areas, the ship channel and the defendants call -- I'm sorry, the plaintiffs call it the complex. The BiOp refers to about 13,000 hectares, which is the equivalent of 30,000 acres of habitat in the preferred salinity range of delta smelt available at 74. And the Court's finding, based on Feyrer's testimony, was that adding habitat units to represent delta smelt habitat in the complex, the Cache Slough complex, would shift the curve. Well, that's already been discussed.

But the Court noted that at that time, the exact impact of the shift had not been calculated by any party. And now Dr. Hanson has, and he provides this figure, Figure 2 from

Exhibit A to his current declaration on the relationship between X2 and habitat area.

And it does shift the curve. And if the Cache Slough complex is considered, the 13,000 acres that were originally available, if you locate X2 at 74 kilometers, you still have it. When X2 is located at 79 kilometers, and that's an independent analysis separate from the Court's. And instead of ignoring those areas of habitat, as the BiOp did, if you locate X2 at 79, which was the Court's location based on all the evidence before it, 79 is where the isohaline line is fixed.

And so, then Dr. Norris' rationale, the defendants argue and the Court agrees, that she just reiterates what's already been provided in declaration or testimony by all the other experts. Nothing new. Nothing that changes any finding that the Court has made, nothing that contradicts or impeaches the evidence on which those findings are based.

Dr. Norris says that recent scientific studies have found a statistical association between fall X2 and the production of young delta smelt during the following year. And there is one study, not a recent scientific studies, plural, that's the Feyrer 2007.

And her suggestion that the Service referenced multiple scientific studies is inaccurate. The Court's citation in detail in approval of Feyrer 2007, the Court will

accept the partisan or an advocate's spin on what the Court said. But the Court's exact words were, "The reliance on Feyrer 2007 was not per se unreasonable, however, the use of that study to justify operational restrictions is more questionable." And, of course, there's no reference to any of the more recent findings.

And Dr. Norris, in her most recent declaration, states the fall X2 action is the only component of the RPA that expressly protects the delta smelt critical habitat, the defendants point out that the RPA action 6 states its purpose as to improve habitat conditions for delta smelt. So obviously that statement is untrue. Whether it's intentionally untrue or whether it is simply negligently untrue, because she didn't bother to read the RPAs, the Court can't discern. But what the Court can know is that it's unreliable, it's testimony that simply cannot be accepted or credited.

And she continued to insist that this is the only -- fall X2 is the only RPA action to benefit the species' critical habitat.

And then we get into her explanation of how 75 kilometers was initially picked based on a regression analysis relative to net Delta outflow. And the Court didn't accept that because the formula that was used didn't incorporate and had nothing to do with inputs that relate to the biology of

the smelt and the impact of X2 on population dynamics. Nothing changes the Court's finding.

Dr. Norris said there when three scientific reasons to locate X2 at 74. And those were that there was a 1994 biological assessment indicating reduced abundance of the species east of 74 kilometers. Variable, but increases in some years when it is west of 74 kilometers. And the Court considered and found unpersuasive those conclusions.

The second reason that Dr. Norris claimed X2 should be at 74 was because it more closely approximates pre-POD fall X2 conditions to return ecological conditions of the estuary, which occurred in the late 1990s during times of larger smelt populations. And also her observed, what she refers to as a striking change in the position of fall low salinity zones in all water years during Pelagic Organism Decline years and her further assertion that X2 at 74 or less increases the expected abiotic habitat index above values that were present during POD years.

And her third and final reason on historical X2 location was that there are inner annual variabilities in fall outflow, and that the variability is necessary to maintain and recover the population. And that the projects eliminated that variability so that the location of X2 in every year resembles a dry year and favored the expansion of invasive species. As noted in the Court's finding, every one of those positions

were addressed. They were analyzed. The time periods weren't long enough to assess trends. There was only one wet year after 2000. The Enright and Culbersome 2009 study recommended evaluating variation in delta outflow salinity based on a 20 to 25 year time frame, not a 10 year time frame used by the defendants * check up * to ensure that lower frequency changes and climate conditions be considered. A September through December, four-month average was used and the RPA only operates three months. It doesn't operate in December.

And the Norris opinion that 74 kilometer X2 requirement is based on a tandem use of 1641, that's the water board decision, X2 compliance locations for spring months. However, that's just it. That's the point. 74 and 81 kilometer points correspond to existing monitoring stations and those D-1641 compliance points in that time of the year has nothing to do with establishing that keeping X2 at those locations is necessary to the survival and recovery of the species.

And that is found where she actually referred to the Bennett, I believe it was Bennett 2008 study. I might be wrong. It's found at Bates 017060 and Bates 017036. Where Figure 19 describes days X2 in Suisun Bay and it's talking all about spring. And then in looking at fresh water discharge to the estuary by managing in an environmentally friendly manner using the X2 standard to ensure maintaining the low salinity

zone in Suisun Bay, again, during spring, quoting Kimmerer 2002, 2004. She was using this to justify the fall X2 action. I don't think that the fall is the spring.

