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16 UNITED STATES DISTRICT COURT

17 FOR THE NORTHERN OF CALIFORNIA

18 CALIFORNIA NATIVE PLANT SOCIETY,)
19 DEFENDERS OF WILDLIFE, and)
20 BUTTE ENVIRONMENTAL COUNCIL)

21 Plaintiffs,)

22 vs.)

23 U.S. ENVIRONMENTAL PROTECTION)
24 AGENCY, U.S. FISH AND WILDLIFE SERVICE,)
25 and U.S. ARMY CORPS OF ENGINEERS,)

26 Defendants.)

27 No. 06-3604-MJJ

28 MEMORANDUM IN SUPPORT
OF MOTION TO CONDUCT
JURISDICTIONAL
DISCOVERY

DATE: August 29, 2007
TIME: 10:00 a.m.
COURTROOM: J. Jenkins, 19th
Floor

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1 INTRODUCTION

2 Through this Motion, Plaintiffs seek an order requiring Federal Defendants to respond
3 to discovery. Discovery is necessary because it will provide the factual basis for Plaintiffs to
4 establish subject matter jurisdiction over the First Claim for Relief in their Amended
5 Complaint.¹

6 The Court has preliminarily concluded that the June 2004 Conceptual Level Strategy for
7 Avoiding Minimizing & Preserving Aquatic Resources Habitat in the Sunrise Douglas
8 Community Plan Area ("Conceptual Strategy"), as developed by Federal Defendants U.S.
9 Environmental Protection Agency (EPA), the U.S Army Corps of Engineers (Corps), and the
10 U.S. Fish and Wildlife Service (FWS), does not constitute "final agency action" under the
11 Administrative Procedure Act (APA). The Court reasoned that subsequent permitting actions
12 taken by Federal Defendants were the actions that could be challenged, whereas the Conceptual
13 Strategy itself did not satisfy the two-part Supreme Court test for final agency action.

14 However, the Court made this determination without the benefit of complete briefing or,
15 more importantly, a fully developed factual record. Discovery would seek information about
16 the administrative process that led to the adoption of the Conceptual Strategy, which included
17 establishing the Preserve Areas in the Sunrise Douglas Planning Area, the configuration of
18 future development in the Area, and the applicable mitigation ratios to compensate for habitat
19 destruction. Discovery would also inquire into whether the Conceptual Strategy determined, as
20 a practical matter, rights or obligations as related to future site-specific projects in the Sunrise
21 Douglas Planning Area and how Federal Defendants treated the Conceptual Strategy when
22 reviewing those projects. Plaintiffs should be provided the opportunity to develop the factual
23 record through discovery on issues related to final agency action.

24 FACTUAL BACKGROUND

25 Plaintiffs' First Claim concerns Federal Defendants' failure to subject the Conceptual
26 Strategy to any environment review under the National Environmental Policy Act (NEPA).

27 ¹ At this time, Plaintiffs do not seek discovery on the merits of their four claims or the
28 appropriate relief. Plaintiffs reserve their right to seek discovery on such issues as becomes
necessary.

1 The Conceptual Strategy covers an area known as the Sunrise Douglas Planning Area in
2 Sacramento County and details how Federal Defendants envisioned allowing some
3 development to proceed while preserving some important areas, including vernal pool habitat
4 and dependent threatened and endangered species. On the face of the document itself, the
5 Conceptual Strategy at least designates Preserve Areas where development cannot take place,
6 as depicted on a map, and establishes mitigation ratios to offset impacts to vernal pool
7 resources. Exh. 1.

8 Since it was adopted in June 2004, Federal Defendants have reviewed several projects
9 in the Sunrise Douglas Planning Area and have issued authorization for at least nine site-
10 specific projects, all of which are at issue in this case. Those approvals rely on the Conceptual
11 Strategy as justification for complying with environmental laws, including NEPA, the Clean
12 Water Act (CWA), and the Endangered Species Act (ESA). Meanwhile, for one project not at
13 issue in this lawsuit (the co-called "Preserve at Sunridge" development in the middle of the
14 Planning Area), Federal Defendants have indicated that non-compliance with the Conceptual
15 Strategy will preclude project approval.

