



ERIC N. ROBINSON

June 19, 2003

Mr. Doug Schleusner
Executive Director
Trinity River Restoration Program
United States Department of the Interior/Bureau of Reclamation
P.O. Box 1300
1313 South Main Street
Weaverville, CA 96093

Re: Comments on the Environmental Assessment/Draft Environmental Impact Report for the Trinity River Restoration Program Trinity River Bridges Project

Dear Mr. Schleusner:

The San Luis & Delta-Mendota Water Authority ("Authority"), on behalf of its agency members, and Westlands Water District ("Westlands" or the "District") submit the following comments on the Environmental Assessment and Draft Environmental Impact Report ("EA/DEIR") for the Trinity River Restoration Program's Trinity River Bridges Project ("Proposed Project" or "Bridges Project").

The Authority is a joint powers authority consisting of 32 member agencies which contract with the United States Department of the Interior, Bureau of Reclamation ("Reclamation") for the supply of Central Valley Project ("CVP") water. The project water supplied to the Authority's member agencies is diverted from the Sacramento-San Joaquin River Delta ("Delta") through the Tracy Pumping Plant and is used to satisfy the water needs of over 1,300,000 acres of highly productive agricultural land in the western San Joaquin Valley, San Benito County, and Santa Clara County. Authority members also provide approximately 200,000 acre feet of water for municipal and industrial uses, primarily in the Santa Clara Valley, and 200,000 to 250,000 acre feet of water for waterfowl and wildlife habitat in the San Joaquin Valley. Westlands is a California water district with a contractual right to receive up to 1,150,000 acre feet of CVP water from Reclamation. Westlands provides water for municipal and industrial uses and for the irrigation of approximately 600,000 acres on the west side of the San Joaquin Valley in Fresno and Kings Counties.

a.

The Trinity Bridges Project is part of the larger Trinity River restoration project, which reduces the water supply to landowners and water users within the service areas of Westlands and the Authority's other member agencies. The Trinity Bridges Project will increase the severity of this water supply impact by allowing unprecedented releases of CVP storage from

b.

Trinity Reservoir to move gravel, scour away riparian vegetation and hydraulically bulldoze the mainstem Trinity River channel into a new configuration. As a result, Westlands and the Authority maintain a significant interest in the Proposed Project.

BACKGROUND

On December 19, 2000, the United States Department of the Interior issued the Trinity River Mainstem Fishery Restoration Record of Decision ("ROD"), which ordered large flow releases from the Trinity River Division ("TRD") of the CVP to convert the mainstem Trinity River into a "dynamic alluvial river." The ROD assumes that the geomorphic attributes resulting from these large flow releases will cause an increase in the size of the Trinity River's anadromous fish populations (*i.e.*, chinook salmon, coho salmon and steelhead). The ROD's flow releases are so large that they cannot be fully implemented without damaging, or inhibiting, use of certain bridges spanning the river. It is these bridges that are to be replaced by the Trinity River Bridges Project. Thus, implementation of the Trinity River Bridges Project is necessary to carry out the ROD's large flow releases.

The ROD was the result of an environmental review process performed under the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA"). The County of Trinity ("County") has discretionary approval authority over certain actions approved by the Interior Department's ROD, including the Trinity Bridges Project. These actions independently would cause significant adverse environmental impacts and are an inseparable part of the whole Trinity River restoration project, which would cause significant adverse environmental impacts. As a result, the County could not approve or carry out any ROD actions without first complying with CEQA mandate to prepare an environmental impact report ("EIR"). To satisfy CEQA, the County and the Department of the Interior, along with the Hoopa Valley Tribe, cooperated in preparing the EIS resulting in the ROD, so that the EIS actually is a joint EIS/EIR.

As part of the NEPA/CEQA process, the Department of the Interior and the County prepared a draft and then a final environmental impact statement /environmental impact report ("EIS/EIR") in an attempt to meet NEPA's and CEQA's mandates to analyze and disclose the environmental impacts of the preferred alternative for Trinity River fishery restoration in light of the comparative impacts of alternative fishery restoration measures and approaches. Westlands and the Authority submitted comments on the draft EIS/EIR explaining why it did not satisfy the requirements of NEPA or CEQA. The final EIS/EIR issued by the Department of the Interior in October 2000 did not remedy the draft EIS/EIR's inadequacies, so Westlands and, ultimately, the Authority filed a lawsuit to compel the Department to prepare a sound EIS that would clearly disclose and compare the impacts of a reasonable range of viable alternatives for

C.

Mr. Doug Schleusner
Trinity River Restoration Program
June 19, 2003
Page 3

10355.004

restoring the Trinity River's anadromous fishery. The County never certified the EIS/EIR, and for good reason.

On February 20, 2003, the U.S. District Court, Eastern District of California, issued a final judgment holding that the Department of Interior's EIS is legally inadequate and that "[t]he ROD was adopted in violation of the National Environmental Policy Act" *Westlands Water District, et al. v. United States*, Case No. CIV-F-00-7124 OWW DLB, at page 2 (filed February 20, 2003) ("Judgment"). The Judgment included an injunction limiting the ROD's flow releases to 369,000 acre feet in critically dry years and to 453,000 acre feet in all other year types defined by the ROD. The Judgment ordered the Department of the Interior to complete a supplemental EIS to remedy the inadequacies of the original EIS, so that a new record of decision could be issued in light of the actual impacts of a full range of alternatives for restoring the Trinity River fishery. Upon motion by the United States, the Judgment was subsequently modified to extend the time for the Department of Interior to prepare an SEIS remedying the serious deficiencies of the original environmental document. The SEIS must be adopted by July 9, 2004.

The Judgment, as modified, holds that the original EIS is legally inadequate for the reasons set forth in the District Court's December 10, 2002, Memorandum Decision ("Memorandum Decision") granting in part, and denying in part, summary judgment motions filed by Westlands and the Authority and other parties. Memorandum Decision and Order Re: Cross-Motions for Summary Judgment, *Westlands Water District, et al. v. United States*, Case No. CIV-F-00-7124 OWW DLB (filed December 10, 2002) ("Memorandum Decision" or "Mem. Dec.") The Memorandum Decision held that "an intentional subversion of NEPA's requirements prevented full and fair consideration of significant impacts which will be caused by CVP reoperations" resulting from the Trinity River ROD. Mem. Dec. at page 140, lines 5-8. The Memorandum Decision held that "the NEPA procedures followed impaired, rather than advanced, public participation and informed decision-making," *id.* at 140, lines 26-28, and that "[t]here is no explanation for the failures of the NEPA process that occurred in this case . . .," *id.* at page 141, lines 19-20.

Specifically, "[w]hen the EIS scoping to define the purpose for the [Trinity River restoration project] began, the [Hoopa Valley and Yurok] Tribes participated and their lawyer stood by while the County of Trinity persuaded the EIS management team to unfairly and unlawfully narrow the purpose and scope of the EIS." Mem. Dec. at 139, lines 15-18 (emphasis added). The result was an unlawfully narrow range of restoration alternatives "which pre-ordained the selection," *id.* at 108, lines 19-21, of an "experimental, untested" restoration approach, *id.* at 93, line 22, redirecting huge amounts of stored CVP water away from Californians who depend upon that water and already suffer chronically inadequate deliveries of

Mr. Doug Schleusner
Trinity River Restoration Program
June 19, 2003
Page 4

10355.004

CVP water that fall far short of the United States' contractual water service commitments. According to the District Court, the Department of the Interior's administrative record in the case "indicates Interior chose to assume the risk of apparent NEPA violations" and "Interior as much as admits it could not cure the NEPA violations that had occurred . . ." Mem. Dec. at 47, lines 16-20.

Although the requirements of the federal NEPA statute are not identical to the state CEQA statute, CEQA was adopted and patterned after NEPA. And in this case, the fundamental problems making the Trinity River EIS/EIR inadequate under NEPA also make the EIS/EIR inadequate under CEQA—a conclusion confirmed by Trinity County's decision not to certify the EIS/EIR. Until all of the original EIS/EIR's failings are resolved by an adequate supplemental EIS/EIR, there is no way for either the Department of the Interior or Trinity County to approve and carry out flow-related ROD actions in light of all their significant adverse environmental impacts. That includes the ROD action now identified as the Trinity Bridges Project.

SPECIFIC COMMENTS

For the reasons presented below, the EA/DEIR and the related draft Finding of No Significant Impact ("FONSI") are legally inadequate and do not comply with NEPA, 42 U.S.C. §§ 4321 *et seq.*, or CEQA, Pub. Res. Code §§ 21000 *et seq.* As a result, Westlands and the Authority request that the Department of the Interior and Trinity County withdraw the EA/DEIR, correct its deficiencies, and recirculate the document prior to approving the Trinity River Bridges component of the overall restoration project approved by the December 2000 ROD. Alternatively, Westlands and the Authority request that the Department of the Interior and Trinity County defer approving or carrying out the Trinity Bridges Project until after completion and certification of an adequate supplemental EIS/EIR.

The EA/DEIR is legally inadequate under NEPA and CEQA for the following reasons:

- The EA/DEIR analyzes only one flow-related segment of the whole Trinity River restoration project approved by the Department of the Interior's unlawful ROD and therefore fails to disclose the impacts of the whole project;
- The federal lead agencies prepared a FONSI when they should have prepared an Environmental Impact Statement;
- the EA/DEIR improperly defines the existing hydrological conditions;

d.

Mr. Doug Schleusner
 Trinity River Restoration Program
 June 19, 2003
 Page 5

10355.004

- the EA/DEIR fails to adequately analyze a reasonable range of alternatives to the Proposed Project;
- the EA/DEIR does not adequately discuss the cumulative impacts of the Proposed Project; and
- the EA/DEIR does not adequately discuss the significant irreversible and irretrievable commitment of resources which would occur as a result of the Proposed Project.

The EA/DEIR is legally inadequate because it fails to analyze the whole of the project

CEQA applies to discretionary approvals of "projects" that may cause significant adverse environmental impacts. Pub. Res. Code § 21080(d). CEQA and its implementing regulatory Guidelines broadly define the term "project" to mean "the whole of an action, which has potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." 14 Cal. Code Regs., § 15378(a) (emphasis added). Thus, the term "project" is defined to refer to the whole activity to be carried out and "which may be subject to several discretionary approvals by governmental agencies" and "does not mean each separate governmental approval." 14 Cal. Code Regs., § 15378(c). Thus, a lead agency, like Trinity County, may not narrow the scope of its environmental impact analysis by defining the "project" in terms of a single discretionary County approval, when the action approved is admittedly a necessary part of a much larger "project" whose significant adverse environmental impacts go far beyond those attributable to just the narrowly defined action being approved.

e.

Recognizing the danger that lead agencies might purposefully truncate their project descriptions to hide impacts of the underlying activities actually being carried out, the courts have given the term "project" "a broad interpretation in order to maximize protection of the environment." *Shawn v. Golden Gate Bridge etc. Dist.*, 60 Cal. App. 3d 699, 701 (1976); *Citizens Assn. For Sensible Development of Bishop Area v. County of Inyo*, 172 Cal. App. 3d 151, 165 (1985). In *McQueen v. Board of Directors*, 202 Cal. App. 3d 1136, 1144 (1988), the court warned that "[a] narrow view of a project could result in the fallacy of division . . . that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole." In *Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of the University of California*, 47 Cal. 3d 376, 396 (1988), the California Supreme Court held that "an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action

Mr. Doug Schleusner
 Trinity River Restoration Program
 June 19, 2003
 Page 6

10355.004

will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.”