The conclusion that the Court reaches is that this testimony particularly with the contradictions, with the revisionist and opportunistic opinions that are now offered totally impeaching, it's self-impeaching and contradictory, both Mr. Feyrer and Dr. Norris. They lack credibility. They are the equivalent of bad faith.

The Court finds agency bad faith here. There simply is no explanation. There is no justification. And again, the government wins. The government is here to protect the United States and to protect the people of the United States. And it's here to protect the species. They're all equally important. And somehow some way that mission and sight is lost. When I see placed before the Court what has been submitted.

The Court can only say that if there were credible and reliable evidence, the Court has never hesitated, the Court, quite frankly, even put an injunction in place, it didn't deny the fall X2 action, it just found that there was simply no reasonable scientific basis. There's still no explanation that's understandable that isn't totally impeached and contradicted, for where you locate fall X2. But nonetheless, out of that potential, there are two objectives

here on the species side and in balancing, that the Court still believes should be served. This is an important opportunity to get more information and data. And that's one thing we absolutely need in these cases. It's to everybody's interest.

So I'm not going to just junk the fall X2 standard and in a peak of disappointment with the government's, because just your scientists can't be honest and can't be straight and can't serve the public interest, that we'll just throw the baby out with the bath water. That's not going to happen. This species is in trouble. It still needs to be protected.

I'll let the parties give me any indication why, quite frankly, we don't modify the injunction so that it doesn't take effect until October 15th. I don't really see any reason for it to take effect before October 15th.

But I will say this, in evaluating the public interest. It is of crucial significance to the Court that the Department of Water Resources is sitting in this Court. I've already found this in many of these cases at earlier times. Their scientists aren't better, they're not worse. They're as good as the federal scientists. They are not less concerned about the species. They are not less concerned about the public interest. And they are here opposing in every way this fall X2 action for very good reasons that are explained and that are justified. Just as that paucity of justification *

check * check * and absence of explanation that makes the action and BiOp unlawful exists on the federal side of this equation. And that weighs heavily because the DWR is here to protect the people of the State of California as well as the national interests in the species and in all the issues that are before the Court.

And so I'll let you tell me why, but my intent is I'm going to deny the request for stay. I'm going to modify the injunction to have it take effect October 16th of 2011. And in other respects, the matter will be as it has been decided. I'm not changing any of my findings. I'm not changing any decisions that I have made, but I am adding now the findings of agency bad faith. I am finding that these witnesses are incredible, that they are disassembling, that they have performed in a way that is unworthy of their public trust. These are strong findings and strong words. They are absolutely compelled on this record.

So let's hear from the parties briefly on my proposed modification of the injunction. Otherwise, fall X2 RPA for -- I'm sorry, RPA Action 4 stays in effect in all other respects.

Mr. Lee.

MR. LEE: Your Honor, first of all, the Department of Water Resources appreciates the trust you have shown in our presentation in these proceedings. It is certainly welcome

given the amount of work we've had, chance to work on this case. I would like to talk about the modification of the injunction. I think, from the data that Mr. Leahigh has presented, it's pretty clear for September that we're not going to have a violation of the monthly average of 74 kilometers.

THE COURT: I've already made that finding.

MR. LEE: Yes.

THE COURT: So we don't need the injunction in September.

MR. LEE: Now, the issue becomes whether we can go up to the brink of October 15th or not. As you might guess, the projections on where X2 will be without project operations as you move farther along become, how shall I say, less precise, less granular.

THE COURT: It's understood.

MR. LEE: All right.

THE COURT: I made that finding too, I said which can't tell, when, quite frankly, X2 is going to move east.

MR. LEE: And Mr. Leahigh indicated that the best estimate is that probably in the latter part of October, it will move east. But he did not say with absolute certainty in his declaration that for the first two weeks of October, without project operations, X2 will, in fact, be at 74 kilometers on an average. And I think the concern here was

the less precision we have, as we move into October.

So we would probably be more comfortable, given that less precision, if you want to modify that injunction to modify it until the first of October. And allow September to go forward. Because of the kind of lack of precision. I know many of the parties have said, well, we're not going to have any problems until the second half of October. And that may very well be. All right? But that position was not expressly said and stated in Mr. Leahigh's declaration. And because it's another month out, there is some concern that the natural state of affairs might not guarantee us the outcome that you've suggested.

THE COURT: Thank you, Mr. Lee.

Any other plaintiff wish to be heard?

MR. WEILAND: Just briefly, Your Honor. I certainly concur --

THE COURT: This is Mr. Weiland.