16 ARGUMENT

17 I. PLAINTIFFS ARE ENTITLED TO CONDUCT DISCOVERY TO DEMONSTRATE 18 THAT THE COURT HAS JURISDICTION OVER THEIR FIRST CLAIM

19 Jurisdiction over Plaintiffs' First Claim is a relevant matter in this case.² The Federal
20 Rules of Civil Procedure authorize discovery over all relevant matters. Fed. R Civ. P. Rule
21 26(b)(1) ("[p]arties may obtain discovery regarding any matter, not privileged, that is relevant
22 to the claim or defense of any party"). The Supreme Court and the Ninth Circuit have
23 construed this discovery rule broadly "to encompass any matter that bears on, or that
24 reasonably could lead to other matter that could bear on, any issue that is or may be in the

25 ² Jurisdictional discovery over Plaintiffs' Third Claim, which alleges that Federal
26 Defendants failed to comply with section 7(a)(2) of the ESA, is not necessary. Because
27 jurisdiction over this claim is derived from the ESA citizen suit provision, final agency action is
28 not required. Washington Toxics Coal. V. U.S. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005).
That said, because a key element of Plaintiffs' Third Claim is whether Federal Defendants
undertook "agency action" within the meaning of the ESA, discovery responses will inevitably
aid in pursuing this claim on the merits.

1 case." Oppenheimer Fund v. Sanders, 437 U.S. 340, 351 (1978); Beckman Ind. v. International
2 Ins., 966 F.2d 470, 475 (9th Cir. 1992) ("Ninth Circuit precedent strongly favors disclosure to
3 meet the needs of parties in pending litigation."). While Rule 26 certainly has limits, it
4 authorizes discovery here because jurisdiction is a relevant issue. Plaintiffs have the burden to
5 demonstrate jurisdiction over their First Claim and, as this Court is aware, jurisdiction has
6 become a key issue because Federal Defendants (1) have expressly challenged jurisdiction in
7 opposing Plaintiffs' emergency motions for injunctive relief, (2) stated their intention to do so
8 again in a Motion for Judgment on the Pleadings, and (3) claimed a lack of jurisdiction as an
9 affirmative defense in their Answer.

10 Discovery is appropriate to resolve jurisdictional matters. Oppenheimer Fund, 437 U.S.
11 at 351 n.13. As the Ninth Circuit has held, as with any other aspect of a case, plaintiffs must be
12 provided the opportunity to develop the factual record through discovery or other means to
13 support jurisdiction. Laub v. U.S. Department of the Interior, 342 F.3d 1080, 1093 (9th Cir.
14 2003) ("discovery should ordinarily be granted where pertinent facts bearing on the question of
15 jurisdiction are controverted or where a more satisfactory showing of the facts is necessary"),
16 quoting Butcher's Union Local No. 498 v. SDC, 788 F.2d 535, 540 (9th Cir. 1986); Wells
17 Fargo v. Wells Fargo Express, 556 F.2d 406, 430 n. 24 (9th Cir. 1977) (noting discovery
18 appropriate where pertinent facts bear on jurisdiction); Budde v. Ling-Temco-Vought, 511 F.2d
19 1033, 1035 (10th Cir. 1975) ("when a defendant moves to dismiss for lack of jurisdiction,
20 either party should be allowed discovery"). Courts throughout the country recognize the
21 importance of allowing for discovery on jurisdictional issues, going so far as to note that
22 denying discovery constitutes an abuse of discretion. See, e.g., Sizova v. National Institute of
23 Standards and Technology, 282 F.3d 1320, 1326 (10th Cir. 2002) ("a refusal to grant discovery
24 constitutes an abuse of discretion if the denial results in prejudice to a litigant"); Gould
25 Electronics Inc. v. United States 220 F3d 169, 176 (3rd Cir. 2000); Commodities Export Co. v.
26 United States Customs Service, 888 F2d 431, 436 (6th Cir. 1989).