The EA/DEIR at issue here defines the “project” as replacement of three bridges and modifications to a fourth bridge and limits the analysis and disclosure of significant adverse environmental impacts to only those impacts directly resulting from these four narrowly defined actions. EA/DEIR at 1-18. The problem with this approach is that these four bridge-related actions are admittedly being proposed in order to carry out the large flow releases originally approved in the illegal Trinity River ROD. The EA/DEIR states that “The proposed bridge replacement project is one part of a larger effort to restore the anadromous fishery of the Trinity River as described in the Secretary of the Interior’s 2000 Trinity River ROD.” EA/DEIR at 1-4. The illegal ROD adopts the Trinity River restoration program’s implementation plan contained in the October 2000 FEIS/EIR. ROD at 12. That implementation plan states that the four bridges at issue here “will be replaced in order to accommodate” the restoration program’s large flow releases, which were approved by the illegal ROD. Thus, the ROD requires the Trinity Bridges Project, and the EA/DEIR explains that the Trinity Bridges Project is intended to allow implementation of the ROD’s flow release regime. Under the test established in *Laurel Heights*, the ROD’s flow release regime is a reasonably foreseeable consequence of the Trinity Bridges Project, and implementation of that flow release regime will be significant in that it will change the scope and nature of the environmental effects of the Trinity Bridges Project. As a result, the CEQA document for the County’s Trinity Bridges Project must, but current does not, analyze and disclose the impacts of the ROD flow release regime.

The EA/DEIR asserts that the Trinity Bridges Project has independent utility and, therefore, may proceed in the absence of a legally adequate disclosure of the impacts of the overall Trinity River restoration program of which it is a part. This assertion is specious. EA/DEIR at 1-2 through 1-3. The alleged independent utility is that the bridge replacements are necessary to protect the citizens of Trinity County from possible flooding dangers. *Id.* However, these “dangers” do not support the County’s assertion that the project has independent utility separate from the ROD.

The alleged “independent utility” for the Trinity Bridges Project is a thinly veiled reliance on the flow releases ordered by the Trinity River ROD. Thus, the flood danger cited by the County to establish “independent utility” separate from the Trinity River ROD flows is, in fact, based on those very ROD flows. The hydrological model used to estimate flood flows at each of the project bridge sites assumes that the ROD flows will occur. *See, e.g.*, EA/DEIR at 2-8, EA/DEIR at 3.4-16 (100-year flood flows “assuming the full implementation of the flow regime identified in the ROD” results in “a more conservative bridge design approach than those that would be derived from” earlier study excluding ROD flows). From this model, the lead

Mr. Doug Schleusner
 Trinity River Restoration Program
 June 19, 2003
 Page 7

10355.004

agencies estimated the 50- and 100-year flood flows for each bridge site, and analyzed the alternatives in light of these estimates. Assuming implementation of the ROD flows, while claiming to establish the "independent utility" of the Trinity Bridges Project, establishes just the opposite; namely that the Trinity Bridges Project was conceived as part of the overall Trinity River restoration program approved by the illegal ROD and remains part and parcel of that overall program, whose environmental impacts have never been adequately analyzed and disclosed to the public or County decisionmakers.¹

The source of funding for the Trinity Bridges Project reveals that it, in fact, is part of the overall Trinity River restoration program and, therefore, must be analyzed in an environmental document that discloses all impacts of the overall restoration program. The EA/DEIR states that the Trinity Bridges Project will be funded in part by money from the California Department of Fish and Game's Coastal Salmon Recovery Program and that the EA/DEIR, itself, was funded through this same program. EA/DEIR at 1-1. These program funds are necessarily earmarked for fishery restoration (*i.e.*, Trinity River fishery restoration), not for "[p]rovid[ing] safe and reasonable year-round access to parcels of land served by the Salt Flat, Bucktail, Poker Bar and Biggers Road bridges across the Trinity River." EA/DEIR at 1-11. The EA/DEIR does not, but should, state whether the Proposed Project would also be funded by the Trinity River Restoration Program or any other funding source earmarked for ROD implementation.

Finally, the EA/DEIR asserts that the Trinity Bridges Project must go forward because the U.S. District Court's Memorandum Decision "expressly authorized and directed the [Department of the Interior] to proceed with non-flow aspects of the December 2000 [ROD] . . ." EA/DEIR at 1-1 to 1-2 (emphasis added). This assertion erroneously characterizes the Trinity Bridges Project as a "non-flow" measure and mischaracterizes the Court's actual disposition of ROD. To describe the Trinity Bridges Project as a "non-flow" measure is specious against the facts and the EA/DEIR's admission that the Trinity Bridges Project is intended to allow implementation of the ROD's large instream flow releases. And rather than directing implementation of the ROD's non-flow measures (*i.e.*, watershed restoration, including road improvements, to reduce sediment input to the Trinity River), the Final Judgment simply states that the Court's injunction limiting ROD flow releases is not "intended to delay or to affect

¹ Apparently recognizing the problem with its "independent utility" theory, the County attempts to rely upon a single 1997 flood event to form a separate independent basis for the Trinity River Bridges Project. However, the EA/DEIR fails to provide any analysis at all of the likelihood that this single event might recur. Under all the circumstances, a single flood event cannot establish the independent utility of a bridge project that admittedly is intended to allow implementation of the ROD flows.

Mr. Doug Schleusner
Trinity River Restoration Program
June 19, 2003
Page 8

10355.004

implementation of any other fishery restoration measure identified in the ROD". Final Judgment at page 4, ¶ 4. The statement that an injunction restricting the ROD's flow releases is not intended to delay implementation of other ROD measures cannot reasonably be interpreted as a blank-check directive to carry out the Trinity Bridges Project in violation of applicable federal and state laws. If the EA/DEIR's contrary assertion were correct, there would be no reason to prepare the EA/DEIR in the first place, because the Court's "directive" would make the project non-discretionary and neither CEQA nor NEPA would apply. This absurd result cannot be premised upon the Court's Final Judgment or any prior ruling or decision in the case.

The October 2000 Trinity River Mainstem Fishery Restoration EIS/EIR was intended to provide a program-level environmental analysis from which Trinity County could tier its CEQA review for the bridge replacement project, but this CEQA compliance strategy was rendered impossible by that document's legal inadequacy and Trinity County's resulting decision not to certify that document. Although the Trinity Bridges Project EA/DEIR asserts that it does not tier from the program-level October 2000 EIS/EIR but, rather, is a stand-alone project-specific EIR, the EA/DEIR is not legally adequate, because neither it nor any other environmental document discloses the impacts of the whole action of which Trinity Bridges Project is a part. The County has three options to avoid or to cure this problem. It may withdraw the present EA/DEIR and decline to carry out the Trinity Bridges Project. It may withdraw the EA/DEIR and revise it to disclose the impacts of the whole action (including the ROD flow releases), and recirculate the new document. Or, the County may simply delay approving the Trinity Bridges Project until after the Supplemental EIS/EIR for the overall Trinity River restoration program is certified. Any other course will violate CEQA.

NEPA also prohibits segmented environmental review of ostensibly separate actions that, in fact, are so connected as to constitute a single overall federal action. *See, e.g., Save the Yaak Committee v. J.R. Block*, 840 F.2d 714, 720 (1988) (road improvement project intended to accommodate increased timber harvesting are connected actions whose combined impacts must be analyzed and disclosed in a single NEPA document); *Thomas v. Peterson*, 753 F.2d 754, 759-760 (1985) (road intended to allow timber harvesting are connected actions whose combined impacts must be analyzed and disclosed in EIS). Thus EA/DEIR's segmentation problem that violates CEQA also violates NEPA, and the federal action agencies that intend to rely upon the EA/DEIR have the analogous remedial options under NEPA as the County does under CEQA.

Mr. Doug Schleusner
 Trinity River Restoration Program
 June 19, 2003
 Page 9

10355.004

NEPA Requires federal lead agencies approving or carrying out the Trinity Bridges Project to disclose the project's impacts in an EIS, not a FONSI

The EA/DEIR violates NEPA by concluding that the Proposed Project will not result in any significant impacts on the human environment, and that a FONSI is, therefore, the appropriate NEPA document upon which to base their approvals or implementation actions for the Trinity Bridges Project. Although Trinity County's decision to prepare an EIR, instead of a negative declaration, shows the inappropriateness of the federal action agencies' decision to prepare an EA/FONSI instead of an EIS, the requirement for a full EIS is clear under the NEPA statute and its implementing regulations.

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for "every . . . major federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). In certain circumstances, agencies may first prepare an EA to make a preliminary determination whether the proposed action will have a significant environmental effect. See *National Parks and Conservation Association v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. § 1501.4), cert. denied, 534 U.S. 1104, 122 S.Ct. 903, 151 L.Ed.2d 872 (2002). "If the EA establishes that the agency's action 'may have a significant effect upon the . . . environment, an EIS must be prepared.'" *Id.* (quoting *Foundation for North American Wild Sheep v. United States Department of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982) (emphasis and alteration in original)). "If not, the agency must issue a finding of no significant impact (FONSI), accompanied by a 'convincing statement of reasons to explain why a project's impacts are insignificant.'" *Id.* (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal quotes and citation marks omitted)). Thus, an EIS is required where the proposed project constitutes a "major" federal action that may "significantly" affect the environment.

f.

The NEPA regulations define the term "significantly" as follows:

"Significantly" as used in NEPA requires considerations of both context and intensity:

- (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site specific action, significance would usually depend upon the effects in the locale

Mr. Doug Schleusner
Trinity River Restoration Program
June 19, 2003
Page 10

10355.004

rather than in the world as a whole. Both short and long term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

...

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

....

40 C.F.R. § 1508.27. If a proposed action is environmentally significant according to any of these criteria, then an EIS is required. (*See National Parks*, 241 F.3d at 731.)

For NEPA purposes, the EA/DEIR contains both an EA and a Draft FONSI, which concede that the Proposed Project is a "major" federal action. However, this EA/Draft FONSI concludes that the possible effects on the environment do not rise to the level of significance that would require preparation of an EIS. EA/DEIR, at 1-6. This conclusion is erroneous, and an EIS is required.

When considered in the context of the overall Trinity River restoration program, and the degree to which the Trinity Bridges Project is connected to the full ROD flows, there is no question that these actions, together, will cause a significant effect on the human environment. The cumulative effect of the Trinity Bridges Project, channel rehabilitation projects, and all the other and related projects approved by the illegal ROD will have significant impacts that must be disclosed in an EIS.

Mr. Doug Schleusner
 Trinity River Restoration Program
 June 19, 2003
 Page 11

10355.004

The federal lead agencies are currently planning several projects approved in the illegal ROD (*i.e.*, Trinity River channel rehabilitation projects). These and other actions, *see, e.g.*, EA/DEIR at 4-1 through 4-5, may have a cumulatively significant impact. As described in the NEPA regulations, "significance cannot be avoided by terming an action temporary *or by breaking it down into small component parts.*" 40 C.F.R. § 1508.27(b)(7) (emphasis added).