MR. WEILAND: Paul Weiland, thank you, Your Honor, for Coalition of sustainable Delta. I concur with Mr. Lee. Frankly, we saw this earlier in the salmon proceedings. There was a question about San Joaquin flows and where they would be maintained. They fell below the estimates given by the federal defendants. And I think that was because, as you go further out, those estimates become less certain.

And the Court has gone through a very careful

balancing in order to come up with 79 kilometers location. And our view is that there's no benefit to the species, it's certainly questionable, and in light of that balancing, for us to bear the risk and for the Court to change the status quo from the current injunction, we think would be inappropriate.

THE COURT: Any other plaintiff?

MR. SIMS: Westlands joins those comments.

THE COURT: All right. Let's hear from the federal defendants.

MR. EDDY: Your Honor, this is Ethan eddy. I don't think we're going to take any position on this selection of the date in light of the fact that Your Honor is denying our request for a stay.

THE COURT: Thank you very much. Defendant intervenors?

MS. POOLE: Thank you, Your Honor. This is Kate Poole. We do support your postponing the effective date of the injunction until October 16th. As the Court found it is August 31st ruling, until that time, wherever X2 is set, it will be met by upstream reservoir depletion. And it's more likely than not that those upstream reservoir depletions will be fully recovered in the winter months, meaning the plaintiffs will likely suffer no irreparable water supply impact from that.

Mr. Leahigh again confirmed that in his September 8th

declaration, that both of his current model runs show, quote, "little to no upstream impact associated with meeting X2 at either kilometer 74 or 79 in September, October and November." Unquote. And that's at paragraph 27.

So, in other words, as long as DWR is meeting the 74 kilometer X2 requirement with upstream reservoir releases, as it will through October 15th, there are no irreparable water supply impacts and we agree with your ruling.

THE COURT: Thank you very much, Ms. Poole.

Is the matter submitted?

MR. LEE: Yes, Your Honor.

THE COURT: All right. I'm going to modify the injunction. It will take effect October the 16th.

Now, I want an order based on my findings. You don't have to include the findings. My findings are stated for the record. But let's have an order so we can get that entered. I know that the defendants wish to urgently pursue the matter. And so I don't want to have any impediment to that happening.

And I'm adopting the modification of the injunction for the reasons that Ms. Poole just stated. I think I have stated them in my long, if you will, recitation of findings of fact, conclusions of law. But she stated them succinctly. If you want to prepare that part of the order, Ms. Poole, maybe you and Mr. Lee can coordinate.

MR. LEE: Your Honor, if I could have just one

clarification.

THE COURT: Yes.

MR. LEE: I assumed, when you say that the injunction only goes into effect --

THE COURT: Well, I'm going to suspend the effect of the injunction. It's been in effect up until today. I'm going to suspend the injunction until October 16, in which it will re-take effect.

MR. LEE: Would, then -- part of the concern is the RPA requires that there be a monthly average of 74. All right? I -- if, in fact, the injunction goes into effect on the 16th and, of course, we have 74 kilometers on a daily basis or an average basis in the first two weeks. Then I'm assuming then no further action would be required.

THE COURT: I'm leaving that to the discretion of the operators.

MR. LEE: I see.

THE COURT: Quite frankly. That's for them to manage. They have manage the water supply. And I believe that Ms. Poole also accurately stated that it's coming from their storage, if you will, operations. And so -- and the way in which the reservoirs are filling and how they're transferring from reservoir to canal to where the other, if you will, outlets for the flows either are held in storage or are released for disposition by the system.

MR. LEE: I understand the means issue, it's the metric that I'm concerned with. And I assume what we're having here is there's been no alteration to the monthly.

THE COURT: Well, as I understand it.

MR. LEE: The monthly metric.

THE COURT: Right. The Bureau calculates the metric. And so the metric is at 74 until October 16. Then it is 79.

MR. LEE: Thank you, Your Honor.

THE COURT: Did you get that, Ms. Poole?

MS. POOLE: Yes, Your Honor. And I'd be happy to join Mr. Lee in drafting the proposed order.

THE COURT: All right. Is there anything further.

(Off the record.)

THE COURT: Did everybody here that? The court reporter says I was quoting from the rough draft, the final transcript has now been prepared, so she will coordinate the accurate -- the official record pages now to this transcript when she prepares it so that you'll have accurate citations to what is now the official record of the July evidentiary proceedings.

Anybody disagree?

From silence, we infer no disagreement.

Is there anything further?

MR. SIMS: One other --

THE COURT: Yes.

MR. SIMS: One other matter, Your Honor. And this is actually beyond the case. This is probably the last time many of us in this courtroom will be appearing before you. And we just wanted to thank you for your service to all of us, and particularly your hard work. And the professionalism of your staff. We will miss you.

THE COURT: Thank you very much.

All right. That concludes our proceedings. Everybody have a good weekend. We are in recess.

MS. POOLE: Thank you, Your Honor.

MR. ORR: Thank you, Your Honor.