27 Plaintiffs require additional facts to demonstrate that their First Claim challenges a
28 "final agency action" under the APA. 5 U.S.C. § 704. Final agency action means: (1) "the

1 action must mark the 'consummation' of the agency's decisionmaking process -- it must not be
 2 of a merely tentative or interlocutory nature;" and (2) "the action must be one by which 'rights
 3 or obligations have been determined,' or from which 'legal consequences will flow.'" Bennett v.
 4 Spear, 520 U.S. 154, 177-178 (1997); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d
 5 1059, 1066 (9th Cir. 2002); see also Alaska, Department of Environmental Conservation v.
 6 U.S. Environmental Protection Agency, 244 F.3d 748, 750 (9th Cir. 2001) (finding decision
 7 consummated agency process even if agency may adopt new position in response to changed
 8 circumstances). "The core question is whether the agency has completed its decisionmaking
 9 process and whether the result of that process is one that will directly affect the parties."
 10 Franklin v. Massachusetts, 505 U.S. 788, 797 (2005). As Judge Patel recently ruled, "[f]actual
 11 information yielded through discovery" is permissible to address both prongs of the final
 12 agency action test. Okinawa Dugong v. Rumsfeld, 2005 WL 522106 *17 (N.D. Cal. March 2,
 13 2005) (reviewing "evidence submitted"); see also Oregon Natural Desert Ass'n v. U.S. Forest
 14 Service, 465 F.3d 977, 985 (9th Cir. 2006) (relying on facts in "administrative record
 15 demonstrat[ing]" existence of final agency action). This Court also recognized, implicitly at
 16 least, that developing facts could establish the Conceptual Strategy was final agency action.
 17 California Native Plant Society v. EPA, 2006 WL 3289203 *3 (N.D. Cal. Nov. 3, 2006) (ruling
 18 on Plaintiffs' Motion for a Temporary Restraining Order states "Plaintiffs have failed to present
 19 any . . . evidence suggesting" the Conceptual Strategy is final agency action).

20 In sum, permitting Plaintiffs to proceed with discovery over a jurisdictional issue such
 21 as final agency action is appropriate.

22 II. FINAL AGENCY ACTION UNDER *BENNETT V. SPEAR* INVOLVES A FACTUAL
 23 INQUIRY INTO THE ADOPTION AND APPLICATION OF THE CONCEPTUAL
 24 STRATEGY

24 A. The Agency Action -- The Conceptual Strategy

25 Through discovery, Plaintiffs anticipate obtaining facts to aid their demonstration that
 26 the Conceptual Strategy concluded a decisionmaking process and had legal and practical
 27 consequences. Although the Conceptual Strategy did not itself authorize any site-specific
 28 project, it did clearly set forth a site-specific plan for development in the Sunrise Douglas

1 Planning Area and established the framework for how Sunrise Douglas development projects
2 would be approved in the future. Specifically, the Conceptual Strategy established boundaries
3 for Preserve Areas that must be avoided in the Sunrise Douglas Planning Area and mitigation
4 ratios to compensate for any on-site destruction. The document itself states: "the Agencies
5 arrived at the boundaries of the Preserve Areas based on best professional judgment," and
6 "[t]he mapped boundaries are the smallest that would be acceptable to the agencies." Exh. 1.
7 Equally significant, the Conceptual Strategy established specific ratios for off-site mitigation
8 that govern individual projects in the Sunrise Douglas Planning Area: "Vernal pools that are
9 directly impacts by projects should be mitigated at ratios equal to or greater than 2:1 for
10 preservation and 1:1 for creation/restoration. Vernal pools indirectly affected should be
11 mitigated at ratios equal to or greater than 1:1 for preservation and 1:1 for creation/restoration.
12 Exh. 1 at 1.

13 Plaintiffs' First Claim concerns only the Conceptual Strategy and whether it satisfies
14 Bennett v. Spear test. Notably, the Conceptual Strategy is an agency action distinct from the
15 actions involved in approving the various site-specific Sunrise Douglas development projects.
16 Whether CWA section 404 permits issued by the Corps or ESA biological opinions developed
17 by FWS for individual projects, including the nine projects at issue in this case, also constitute
18 final agency actions is not a relevant inquiry. Although those permits and approvals authorize
19 site-specific activities, the broader Conceptual Strategy can similarly be final agency action
20 even if it does not directly authorize individual development projects.

21 Below, as the Court requested, Plaintiffs identify certain factual matters relevant to the
22 jurisdictional question presented in the First Claim, including how the agencies relied on the
23 Conceptual Strategy to review and approve site-specific development projects in the Sunrise
24 Douglas Planning Area.