For these reasons, the Proposed Project may have a significant effect on the environment. Therefore, an EIS is required, and the lead agencies cannot adopt a FONSI in instead. The Authority and Westlands request that the lead agencies not adopt the draft FONSI contained in the EA/DEIR, but instead prepare and circulate a EIS and ultimately a final EIS for the Trinity Bridges Project.

The EA/DEIR is legally inadequate because it improperly defines existing hydrological conditions to include full ROD flows

The EA/DEIR asserts that the environmental baseline (*i.e.*, existing environmental conditions) used to assess the significance of the Proposed Project's impacts reflects the flow releases allowed under the U.S. District's Court's injunction, when the environmental baseline actually used in the impacts analysis assumes implementation of full ROD flows.

For example, the EA/DEIR at page 2-1 states that "[t]he flow regime used to evaluate the existing bridges spanning the Trinity River between Lewiston and Douglas City are the flows authorized by the December 9, 2002 'Memorandum Decision' issued by Judge Oliver W. Wanger of the United States District Court for the Eastern District of California . . .". Similarly, the EA/DEIR at pages 2-1 through 2-2 states that "the flows authorized by Judge Wanger are deemed to constitute the 'existing [hydrological] environment' for CEQA purposes, and are considered part of both the no project alternative (for CEQA) and the no action alternative (for NEPA)." 9.

The preceding assertions contradict the statement made earlier in the EA/DEIR that "[t]he flow regime identified in the ROD was used to evaluate the existing bridges spanning the Trinity River between Lewiston and Douglas City." EA/DEIR at 1-12. In fact, it seems that the latter full-ROD-implementation approach actually defined the existing hydrological conditions in the model used to evaluate water resources impacts. The EA/DEIR explains that this model considered all five ROD water year types. *See* EA/DEIR at 3.4-16 (Water Resources impacts chapter); *see also* EA/DEIR at 2-8, Table 2-2, Note a (river flows assuming "all 5 ROD water year type" including "11,000 cfs release"). The "Affected Environment/Environmental Setting" section of the EA/DEIR's Water Resources chapter spends considerable time reviewing the history of Trinity River flows and Trinity River Division diversions to the Sacramento River.

Mr. Doug Schleusner
 Trinity River Restoration Program
 June 19, 2003
 Page 12

10355.004

But nowhere in that chapter—or in any of the other EA/DEIR documents provided to Westlands and the Authority—is there an analysis demonstrating exactly what TRD flow release conditions actually were used as the baseline to identify, assess and disclose the significant adverse environmental impacts of the Trinity Bridges Project.

Both NEPA and CEQA require disclosure of a clear, understandable baseline from which to undertake impacts analyses. The EA/DEIR is legally inadequate under both CEQA and NEPA, because it lacks such a baseline. This deprives the public and the decisionmakers who are to rely upon this environmental document of a fair opportunity to understand and react to the adverse impacts of the Trinity Bridges Project. There are two options to remedy this problem. Either the EA/DEIR must be withdrawn, revised to employ a clear baseline reflecting actual existing conditions, and recirculated, or the EA/DEIR must be withdrawn and the Trinity Bridges Project abandoned.

The EA/DEIR is legally inadequate because it fails to adequately analyze a reasonable range of alternatives to the Proposed Project

The EA/DEIR gives short shrift to the analysis of alternatives to the Proposed Project. Both NEPA and CEQA require meaningful analysis of alternatives. Under CEQA, “if the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting its conclusions.” *Marin Municipal Water District v. KG Land Corporation of California*, 235 Cal.App.3d 1652, 1664 (1991). NEPA requires a similar discussion of alternatives, but with even greater detail. EA/DEIR at 1-6. The minimal attention given to the analysis of potential alternatives to the project in the EA/DEIR violates both CEQA and NEPA.

For each of the projects except one, the EA/DEIR presents three alternatives, including a “no action” alternative, the preferred action, and one alternative. In the case of the Salt Flat Bridge, the EA/DEIR presents two alternatives, but these are essentially the same alternative except for different ownership of the land underlying the bridge. EA/DEIR at 2-37. For every site described in the EA/DEIR, the preferred action is similar to the alternatives presented. This limited range of exploration of alternatives violates both NEPA and CEQA.

The EA/DEIR does provide a brief discussion of other alternatives that were considered but eliminated from further evaluation based on various criteria. See EA/DEIR at 2-130 through 2-132. In these instances, the lead agencies determined that the alternatives would be infeasible even before conducting a detailed analysis as required under NEPA and CEQA. At a minimum, the lead agencies should have included detailed discussions of these alternatives in the EA/DEIR.

h.

Mr. Doug Schleusner
 Trinity River Restoration Program
 June 19, 2003
 Page 13

10355.004

For these reasons, the Authority and Westlands request that the lead agencies revise the EA/DEIR to include discussions of alternatives beyond those already discussed.

The EA/DEIR is legally inadequate because it fails to adequately discuss the cumulative impacts of the proposed project

The EA/DEIR is not sufficiently detailed to aid the lead agencies in their decision regarding the Proposed Project, or to provide the public with the information needed to effectively respond to the Proposed Project. The EA/DEIR's cumulative impacts section is particularly deficient.

The preparation of an EA is intended to "ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning [potential] environmental impacts." *Robertson, et al. v. Metho Valley Citizens Council, et al.*, 490 U.S. 332, 339 (1989). The EA/DEIR gives short shrift to the potential cumulative impacts of the Proposed Project. In particular, the document fails to consider the impacts that the Proposed Project will have on the remaining projects approved by the Trinity River ROD. The Trinity Bridges Project may not go forward until an adequate NEPA/CEQA document discloses these cumulative impacts.

The EA/DEIR is legally inadequate because it fails to adequately discuss the significant irreversible and irretrievable commitments of resources that would result from the proposed project

The EA/DEIR provides only a minimal discussion of the commitment of resources that would occur should the Trinity Bridges Project be implemented. Both NEPA and CEQA require a more detailed discussion of the commitment of such resources. *See* 40 C.F.R. § 1502.16; 14 Cal. Code Regs. § 15126.2(c). The EA/DEIR discusses only the irretrievable "commitment of energy (*i.e.*, fossil fuels) and other nonrenewable resources used in building materials, including labor, to implement this project." The document notes that the commitment of these resources would be relatively minor, and thus would not have a significant adverse effect on their continued availability.

What the EA/DEIR fails to disclose is that the Trinity Bridges Project is a significant irreversible and irretrievable commitment to implementing the illegal ROD's flow regime. This is the kind of commitment that creates momentum to approve the ROD's flow regime regardless of the resulting adverse environmental impacts disclosed in the remedial SEIS now being prepared. By irretrievably investing in the Trinity Bridges Project for the admitted purposes of implementing full ROD flows, the Trinity Bridges Project will reduce the remedial

Mr. Doug Schleusner
Trinity River Restoration Program
June 19, 2003
Page 14

10355.004

SEIS to a *post hoc* rationale for a decision already made. That violates CEQA and NEPA. The only way to avoid this problem is to decline to approve this current project until after a legally adequate remedial SEIS is completed and a new ROD is adopted.

CONCLUSION

For the reasons set forth in these comments, the EA/DEIR is legally inadequate and does not comply with the provisions of NEPA or CEQA. The preceding comments suggest means for resolving the legal inadequacies. We thank you for the opportunity to provide these comments.

k.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation



Eric N. Robinson

APT/dg

743984.1

Responses to Comment 6

San Luis & Delta-Mendota Water Authority and Westlands Water District (Letter from Counsel Eric N. Robinson)

6-a: No response is required, as commentor merely characterizes the interests of its members in receiving water from the Central Valley Project.

6-b: The lead agencies recognize that the Trinity River Restoration Project, which as approved by Secretary of Interior Bruce Babbitt in December 2000 included improvements to, or replacement of, four bridges along the Mainstem Trinity River, will have adverse impacts on some water supply customers of the Central Valley Project (“CVP”). The lead agencies note, however, that the comment does not identify or acknowledge either the statutory basis for the Restoration Project or its intended environmental benefits.

The purpose of the Trinity River Mainstem Fishery Restoration project is to “restore and maintain the natural production of anadromous fish on the Trinity River mainstem downstream of Lewiston Dam.” (Trinity River Mainstem Fishery Restoration EIS/EIR at 1-4 (“EIS/EIR”). In the Central Valley Project Improvement Act of 1992 (“CVPIA”), Congress mandated that such restoration be undertaken, including increasing flows to the Trinity River if necessary, in an attempt to reverse the historic damage done to the River (particularly the fish populations, and consequently the Hoopa Valley and Yurok tribes) by diverting most of the water in the River to the Central Valley facilities of the CVP, which in turn delivered Trinity River water to a variety of users, including the entities represented by the commentor. (*Id.* at 1-12.) In other words, certain Central Valley interests and others had received economic benefits at an environmental cost to the Trinity River that Congress, in enacting the CVPIA, now considered unjustified in retrospect. Congress was also concerned that historic high exports had created unacceptable impacts on the Hoopa Valley and Yurok Tribes.

It is true that the Trinity River Bridges Project is a component of the larger Trinity River Restoration Project, as the Bridges Project will allow for higher levels of flows down the Trinity River. Even so, however, the Trinity River Bridges Project would create operational and public safety benefits that would be independent of the larger Restoration Project. Many of these independent benefits are discussed in the remaining responses to Comment Letter # 6.

In sum, although the commentor and the interests he represents may be adversely affected by the larger Restoration Project, which, as contemplated by Congress, will create environmental benefits within the Mainstem Trinity River, the Bridges Project itself will not directly adversely affect any of the interests of the commentor and the entities on whose behalf he has written. In fact, as discussed below, the Bridges Project, standing on its own, might provide benefits to Central Valley water users.

6-c: The commentor is correct that, on December 19, 2000, former Secretary Babbitt approved a Record of Decision (“ROD”) mandating that, pursuant to the CVPIA, thenceforth the Department of Interior would increase the flows going down the Mainstem Trinity River, and reducing the amount of water available for export to the Sacramento River watershed for use by certain irrigators and other economic interests. It is also true that the ROD assumed that the various components of the program

approved by the ROD would create geomorphic benefits that would increase fish populations and thereby benefit the Hoopa Valley and Yurok Tribes. These components were developed after a long period of scientific study, and represented the best scientific judgment of the professionals who had formulated the program. It is also true that the ROD mandated improvements to, or replacement of, four bridges that would be adversely affected by certain higher flows contemplated for certain meteorological and hydrological conditions.

The ROD was approved after completion of a NEPA process that culminated in late 2000. Although the federal lead agencies, working with Trinity County, had prepared the NEPA environmental impact statement (“EIS”) in a manner that permitted the document to also function as an environmental impact report (“EIR”) prepared pursuant to the California Environmental Quality Act (“CEQA”), the Trinity County Board of Supervisors has not yet taken any action to “certify” the EIR portion of the joint document. Indeed, in the aftermath of the federal litigation described by the commentor, the County’s current plan is to await completion of additional environmental review, as mandated by the federal District Court, before preparing a final EIR for possible certification under CEQA.

The lead agencies note that while the commentor’s description of the content and effect of the District Court’s decision are accurate in some respects, it could be argued that the description reflects the views of a particular litigant with a particular perspective. For the lead agencies’ view of the decision, readers are referred to pages ES-1 through ES-3 and pages 1-1 through 1-3 of the EA/Draft EIR. The lead agencies also note that the full text of Judge Wanger’s decision is attached as Appendix A to the EA/Draft EIR. Readers are free to draw their own conclusions regarding the decision, but should be aware that the matter is now on appeal before the Ninth Circuit Court of Appeals. It is possible that the appellate court may reach conclusions different from those of the district court.

As CEQA lead agency – and a non-party to the federal litigation – Trinity County, speaking solely for itself, respectfully disagrees with the district court that “the County of Trinity persuaded the EIS management team to unfairly and unlawfully narrow the purpose and scope of the EIS.” The adequacy of the “purpose and need,” as set forth in the original EIS, as well as the range of alternatives, are issues that the Ninth Circuit Court will address on appeal.

The lead agencies disagree with the commentor that “[u]ntil all of the original EIS/EIR’s failings are resolved by an adequate supplemental EIS/EIR, there is no way for either the Department of Interior or Trinity County to approve and carry out” the Bridges Project. The reasons for this disagreement will be evident from the lead agencies’ responses to the remaining comments from Letter # 6.

6-d: No specific response is necessary for Comment 6D, as it merely introduces, in summary form, certain legal arguments and assertions that are to follow in more detail.

6-e: The commentor makes a lengthy legal argument to the effect “the EA/DEIR is legally inadequate because it fails to analyze the whole of the project.” The lead agencies disagree with this assertion for a number of reasons, supported by both CEQA and NEPA principles. This response will address the commentor’s CEQA arguments first. With respect to these CEQA arguments, this response reflects the

views and perspective of Trinity County, as the entity responsible for CEQA compliance with respect to the Bridges Project.

The Scope of the “Project” at Issue in the EA/EIR

In arguing that Trinity County has violated CEQA by preparing an EIR focused on the impacts of the four bridges rather than the entire “Flow Decision” contemplated by the 2000 ROD and mandated in some form by the CVPIA, the commentor relies heavily on *Laurel Heights Improvement Association of San Francisco v. Regents of the University of California*, 47 Cal. 3d 376, 386 (1988) (“*Laurel Heights I*”), in which the California Supreme Court held that “an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable *consequence* of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” (Emphasis added.) Although the commentor accurately states the principle set forth in *Laurel Heights I*, Trinity County disagrees with the conclusions that the commentor draws from the case as applied to the facts at hand.

The Trinity River Bridges Project EA/EIR is *not* required to fully consider all of the environmental impacts of a future flow release regime, as future increased flow is not a reasonably foreseeable or necessary *consequence* of the proposed Trinity River Bridges Project causing significant changes in the scope and nature of the Bridge project or its environmental impacts.

The DEIR prepared by Trinity County does not hide adverse impacts of a broader project or improperly narrow the scope of its environmental review as the commentor suggests. Rather, the decision whether to approve the Trinity River Bridges Project is the only action immediately within the control of either the County or any other regional or state entity subject to CEQA. No such non-federal entity has control over the amount of water that the Department of Interior chooses to allow to flow down the Trinity River, provided that the Bureau of Reclamation (Reclamation), in diverting water from the Trinity River to the Sacramento River watershed, acts within the scope of its current state water rights permits, which require that only 120,500 acre feet per year flow down the Mainstem Trinity River.

The *Laurel Heights I* case is easily distinguishable from the situation at hand. There, the University of California, San Francisco (“UCSF”) sought to move research units for its School of Pharmacy from one UCSF campus to its facility in Laurel Heights. (47 Cal.3d at 393.) The EIR prepared for the project, however, only addressed the occupation of 100,000 square feet of the building, because the remaining 254,000 square feet was occupied by a tenant with lease extension options for several more years. (*Id.*) The court found that the EIR was inadequate because it failed to discuss the environmental impacts of anticipated future use of the remaining portion of the building. (*Id.* at 399.) These future plans were “reasonably foreseeable” because there was “telling evidence” that the University had made decisions or formulated reasonably definite proposals to expand its use to the entire facility. (*Id.* at 397.) Here, neither the County nor any other agency subject to CEQA has the ability to control the actions of Reclamation in choosing not to divert all of the water from the Trinity River that its existing state water rights permits would allow. Unlike the University of California in *Laurel Heights I*, which had both the clear intent and the ability to undertake a larger project than the one disclosed in its EIR, here neither the County nor any other state or regional agency subject to CEQA has the same kind of power, authority, or

opportunity to impose its will on the Department of Interior, which has heretofore acted solely on its own – pursuant to directives from Congress – in deciding to forego some of its rights under its state water rights permits.

The facts and conclusions of *Laurel Heights I* must also be understood within the larger context of CEQA case law dealing with allegations of “piecemealing,” which is a CEQA concept similar to the concept of “segmentation” addressed in NEPA case law. In *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego*, 10 Cal. App. 4th 712 (1992) (“*Del Mar*”), the court rejected a claim that the EIR at issue – for a discrete freeway project – constituted an impermissible example of “piecemealing” or “segmentation.” (*Id.* at 733, 735, 737.) In that case, the Court of Appeal also characterized the facts and holding of *Laurel Heights I* in a manner that is illuminating with respect to the Bridges Project. (*Id.* at 731.) Whereas *Laurel Heights I* involved “current and future uses of a *particular* building at a *particular* location,” the case before them involved “1.8 miles of state highway, to be developed separately from other adjoining segments of the highway” that would be developed in five separate phases, one of which crossed a zone controlled by a growth management initiative (called a Future Urbanizing Area (“FUA”). (*Id.*, emphasis added.) The court found that “the uncertainty of whether and when the electorate will approve development in the FUA” distinguished the case from *Laurel Heights I*. (*Id.*)

The *Del Mar Terrace* court analyzed the sufficiency of the EIR in light of a National Environmental Policy Act (NEPA) case with similar facts, and found that the segment of highway provided practical benefits of reducing existing traffic, accommodating predicted future increased traffic, and public benefits of a drainage and sediment control channel and landscaped greenbelt with equestrian, bicycle and pedestrian trails. (*Id.* at 733-34.) The court held that these benefits demonstrated that the preparers of the EIR had evaluated the various components of the overall highway project as “separate projects with *independent utility*, regardless of the completion or noncompletion of each other portion of the overall project.” (*Id.* at 732-734 (emphasis added).) These benefits also demonstrated that the project met state and local needs for such amenities. (*Id.*)

Further, the court found that the separate evaluation of one segment of the highway did not serve to “irretrievably commit” the City to complete the entire project; nor did it “interfere with future consideration of alternatives.” (*Id.*) The court also held that the EIR satisfied the *Laurel Heights I* requirement that the EIR include, “in at least general terms,” discussion of the environmental effects of future expansion or other action, as limited by the rule that “where a proposed project itself is fully evaluated in an EIR, it is not improper to omit discussions of other separate projects.” (*Id.* at 735.) The court held that, the “potential future connection . . . was no secret . . . and was adequately disclosed both to the public and to the City’s decisionmakers in the EIR.” (*Id.* at 736.)

In conclusion, the *Del Mar Terrace* court articulated a general principle that applies to the Trinity River Bridges Project: “Where . . . environmental review of one project includes in general terms discussion of the potential effects of an anticipated future project, which is still *contingent upon the happening of events which are currently outside the powers of the decision makers to cause*,” such an EIR has “fulfill[ed] its purpose of providing adequate, complete, and good faith efforts at full disclosure of information about the

effect which the proposed project is likely to have on the environment.” (*Id.* at 736-737 (emphasis added).)

Like the EIR in *Del Mar Terrace*, the EIR for the Trinity River Bridges Project has fulfilled its purpose of disclosing the environmental effects of the proposed project. First, like the future action in *Del Mar Terrace*, which required voter approval, and thus was outside the control of the City as decision makers for the highway project, the future decision regarding Trinity River flows is outside the control of Trinity County. The decision to reduce diversions from the Trinity River must be made by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe. In this instance, the Secretary’s decision is further subject to the oversight of Judge Wanger of the U.S. District Court for the Central District of California, placing the decision completely in federal hands. Thus, Trinity County has no control over the flow release decision, and should not be required to evaluate the impacts of such third-party action on its proposed bridge replacement project.

Not even the State Water Resources Control Board (“SWRCB”) has any necessary role in the future federal flow decision because the ultimate flow decision will result in the Bureau of Reclamation diverting *less* than its permitted amounts of water from the Trinity River, which is within their discretion to do without modifying its SWRCB permits. As no state or local agency is involved in the large-scale flow aspects of the Trinity River Mainstem Fishery Restoration Project, environmental review of the impacts of those flow decisions need not be included in Trinity County’s EIR for the Bridges Project.

Second, like the 1.8 mile highway project in *Del Mar Terrace*, the Trinity River Bridges Project has “independent utility” and meets state and local needs as higher bridges will promote safety of life and property, as well as federal, state and local goals for restoration of the Trinity River by accommodating additional capacity. (See discussion of Independent Utility, *infra.*) Further, completion of the higher Trinity River Bridges Project as proposed does not foreclose the consideration of future alternative flow rates to be determined by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe.

Third, like the EIR approved in *Del Mar Terrace*, the Trinity River Bridges Project DEIR does “include in general terms discussion of the potential effects of an anticipated future project.” The DEIR identified the potential increased release from Lewiston Dam pursuant to Trinity River Restoration goals among the justifications for Trinity River Bridges Project. (EA/DEIR at 1-10 to 1-11.) Thus, a potential future connection is “no secret,” and the EIR satisfies the disclosure standards required by CEQA with respect to potential effects of an anticipated future project outside the decision maker’s (Trinity County’s) control.

Indeed, the EA/DEIR provides clear notice of the existence and history of the 2000 ROD and the lengthy environmental analysis that preceded it. Not only do the first few pages of both the Executive Summary and the Introduction explain this background information; and not only does Chapter 4.1 (“Cumulative Impacts”) expressly refer to the larger Flow Decision and the new Supplemental EIS that is now underway; and not only does the EA/DEIR include the court’s December 2002 Memorandum Decision as an appendix; but the Introduction to the EA/DEIR clearly states, on pages 1-2 and 1-3, that

Copies of all of the above-referenced court documents, as well as the December 19, 2000, ROD, *and the documents that, taken together, constitute the FEIS/EIS*, are available for public review at [an identified location].

In short, the EA/EIR makes extremely clear the relationship between the Bridges Project and the larger Flow Decision, and clearly reveals that the eventual details of the ultimate Flow Decision will not be known until the completion of a new SEIS and a new ROD – the precise contours of which no one can predict at present with any certainty.

Fourth, unlike the situation in *Laurel Heights I*, in which there was “telling evidence” that the University intended to expand its use to include the remainder of the same building in the near future, the final numbers for future flows in the Mainstem Trinity River have not yet been determined by the Secretary and the Hoopa Valley Tribe. Given the character of the court’s decision and the uncertainty created by the dependency on an appeal of his decision in the Ninth Circuit, it is unreasonable for the commentor to expect Trinity County to have evaluated environmental impacts at each possible flow level that might be selected by third-parties, because such a requirement would effectively require the County to duplicate the Supplemental Environmental Impact Statement (“SEIS”) currently being prepared by the United States Fish and Wildlife Service and its co-lead agencies for the Flow Decision, in compliance with the court’s order (subject to modification in the event of a Ninth Circuit decision overruling the court’s decision in some respect(s)).

Trinity County believes that the court could not have intended such an inefficient and cumbersome result when the court ordered that “*all non-flow measures prescribed by the ROD shall proceed.*” (Memorandum Decision and Order, Dec. 9, 2002 at 143.) Thus, an uncertain future flow decision affecting huge portions of Northern and Central California very distant from the Bridge sites is not a reasonably foreseeable *consequence* of either the County’s proposed decision to authorize certain bridge proposals or the decisions of any CEQA “responsible agencies” that must take action with respect to these same proposals. (See EA/DEIR, pp. 1-33 - 1-34.)

The Trinity River Bridges Project is also in a unique procedural context that distinguishes it from any fact situations depicted in CEQA case law because a federal judge has *ordered* that the bridge renovation, as a non-flow measure, “shall proceed” in the absence of the SEIS required for the larger Flow Decision itself. The court enjoined only the implementation of ROD flows in any years except dry or critically dry years until an SEIS could be completed in compliance with NEPA and its decision. (Final Judgment, February 19, 2003 at 3; Memorandum Decision and Order, December 9, 2002 at 143.) Meanwhile, the court insisted that “nothing in this judgment is intended to delay or to affect implementation of any other fishery restoration measure identified in the ROD” (Final Judgment at 4), and ordered that “all non-flow measures prescribed by the ROD shall proceed.” (Memorandum Decision and Order at 143.)

As the bridges are non-flow measures, they *must* proceed without delay in order to fulfill the Federal Government’s trust responsibilities to the Hoopa Valley and Yurok tribes. (See discussion of the court’s mandate, *infra*.) This federal judicial directive to proceed with the renovation of the bridges in spite of the uncertainty of future flow decision outcomes implies two things. First, the court recognized that some increase in flow, above the statutory minimum rate, was likely associated with increased volumes of water in the Trinity River that would be eventually effectuated; otherwise, there would be no need to proceed with measures intended to promote additional channel capacity. Second, the court did not intend that the impacts of future flow increases be considered in every environmental document prepared for any

non-flow component of the fishery restoration plan. Thus, the court’s intent in crafting this highly efficient remedy would be thwarted if the EA/DEIR for the Trinity River Bridges Project were to have to include analysis of all of the environmental impacts resulting from implementation of a future flow release “regime.”

Finally, if any cause and effect relationship exists between the Trinity River Bridges Project and the flow decisions made in connection with the Trinity River Mainstem Fishery Restoration Program, it would be the *opposite* of what the commentor suggests: the construction of the bridges could be considered a “reasonably foreseeable consequence” of allowing increased flows in the river pursuant to the 2000 ROD, which has only been partially enjoined. The EIS/EIR for the Trinity River Mainstem Fishery Restoration Program acknowledged that damage to the bridges would result from all but the No Action and State Permit alternatives, and allowed for replacement or modification of the bridges subject to supplemental environmental review as necessary. (Trinity River Mainstem Fishery Restoration Program EIR/EIS at 3-301, 3-311.) This causal relationship, however, is the inverse of the one put forward by the commentor. While, under normal circumstances, such a relationship might suggest that completion of an environmental document for the overall restoration project should precede the bridge replacements, in the actual circumstances at hand it does not follow that an environmental review of the bridges should include in-depth CEQA analysis of the impacts of the restoration project as a whole – particularly when the question of flows down the Mainstem Trinity River lies solely in the hands of federal agencies and a federal judge, neither of which are subject to CEQA.

The “Independent Utility” of the Trinity River Bridges Project

Even if Reclamation and Trinity County were not facing the unique procedural situation described above, the EA/DEIR for the Trinity River Bridges Project would not be required to fully analyze the impacts of the entire Trinity River Mainstem Fishery Restoration endeavor, as it is a severable project with independent utility (like the highway project in *Del Mar Terrace, supra*). As outlined in the EA/DEIR, the proposed bridge improvements would have value even apart from any increase in flow rates, pursuant to the 2000 ROD or a future ROD. (EA/DEIR at 1-3.) As recently demonstrated during the New Year’s Day flood of 1997, the existing bridges are susceptible to adverse impacts including overtopping and flooded approaches during floods, and would be similarly affected by flows released from Lewiston Dam at a rate greater than 6,000 cubic feet per second (cfs). (*Id.* at 1-3, 1-4, 1-10, 1-11.)

The Bridges Project is designed not only to accommodate higher flows mandated by the CVPIA, but also to increase the safe channel capacity of the River, thus allowing for higher flow rates during planned releases and emergency conditions such as floods. (*Id.* at 1-10 to 1-11.) This increased capacity will result in greater public safety, and the operational flexibility to release water at a higher rate for a shorter duration in order to quickly gain reservoir capacity during a storm, or to accomplish other restoration goals such as sediment reduction. (*Id.*) Rather than releasing water at the current safe rates over a long period of time in advance of a storm that may never materialize, dam operators will be able to retain more water in storage, releasing only what is necessary. (*Id.* at 1-11.) This reduction in “wasted” water is likely to actually increase the amount of water available for use by Westlands and other CVP users. (*Id.*)

In high-flow situations, whether as a result of natural flooding, or increased inflow from the Dam or tributaries, life and property on and near the inundated bridges may be jeopardized directly by the rising waters, or indirectly by the resultant lack of access for residents or emergency personnel. (*Id.*) Thus, renovation of the bridges to accommodate greater flows will benefit public safety even if releases from the Dam remain constant. (*Id.*) Trinity County has every reason to consider the Bridges on their own merits – regardless of what the Department of Interior, the Hoopa Valley Tribe, and (perhaps) the federal courts eventually decide with respect to the overall Flow Decision.

The Trinity River Flow Evaluation Final Report makes it clear that occasional dam releases larger than 6,000 cfs are essential for re-establishment of the dynamic ecological conditions and processes necessary for restoration of healthy fishery populations. Sustaining the Trinity River’s diverse physical processes requires a varied flow regime to simulate the natural ebb and flow of the river before TRD (Trinity River Flow Evaluation Final Report at 50, 95, 141-42, 229.). Fluvial geomorphic processes such as mobilization of channel-bed surfaces, scour and refilling of channel-bed surfaces, channel migration, and channel morphology require dramatic flow variability, and cannot be satisfactorily accomplished with flow releases constrained to 6,000 cfs. (*Id.*) Even the Trinity River restoration alternative proposed by CVP power interests would necessitate higher-magnitude flows if Safety of Dams (SOD) releases were timed to occur during periods of high tributary runoff below Lewiston Dam. The existing bridges must be renovated prior to implementing any effective Trinity River restoration program, not just the flow regime prescribed by the 2000 ROD. Because the restoration of the Trinity River is mandated by Congress, the Bridges Project has a great deal of utility independent from the 2000 ROD.

In a similar vein, increased channel capacity would allow for a higher efficiency of sediment transport through the river system, as significantly more sediment is transported per acre-foot of water at higher release rates. (EA/DEIR at 1-1; Trinity River Flow Evaluation Final Report at 158, 163.) This sediment transport is critical to achieving targeted sediment reduction goals and removing the Trinity River from California’s Clean Water Act Section 303(d) Impaired Waterbodies List. (*Id.*) Raising the bridges, then, would allow water to be released at higher rates for shorter durations, thus achieving a greater degree of sediment reduction while conserving water in the reservoirs for use by CVP and other users.

Of particular interest to CVP water users is the fact that current flow constraints on the Trinity River can result in large amounts of water being unnecessarily released from the dams during the winter months, and thus made unavailable for CVP and other uses during the dry summer months when the water is most needed. (EA/DEIR at 1-3, 1-4, 1-10, 1-11.) Because the potential inflow (e.g., up to 202,000 cubic feet per second [“cfs”] into the reservoir above Trinity Dam) so far exceeds the discharge rate of 6,000 cfs above which damages to structures in the floodplain (including the bridges) can occur, the federal operators are forced to release water from the dams during the winter to maintain empty capacity in the reservoirs to prevent overtopping of the dams during high-inflow events such as storms. (*Id.*) If Reclamation’s operators were able to release water at a greater rate, they could wait to do so until they could more accurately estimate the amount of reservoir capacity they needed to make available. As the situation currently stands, there is little flexibility, with the potential to “waste” substantial amounts of water which could be used for water supply purposes in many years. Thus, one of the main benefits of renovating these bridges is the operational flexibility the increased channel capacity would provide for

handling unpredictable flow rates. The ability to accommodate *scheduled* higher flows, such as may result under the final Trinity River Mainstem Fishery Restoration plan, should only be considered as one of the many potential benefits of the Trinity River Bridges project. In any case, the operational flexibility afforded by renovation of the Trinity River Bridges will allow more water to remain in the reservoirs more often for CVP users and others. In any event, Trinity County, as both CEQA lead agency and the physical location at which better flood management creates the prospect of saved lives and property, has every reason to consider the benefits of the Bridge Project regardless of the fate of the eventual Flow Decision to be made by the Department of Interior, the Hoopa Valley Tribe, and (subject to review by) the Federal Judiciary.

The Commentor, on page 6 of his letter, states that “[t]he alleged ‘independent utility’ for the Trinity River Bridges Project is a thinly veiled reliance on the flow releases ordered by the Trinity River ROD.” He attempts to support this accusation by stating that “[t]he hydrological model used to estimate the flood flows is, in fact, based on those very ROD flows.” For reasons explained in detail below, the commentor misinterprets the use of ROD flows in the hydraulic modeling included in the EA/DEIR.

Modeling Assumptions and Data Informing Bridge Design

Understanding that river flows are necessarily variable (Trinity River Flow Evaluation Final Report at 93, 95, 141-42 (warning that flows in the post-TRD Trinity River are actually not variable enough to sustain the natural geomorphological processes supporting the River’s ecosystem)), the EA/DEIR contains many analyses of various hydrologic effects of the project on existing or proposed structures in light of a wide range of historic and potential future river flows. (See, e.g., EA/DEIR at 2-8, 2-46, 2-70, 2-104, Appendix J at 2.) In these analyses, however, the EIR presents different flow rates for comparative purposes, including ROD flows, tributary flows, 50- and 100-year flood flows, maximum controlled release rates, 1997 flood rates, and “typical” flow rates. Thus, the ROD flow regime is among several scenarios used to model the impacts of the bridges and the ability of the bridges to adequately accommodate high-flow events.

To address the issue of providing Reclamation flexibility in Trinity River Division reservoir operation, an analysis of each existing bridge was performed to see if it could safely pass: (1) a potential ROD release of 11,000 cfs from Lewiston Dam plus downstream tributary accretions for fishery enhancement purposes; *and* (2) a maximum controlled release of 13,750 cfs plus tributary accretions for Safety of Dams (“SOD”) purposes.

The analysis showed that, at each of the four bridge sites, either the bridges themselves or the approach roads did not have the hydraulic capacity and appropriate freeboard to safely accommodate these requirements.

Given that situation, Reclamation proceeded to initiate conceptual designs of replacement structures. The proposed actions and alternatives in the EA/DEIR were designed to meet a variety of standards, as noted in Chapter 2 of the document. Caltrans bridge design standards require that the bridge provide two feet of freeboard (or clearance above) the calculated 50-year event (“Q50”) and that they pass the 100-year event (“Q100”). The Q50 and Q100 flood discharges are generally obtained from Federal Emergency Management Agency (“FEMA”) flood studies.

As design activities in support of NEPA/CEQA alternative development proceeded, questions began to be raised as to the adequacy of the FEMA flood discharges for bridge design based on the age of the study upon which they were based (1976), and the results of new studies currently available. The FEMA flood discharges contained in the Trinity County Flood Insurance Study (1996) are the regulatory and technical basis for Trinity County's Floodplain Management Zoning Ordinance in the Trinity River. The FEMA flood discharges appear to underestimate the high flow events in tributaries downstream of Lewiston Dam, and also do not consider new dam operational procedures (i.e., SOD). The FEMA study also does not provide site specific hydraulic information needed for bridge design. Therefore, to obtain design flows at each bridge site and to provide an appropriate level of conservatism in accordance with industry standards, Reclamation prepared the "Trinity River Restoration Program, Trinity River Bridge Hydrologic Analysis, April 2003" ("TRBHA").

The TRBHA is a probabilistic study that determines the frequency of discharges by using a combination of background information, an operational study, balanced hydrographs, flood routings, regulated flows from the reservoirs, and previous studies. For example, the ROD allocates volume and identifies potential peak flows, but actual releases have no associated probabilities. This is important because the flows used to design the bridges do not include any specific magnitude releases from the dam – just probabilistic flows based on historic and anticipated reservoir operations. Because the regulated river is highly dependent on seasonal reservoir operations, the TRBHA analyzed Winter, Spring and Combined ("Annual") cases for both "ROD" and "Without ROD" scenarios using the best information available, including historic CVP allocations. The TRBHA identified that in all cases, the Q50 and Q100 FEMA discharges were less than the discharges for the "ROD" and "Without ROD" scenarios. The highest discharges were associated with the "Without ROD" scenario.

To show fiscal responsibility and to keep construction impacts to a minimum, it was decided to design the bridges to accommodate the "With ROD" hydrology since it would result in smaller, lower structures while still exceeding FEMA requirements. Specifically, the Q50 and Q100 water surface elevations chosen for design were derived from the "With ROD-Annual (Winter or Spring)" category in the TRBHA. Salt Flat, Poker Bar, and Bucktail replacements or modifications were designed to pass these flows. Because Steel Bridge Road is inundated at flows below the Q50, the replacement bridge at Biggers Road was designed to withstand overtopping by the Q50 and Q100 events. It is important to note that the design of the bridges also incorporated the criteria of safely passing the Trinity Dam maximum-controlled flow release plus spring 100-year event ("Qmcr"). (The maximum controlled flow release from Trinity Dam is 13,750 cfs). All bridges were designed to safely pass the Qmcr.

The commentor seems to believe that he proves his point by quoting a statement from the EA/DEIR to the effect that "(100-year flows 'assuming the full implementation of the flow regime identified in the ROD' results in 'a more conservative bridge design approach than those that would be derived from' a earlier study excluding ROD flows.)" The commentor is incorrect. The TRBHA shows that the existing bridges and/or approaches are extremely vulnerable to magnitude Q50 and Q100 events regardless of whether the "ROD" or "Without ROD" scenario is analyzed. For example, the flow estimates for the 1997 flood event correspond to about a 30-year return frequency flood (corresponding to 0.033 probability of occurrence) *assuming no ROD implementation* (TRBHA figs. 6-52 to 6-55).

The language quoted by the commentor was taken out of context and actually reads (from Chapter 3.6):

In all cases these flood flows are higher and represent a more conservative bridge design approach than those that would be derived from *the 1976 [FEMA] study*.” (Emphasis added.)

As indicated, the 1976 FEMA study is considered by the design engineers and hydrologists to no longer be a sufficient basis for design of the bridges.

The commentor also errs in trying to fault Trinity County for “attempt[ing] to rely on a single 1997 flood event to form a separate independent basis for the Trinity River Bridges Project.” He adds that “the EA/DEIR fails to provide any analysis at all of the likelihood that this single event might recur.” The commentor is wrong to imply that the flood of 1997 might be so rare an event that prudent people need not plan to avoid a similar event in the future. The 1997 flood event has been calculated to have an approximate return interval of only *30 years*. Notably, EA/EIR Comment #4 from James Evans, a Salt Flat resident, indicates that the existing bridge was installed after the 1982/1983 flood event destroyed the previous bridge. At page 3.4-6, the EA/DEIR indicates that “floods” have occurred in numerous years. It is not unusual for the bridges to be impacted by flood events less significant than the 50-year frequency event (without ROD).

In sum, on the subject of “independent utility,” the key fact to remember is that construction of the bridges will provide *greater flexibility in Safety of Dams operations*, allowing controlled releases of up to 13,750 cfs vs. the existing downstream infrastructure limit of 6,000 cfs. This improvement could presumably increase the storage capability of the reservoir – thereby *benefiting* the commentor and his clients – by allowing CVP personnel to delay SOD releases.

The commentor also attacks the notion of “independent utility” by noting that Trinity County has received money from the Department of Fish and Game because of the fisheries benefits that higher flows should create. These expenditures are perfectly appropriate given the facts that the 2000 ROD contemplates higher flows, that the Federal Government has trust obligations to the Hoopa Valley and Yurok tribes, and that flow rates higher than those currently occurring are very likely to be established at some point in the relatively near future. Even so, the source of some of the funding for the Bridges does not alter the fact that, regardless of the flow levels that follow completion of the SEIS now underway, improvement of the bridges, by improving the flexibility of TRD operations, will both create safety benefits for Trinity County citizens and water supply benefits for the commentor and his clients.

Bridge Construction is an Example of a “Non-Flow” Measure that the Court Directed to Proceed

The lead agencies disagree with the commentor that the court’s order and judgment do not contemplate expeditious movement forward with the Bridges Project. Pending completion of the SEIS, the court only enjoined some of the actual flow volumes contained in the ROD. The court plainly intended that the remainder of the “non-flow” measures in the ROD should proceed.

On December 9, 2002, the court enjoined only the implementation of ROD flows in any years except dry or critically dry years until an SEIS could be completed in compliance with NEPA and its decision. (Final Judgment, February 19, 2003 at 3; Memorandum Decision and Order, December 9, 2002 at 143.) In its Memorandum Decision, the court expressly ordered that “*all non-flow measures prescribed by the ROD shall proceed.*” (Memorandum Decision and Order at 143.) In its final judgment, the court emphasized that “nothing in this judgment is intended to delay or to affect implementation of any other fishery restoration measure identified in the ROD.” (Final Judgment at 4.)

The proposed Trinity River Bridges are non-flow measures. In its lengthy Memorandum Decision, the court described the components of the ROD. In that framework, the court treated “flows” as a category of ROD components separate from “infrastructure.” Specifically, the court delineated the essential components of the ROD as follows: (1) “Permanently *increase variable annual flows* for the Trinity River”; (2) “Rehabilitate physical channels, remove riparian berms and establish side channel habitat”; (3) “Sediment management to increase spawning gravels and reduce fine sediments”; (4) “Restore the watershed damage by land use practices”; and (5) “*Improve infrastructure, including bridges and other structures affected by peak flows.*” (Memorandum Decision and Order at 15 (emphasis added).)

This categorization necessarily considers “non-flow measures” to refer to everything that is not a “flow” measure covered by component (1). Bridge improvements, listed under component (5) as a kind of “infrastructure,” then, are “non-flow measures” that “shall proceed” under the judge’s order. This interpretation not only reflects the terminology employed by the court, but also accords with common sense, in that the construction of new bridges does not come within the common notion of what is understood by the word “flow.”

The lead agencies note that the commentor now takes the position that bridge improvements are “flow measures” effectively enjoined by the court, although the commentor himself has previously indicated a very different view in correspondence to the court. In a letter dated January 24, 2003, the commentor foreshadowed his current belief that the court should not *mandate* bridge construction, but clearly did not consider such construction to be an example of a “flow measure” that had been *enjoined* either by court order or by general legal principles. Said the commentor:

“...if the SEIS process were to result in a new secretarial decision under which maximum fishery flow releases did not require the raising of bridges or the implementation of any *other non-flow restoration measures* whose efficacy depends entirely upon the original ROD’s huge instream flow releases.”

(Emphasis added.)

The commentor, in his comments on the EA/DEIR, is consistent with his opinion, as expressed to the court, that bridge construction need not be *mandated*. He has now completely abandoned, however, his implied characterization of bridge construction as a “non-flow measure” that *may* go forward because it is not *enjoined*. By referring to “other non-flow restoration measures” immediately after mentioning bridge construction, the commentor necessarily conceded the point that bridge construction was not an enjoined “flow measure.” Despite this statement, however, the commentor argues, in his comments on the EA/DEIR, that “[t]o describe the Trinity Bridges Project as a ‘non-flow’ measure is specious[.]” He further claims that the Bridges Project cannot proceed until a new SEIS is complete.

Although it is true that the final judgment, as a single document read in isolation, does not explicitly mandate implementation of the Bridges Project, the court’s desire that the Project go forward is evident from the overall context in which the final judgment was issued. As noted earlier, in the Memorandum Decision, the court expressly ordered that “*all non-flow measures prescribed by the ROD shall proceed.*” (Memorandum Decision and Order at 143.) This explicit directive came at the end of a lengthy opinion that, among other things, found that the United States Government was taking too long in acting upon its obligation to restore the Trinity River and make good on its trust responsibilities to the Hoopa Valley and Yurok Tribes.

More specifically, the court found that the federal government had a “trust responsibility” to the Hoopa and Yurok Indian Tribes that included making a decision on the Trinity River Flow Evaluation by 1996, a deadline long past. (*Id.* at 135; Central Valley Project Improvement Act, § 3406, subd. (b)(23).) The court emphasized the fact that, in the CVPIA, Congress prioritized the use of federal water for the Trinity River in an “overriding mandate” that “the Trinity River and its fishery must be restored without further delay.” (Memorandum Decision and Order, December 9, 2002 at 136.) Thus, the non-flow measures of the ROD should proceed because “[c]ontinued delay only exacerbates the harm [to the Tribes].” (*Id.* at 135, 139.) The court explained that “[a]ny harm to the NEPA decision making process by allowing these [non-flow] measures to go forward is overwhelmingly offset by the benefit of the Trinity River fishery and need to discharge the federal trust obligation owed to the Indian Tribes.” (*Id.* at 136-37.)

Thus, the court clearly intended that the replacement of the bridges and other non-flow portions of the ROD be commenced as soon as possible, envisioning that, by the time the final flow decisions are made, subject to the ordered SEIS, the other necessary improvements to the Trinity River would be completed. The federal government’s trust responsibilities toward the Hoopa and Yurok Tribes requires that the restoration of the Trinity River be facilitated with minimal further delay.

The court’s directive to proceed with the renovation of the bridges in spite of the uncertainty of future flow decisions indicates two things. First, the court recognized that some increase in flow, above the statutory minimum rate, was likely associated with increased volumes of water in the Trinity River that would be eventually effectuated; otherwise, there would be no need to proceed with measures intended to promote additional channel capacity. Second, the court did not intend that the impacts of future flow increases should be considered in every environmental document prepared for any non-flow component of the fishery restoration plan. Thus, if the EA/DEIR for the Trinity River Bridges Project were to include analysis of all of the environmental impacts resulting from implementation of a future flow release “regime,” the court’s intent in providing this highly efficient remedy would be thwarted.

Notably, the limited injunction of ROD flows pending a satisfactory SEIS was designed to avoid hardship to the groups, including the Westlands Water District, that challenged the adequacy of the EIS. This recognition that Westlands and other CVP water users may be affected by a decision that could reduce the amount of water available to them by allowing more water to flow down the Trinity River, however, does not necessarily imply that bridge construction activity along the Trinity River would similarly affect the CVP water users.

Although the Federal Lead Agency has Appropriately “Tiered” from the EIS, Trinity County has not Attempted to Do So, as it Never Certified a Final EIR.

For the reasons explained above, the federal lead agencies have appropriately “tiered” from the EIS for the Flow Decision in preparing their EA for the Bridges Project. By directing that they proceed with implementation of all non-flow aspects of the ROD, the federal court impliedly held that the EIS was adequate for the limited purpose of providing a programmatic data base for bridge construction. Since none of the plaintiffs in the litigation ever questioned the adequacy of the EIS for that narrow purpose, there is no reason to assume that the court thought the document was deficient for that purpose.

As the commentator points out, however, Trinity County did not certify the EIR/EIS for the Trinity River Mainstem Fishery Restoration project. For that reason, the EIR portion of the EA/EIR has been intended from its inception to serve as a stand-alone document addressing, for CEQA purposes, all of the direct and reasonably foreseeable indirect impacts of the Trinity River Bridges Project. For reasons already explained at length above, CEQA does not require that Trinity County include a full analysis of all the environmental impacts that may result from full implementation of the Trinity River Mainstem Fishery Restoration project in its consideration of the impacts of the Trinity River Bridges Project, as the large scale decisions associated with that larger project will not be made by any entity subject to CEQA.

More specifically, because the ultimate flow decisions will be made by the Secretary of the Interior after conferring with the Hoopa Valley tribe, because the outcome of such decisions is uncertain, and because a federal court has mandated that this project go forward before the flow decisions are made, increased flows such as those proposed by the 2000 ROD are not a reasonably foreseeable consequence of the bridge renovation project, and need not be analyzed in the EIR for this project. The EIR complies with the minimal disclosure required by *Laurel Heights I* and *Del Mar Terrace* (described earlier) to allow for informed decision-making by not keeping the possibility of future increased flows a “secret,” and by including some discussion of these future flows in the analysis of the Trinity River Bridges’ construction and design.

The Federal Lead Agencies have not Engaged in Improper Segmentation

Although the preceding analysis, to the extent it was based primarily on CEQA grounds, reflected the views of Trinity County, the following discussion of NEPA issues represents the views of the federal lead agencies.

Under NEPA, agencies are given “considerable discretion” in defining the scope of an environmental review document. (*Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1067 (9th Cir. 1995) (“*NRIC*”), citing *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (“*Thomas*”).) However, “connected actions” that do not have “independent utility” must be considered together. (*NRIC, supra*, 56 F.3d at 1067-68.)

The Ninth Circuit has developed an interpretation of connected actions that allows separate discussion of impacts even where projects benefit from each other, so long as they are not “inextricably intertwined.” (*NRIC, supra*, 56 F.3d at 1068, citing *Thomas, supra*, 753 F.2d at 759.) In *NRIC*, the court found that flow improvement measures and a salmon transportation program were not connected actions, even though the transportation program was triggered by flow levels (salmon would not be transported if flows from the dams exceeded certain rates). (*NRIC, supra*, 56 F.3d at 1069.) While the court would not “allow an agency to segregate its actions in order to support a contention of minimal environmental impact,” the court was concerned that forcing an agency to aggregate actions “to the point where problems must be tackled from every angle at once” would cause “further paralysis of agency decisionmaking.” (*Id.*) The environmental impacts of various projects need not be considered together if, “standing alone,” they have “independent utility” (i.e., if “each could exist without the other, although each would benefit from the other’s presence”) (*Id.* at 1068-69.)

Here, the Trinity River Bridges Project EA/DEIR identifies, *inter alia*, demonstrable flood control and public safety benefits that would result from renovation of the project bridges regardless of future planned flow increases. Thus, although the Trinity River Bridge improvements would complement increased flows should they occur, the bridges have benefits standing alone and thus have independent utility, so the impacts of future river flows need not be addressed in the same environmental document.

The commentor seeks to invoke a line of Ninth Circuit cases dealing with logging roads in order to claim that the Trinity River Bridges Project EA should also fully consider the impacts of a future increase in Trinity River flows. These cases, however, are inapposite. In *Thomas*, 753 F.2d at 760, and *Save the Yaak Committee v. J.R. Block*, 840 F.2d 714, 720 (9th Cir. 1988) (“*Save the Yaak*”), the Ninth Circuit held that the environmental review for the proposed logging roads must include analysis of the impacts of the actual contemplated sales of timber that would be transported on the roads, because in both cases, the roads would not be built “but for” the contemplated timber sales.

The factors that the court relied on to find that the projects were “inextricably intertwined” in *Thomas*, and joined by a “clear nexus” in *Save the Yaak*, are not present with respect to the Trinity River Bridges Project, however. In *Thomas*, and *Save the Yaak*, the cost-benefit analysis of each road project identified the timber as the “benefit of the road,” and in neither case did the Forest Service claim that other benefits of the logging road would be sufficient to justify the road in the absence of the timber sales. (*Thomas, supra*, 753 F.2d at 758-59; *Save the Yaak, supra*, 840 F.2d at 720.) By contrast, the Trinity River Bridges

Project EA does identify, *inter alia*, demonstrable flood control and public safety benefits that would result from renovation of the project bridges. This fact gives the project “independent utility,” and thus would justify the project even if future increased flows anticipated by the Trinity River Mainstem Fishery Restoration plan never materialize.

The holdings in *Thomas* and *Save the Yaak* also rely on the interdependence of the actions as evidenced by the relative timing of the connected projects – the timber contracts were awarded first, then completion of various segments of the logging roads was tied to particular timber sale contracts. (*Thomas, supra*, 753 F.2d at 759; *Save the Yaak, supra*, 840 F.2d at 720.) Such a contractual link does not exist between the potentially increased flows in the Trinity River and renovation of the Trinity River Bridges. Thus the extremely close connections found in these cases does not exist in the Trinity River Bridges context. Rather, as discussed above, the bridge project has “independent utility” like the projects in *NRIC*, and thus, its impacts are properly evaluated independent from the impacts of the rest of the Trinity River Mainstem Fishery Restoration project.

In any event, regardless of the independent utility of the Bridge Project, the federal lead agencies are acting consistent with, and indeed, are carrying out the directives of a federal court which has fashioned an equitable remedy that contemplates an expeditious completion of the Bridges Project. Federal case law is clear that federal courts enjoy broad discretion under such circumstances.

A district court maintains its traditional equitable powers in entering a judgment on the merits of a NEPA case to fashion a remedy that does not involve completely invalidating an agency’s decision. (*Wisconsin v. Weinberger* (7th Cir. 1984) 745 F.2d 412, 424; see also *Environmental Defense Fund, Inc. v. Armstrong* (N.D. Cal. 1972) 352 F.Supp. 50, 60.) According to the court in *Weinberger*, which allowed a navy submarine communications system to operate while a supplemental EIS was prepared, a failure to balance the relative harms in fashioning a decision on the merits of a NEPA challenge was an abuse of discretion. (*Ibid.*) The district court refused to balance the equities because doing so would frustrate the purposes of NEPA. (*Id.* at p. 425.) In so holding, the district court relied on the Supreme Court’s ruling in *TVA v. Hill* (1978) 437 U.S. 153, that the Endangered Species Act mandated an injunction removing the dam despite the dam’s near completion. (*Ibid.*) On appeal, the *Weinberger* court disagreed.

The court in *Weinberger* held that “NEPA cannot be construed to elevate automatically its procedural requirements above all other national considerations.” (*Ibid.*) In discussing the court’s role in NEPA challenges, the court stated that “although the judicial role is to insure that this weighing of competing interests takes place, we must fulfill this role in accordance with a consideration of other social costs, as recognized by the statute itself.” (*Id.* at p. 426.) The court also identified a majority trend “to evaluate competing public interests in fashioning permanent injunctive relief for NEPA violations.” (*Ibid.*) The court did not set out specific factors that must be considered to fashion an equitable remedy; rather, it simply noted that a balancing must occur. (*Ibid.*) Specifically, the court found that the only irreparable injury involved was the possibility of bias in later decision making. (*Ibid.*) Since the project was ongoing in nature and affirmed a pre-existing commitment of resources to the project, the danger of bias was slight. (*Id.* at pp. 426-27.) Against this slight risk, the court weighed the interests of national security in preventing the Navy from proceeding. (*Id.* at p. 427.)

With regard to the appropriate remedy in the event of a NEPA violation, the court instructed that: “An order requiring the preparation of a SEIS, of course, may always be appropriate to vindicate the purposes of NEPA should a violation of the CEQ regulations occur. Whether an injunction should also be entered preventing a project from continuing, however, is plainly an additional issue. We disagree with the district court that NEPA presumes that such injunctions should issue.”

(*Id.* at p. 428.) Thus, the court in *Weinberger* held that even if a district court determines that NEPA has been violated, it must balance the equities to fashion the appropriate remedy.

Significantly, while the court noted the importance of national security, it did not create a national security exception. Rather, the court held that traditional equitable principles apply when district courts fashion remedies in the event of NEPA violations. (*Id.* at p. 424.) Moreover, *Weinberger*’s essential holding has been applied in other circuits, including the Ninth Circuit. (See, e.g., *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison* (9th Cir. 1995) 67 F.3d 723, 724, 732 (applying *Weinberger* court’s approach, and ordering district court “to conduct a balancing of the equities to determine whether the preliminary injunction now in force should continue pending the Forest Service’s compliance with NEPA and Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C.S. §§ 3112(1)), or to fashion an injunction as it deems appropriate”).) Thus, the district court must balance the equities when fashioning a remedy for a violation of NEPA.

As noted above, balancing the equities is appropriate even when the interests involved do not include national security. In *Environmental Defense Fund, Inc. v. Armstrong*, for example, the district court allowed work on the New Melones Dam to proceed while the Bureau of Reclamation supplemented its EIS. (*Id.* at p. 59-61.) Work was allowed to proceed, in part, because delaying the project until the EIS had been supplemented would have increased costs by at least 12.6 million dollars. (*Id.* at p. 60.) On the other hand, no construction that occurs before the EIS is supplemented will have irreversible impact on the environment. (*Ibid.*) Thus, even increased costs may justify allowing a project to proceed despite technical deficiencies in NEPA compliance.

In the matter at hand, the court has employed its equitable discretion in a manner that is calculated to minimize long-term harm to the Trinity River fishery and the Hoopa Valley and Yurok Tribes. In reaching what it regarded as an appropriate balance between the interests of the plaintiffs and those of the defendants, the court was mindful, as it repeatedly explained, of the will of Congress in enacting CVPIA and the unquestioned obligation to restore the Trinity River for the benefit of both its fisheries and the tribes that draw sustenance from those fisheries.

In short, both *Weinberger* and *Alaska Wilderness* authorize the approach taken by the court in this matter. Both cases indicate that in fashioning a remedy, it was not required to prohibit the federal government from proceeding with non-flow measures such as bridge modifications despite NEPA violation associated with some aspects of the EIS and ROD.

6-f: In arguments very similar to those addressed above, the commentor claims that “NEPA requires federal lead agencies approving or carrying out the Trinity Bridges Project to disclose the project’s impacts in an EIS, not a FONSI.” Although this argument frames in NEPA terms an almost identical argument framed in CEQA terms, the federal lead agencies’ answer can be found in that portion of

Response 6E dealing with allegations of “segmentation.” The commentor’s demand for an EIS is essentially a claim that the EA is flawed because it does not address the entirety of the Department of Interior’s anticipated Flow Decision (to be reached after completion of a new SEIS and ROD). The commentor is therefore referred to the Response to Comment 6E.

To the extent that the commentor insists that the cumulative impacts associated with activities occurring within the Central Valley, rather than within Trinity County should be evaluated, the federal lead agencies still rely on the responses given earlier. The Bridges Project has independent utility, and is being undertaken with the express blessing of a federal judge who has fashioned a remedy using his broad equitable powers, as recognized in NEPA case law.

In this context, the federal lead agencies note that the EA/DEIR does include a discussion of cumulative impacts (see pp. 4-1 - 4-12), which appropriately focuses on activities occurring within Trinity County, as only such activities will have impacts that interrelate with, or compound, those of the Bridges Project itself.

6-g: The commentor’s next argument is that “the EA/DEIR is legally inadequate because it improperly defines existing hydrological conditions to include full ROD flows.” Again, neither Trinity County (under CEQA) nor the federal lead agencies agree that the commentor has identified a legal inadequacy of the EA/EIR.

The commentor confuses several issues addressed separately in the EA/EIR. First, the “Hydraulic, Scour and Riprap Sizing Analysis” study mentioned on page 3.4-16 of the EA/DEIR and contained in Appendix J was conducted to “reduce the risk of loss, injury or death of individuals using the bridges during high flow events”; and it used hydraulic modeling results to “assess the effectiveness and determine potential impacts of each bridge alternative for various flow release and hydrology scenarios.” (EA/DEIR, Appendix J at 4.) In this study, the bridge alternatives were examined in light of many different flow numbers, including a maximum controlled release from Lewiston Dam, the 1997 flood, and various ROD flows. (See, e.g. EA/DEIR, Appendix J at 2.) The ROD flows did not act as any kind of baseline; rather, they were considered along with other examples of varying degrees of flow that may occur.

Second, the hydraulic models presented under the “No Action” alternatives for each bridge evaluated the ability of the existing bridge structures to withstand the impacts of varying flows. (See, e.g., EA/DEIR at 2-8, 2-46, 2-70, 2-104.) Numbers generated from the ROD were among the various flow rates evaluated. However, this use of ROD numbers is not inconsistent with the use of the court’s ordered flows as the “existing environment” for CEQA purposes. (*Id.* at 2-1 to 2-2.) Flows in the Trinity River, as in all alluvial rivers, are necessarily highly variable. (Trinity River Flow Evaluation Final Report at 93, 95, 141-42 (warning that flows in the post-TRD Trinity River are actually not variable enough to sustain the natural geomorphological processes supporting the River’s ecosystem).) Thus, the studies undertaken in preparation of the EIR employed a range of flow rates to simulate river flow conditions as they fluctuate throughout the year, and to demonstrate high-flow events that can result from flooding, irrespective of the rate of release from Lewiston Dam.

The commentor raises the question of which TRD flow release conditions were used as the baseline for evaluating the impacts of the Trinity River Bridges Project. The focus of the EA/EIR, however, is on the *impacts* of the bridge construction, rather than the amount of water being diverted from the Trinity River system for CVP use. (*Id.* at 1-4.)

6-h: Next, the commentor argues that “the EA/DEIR is legally inadequate because it fails to adequately analyze a reasonable range of alternatives to the Proposed Project.” Again, the lead agencies disagree.

Under CEQA, an EIR must describe a range of reasonable alternatives to the project, or to the location of the project, that “could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects [of the project].” (CEQA Guidelines, § 15126.6, subd. (c).) “An EIR need not consider every conceivable alternative to a project,” so long as the range of alternatives “fosters informed decision making and public participation.” (*Ibid.*) CEQA allows considerable flexibility in fashioning a range of alternatives in that “there is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.” (*Ibid.*) Thus, the goal of the requirement is to “produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned.” (*San Bernardino Valley Audubon Society, Inc. v. County of An Bernardino* (1984) 155 Cal.App.3d 738, 750-751.)

In light of the nature of the project at issue – the need to improve or replace four separate bridges to accommodate higher flows and to increase TRD operational flexibility – a conventional alternatives analysis was impossible. Here, there was not a single proposal that could spawn two or three or four separate alternatives. Instead, there were four proposals, none of which would have significant environmental effects if all recommended mitigation measures are carried out. Under the circumstances, the approach taken by the lead agencies more than satisfies CEQA. Notably, each alternative offered in connection with each bridge proposal was more environmentally benign than the preferred proposal in at least some respect or respects.

The commentor is incorrect insofar as he implies that CEQA does not permit the kind of approach taken herein, in which a total of four alternatives were considered. This number more than satisfies CEQA’s requirement for a “reasonable range.” (See *Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151 [“four alternatives . . . represent enough of a variation to allow informed decision making”]; *Marin Municipal Water Dist. v. KG Land Corp. of California*, 235 Cal. App. 3d 1652, 1664-1666 (1991) (“*Marin*”) (court upholds an EIR with only one alternative other than “no project”); see also *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 741, 744-746 [court upholds EIR alternatives analysis consisting of only four pages].)

The commentor correctly notes CEQA’s requirement that, “[i]f the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion.” (*Marin, supra*, 235 Cal. App. 3d at 1664.) The court in *Marin*, however, made it clear that while “the analysis must be sufficiently specific to permit informed decision-making and public participation [and that] . . . the requirement should not be construed unreasonably to defeat projects easily.” (*Id.*; see also *Laurel Heights I, supra*, 47 Cal. 3d at 406.)

There is no “categorical imperative” dictating the scope of alternatives to be analyzed in an EIR; rather, both the range of alternatives and level of analysis are subject to a “rule of reason.” (*Marin, supra*, 235 Cal. App. 3d at 1664-65; *Laurel Heights I, supra*, 47 Cal. 3d at 407; *Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County*, 52 Cal. 3d 553, 565-66 (1990) (“*Goleta II*”); CEQA Guidelines § 15126.6, subd. (a).)

In *Marin*, as noted above, the court upheld an EIR that discussed only the preferred action, the no project alternative, and one other alternative. (*Marin, supra*, 235 Cal. App. 3d at 1665-66.) Although the DEIR in this matter looked at a total of four alternatives, it could also be characterized as looking at four separate projects, with one alternative each (in addition to no project). Under the facts at issue, such an approach was perfectly reasonable.

As in *Marin*, the range of alternatives for the Trinity River Bridges Project is defined by the purpose for the project. (EA/DEIR at 1-10 to 1-11.) Thus, the EIR need not include discussion of alternatives that would not accomplish the purpose of providing safer bridges in the vicinity of the existing bridges capable of accommodating higher flows.

The discussion of alternatives “considered but eliminated from further evaluation,” as set forth on pages 2-130 through 2-132 of the EA/DEIR, was included pursuant to CEQA Guidelines section 15126.6, subdivision (c), which states: “The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and *briefly* explain the reasons underlying the lead agency’s determination.” (*Id.* (emphasis added).) CEQA thus intends that discussion of these alternatives be succinct, and does not “require . . . detailed discussions” as the commentor suggests.

The reasons set forth above apply with equal vigor to the federal lead agencies’ obligations under NEPA. An EA should include a “brief discussion” of alternatives. (40 C.F.R. § 1508.9(b).) Here the discussions of the four alternatives were anything but brief. Any alternatives to be addressed in an EA, as with an EIS, should be “reasonable.” As noted above, the nature of the Project – the construction of small bridges to facilitate environmental and public safety benefits – yielded a relatively modest number of reasonable alternatives. As also noted above, the document included a discussion of how the alternatives that were discussed in detail were derived from a larger universe of potential alternatives.

In closing, it is worth noting that the commentor has not identified any particular environmental impact associated with bridge construction that should have attracted any greater attention. Nor does the commentor identify any particular alternative or category of alternative that should have been included. The seemingly most likely reason for such omissions from the commentor is the fact that the bridges as proposed, as well as the alternatives discussed, are all very effective in reducing environmental impacts to the minimum amount possible.

6-i: Next, the commentor argues that the “EA/DEIR is legally inadequate because it fails to adequately discuss the cumulative impacts of the proposed project.” As with the preceding comments addressed at length, the lead agencies see no merit in this claim.

The EA/DEIR dedicates over ten pages to discussion of the possible cumulative impacts of the bridge renovation projects when considered with other “closely related past, present, and reasonably foreseeable probable future projects.” (CEQA Guidelines § 15355, subd. (b); see also 40 C.F.R. § 1508.7.) Because the commentor devotes less than half a page to this argument, and offers no real specifics, the lead agencies are not sure how to respond. They do emphasize, however, that a number of specific related projects are specifically mentioned, and that detailed analyses of specific impact categories are included. Given the modest nature of the project proposals, and the fact that construction related impacts have the most potential for environmental harm, the discussions appropriately focus on categories such as the following: land use; geology, fluvial geomorphology, and soils; water resources; water quality; fishery resources; vegetation, wildlife, and wetlands; recreation; socioeconomics, population, and housing; tribal trust; cultural resources; air quality; environmental justice; aesthetics; hazardous materials; noise; public services and utilities/energy; and transportation/traffic circulation. None of these discussions is conclusory.

In this context, it is important to remember that, even in the context of cumulative impacts, an EIR “should not discuss impacts which do not result in part from the project at hand.” (CEQA Guidelines § 15130, subd. (a)(1).) This observation applies to several of the impact categories mentioned above.

6-j: Finally, the commentor argues that “the EA/DEIR is legally inadequate because it fails to adequately discuss the significant irreversible and irretrievable commitments of resources that would result from the proposed project.” Again, this argument is unpersuasive.

CEQA requires that an EIR evaluate the proposed project’s use of nonrenewable resources and irretrievable commitments of resources such as highway improvements that provide public access to previously inaccessible areas. (CEQA Guidelines § 15126.2, subd. (c).) NEPA imposes a similar requirement for the preparation of environmental impact statements. (40 C.F.R. § 1502.16.) Here, the EA/DEIR discusses the use of nonrenewable resources such as energy and labor required to implement the project. (EA/DEIR at 4-15.)

The renovation of the Trinity River Bridges as outlined in the EA/DEIR does not foreclose any options for the Secretary of the Interior and the Hoopa Valley Tribe as they decide on a final flow regime subject to completion of an SEIS. Rather, the Trinity River Bridges Project actually expands the range of flow rates that may be selected by the Secretary, as it will result in increased channel capacity relative to the current situation. Thus, this project does not “create momentum” that will force the implementation of full ROD flows as commentor suggests. As the EA/DEIR notes, the construction activities contemplated by the project will consume limited amounts of energy and building materials, but the amounts at issue are relatively minor. The commentor has shown no flaw in the discussion. The additional flexibility for Reclamation to manage SOD releases may result in increased conservation of flood waters for the commentor’s clients.

30603162.001