25 B. Discovery Regarding Whether The Conceptual Strategy Marked The
26 Consummation Of A Decisionmaking Process

27 The Supreme Court has held that the consummation of an agency's decisionmaking
28 process occurs when an agency "render[s] its last word on the matter in question." Whitman v.

1 Am. Trucking Ass'ns, 531 U.S. 457, 478 (2001) (emphasis added). Courts thus have to
2 determine what is the "matter in question." For example, in Okinawa Dugong, the court
3 determined that there were two actions -- first developing site selection criteria for a military air
4 base and then approving final plans for construction of the facility. Okinawa Dugong v.
5 Rumsfeld, 2005 WL 522106 at *17. The court found that the decisionmaking process for the
6 first action was completed in which the agency had established benchmarks for its later review
7 and approval of a military facility. Id. In the present case, the "matter in question" is the
8 Conceptual Strategy's establishment of Preserve Areas and mitigation ratios, not the subsequent
9 approval of particular projects.

10 Plaintiffs seek an opportunity to conduct discovery regarding the process leading up to
11 the Conceptual Strategy. This Court's July 10, 2007 Order notes that "[s]tanding alone, the
12 Conceptual Strategy does not purport to embody the consummation of the Federal Defendants'
13 decision-making process." Order at 20:15-17 (emphasis added); see also California Native
14 Plant Society v. EPA, 2006 WL 3289203 *3 (ruling on TRO similarly states Plaintiffs "failed to
15 adequately articulate how the creation and issuance of the Conservation Strategy, standing
16 alone, qualifies as final agency action for purposes of APA review"). However, this was a
17 preliminary determination, and the Court recognized that more factual information was
18 necessary, but was not before the Court. Similarly, Federal Defendants argued in opposing the
19 preliminary injunction motion that "Plaintiffs offer no new evidence that buttresses their [final
20 agency action] argument." Dkt. # 84 at 8:16-17. Meanwhile, Sunridge-Intervenors argued that
21 "no . . . deliberate decisionmaking occurred here." Dkt. # 82 at 4:4-5. Although faulted by
22 Federal Defendants and Intervenors for an inability to present evidence, Plaintiffs never had the
23 opportunity to gather evidence showing a detailed decisionmaking process because the case had
24 been proceeding on emergency motions. Now, through discovery, Plaintiffs intend to gather
25 and "offer new evidence" to support jurisdiction over the First Claim.

1 Based on a pre-litigation review of EPA files, Plaintiffs understand that there was some
2 sort of administrative process associated with the Conceptual Strategy.³ See, e.g., Exh. 4
3 (1/14/03 email discussing drafting "rules of engagement" for process and "establishment of
4 boundaries"); Exh. 5 (7/18/03 FWS letter discussing developing "interim strategy" in lieu of
5 formal Habitat Conservation Plan, but noting it "has yet to be agreed to"). The Conceptual
6 Strategy itself confirms that a process occurred at least between March and May 2004. Exh. 1
7 at 1. Other documents EPA made available strongly indicate that an administrative process
8 concluded with the June 2004 Conceptual Strategy and that process had been ongoing for
9 several years prior to March 2004. Exh. 2 (4/26/04 EPA letter stating "over the last two years,"
10 there were meetings that "produced a plan (Conceptual Strategy)"); Exh 3 (7/22/04 Hodgson
11 letter indicating process began in May 2002).

12 Other documents similarly highlight the likelihood of a process that concluded with
13 adoption of the Conceptual Strategy. For instance, a February 18, 2005 EPA letter references a
14 "White Paper" for the Conceptual Strategy. Prepared by "interagency staff," the White Paper
15 "elaborat[es] on the key environmental justifications" for the Conceptual Strategy. Such
16 support for the Conceptual Strategy is relevant because the agencies presumably provided the
17 biological basis for the Preserve Area design and the mitigation ratios, further indicating the
18 agencies were engaged in a decisionmaking process of some sort.

19 Moreover, notes from a May 17, 2004 meeting indicate that Federal Defendants
20 discussed performing environmental reviews under NEPA and the ESA for the Conceptual
21 Strategy. The agencies discussed what compliance would entail and how long it would take.
22 They specifically suggested preparing "1 Biological Opinion for [the] aggregated applications
23 under 1 Master Plan" and an "EIS [to review] wetlands, ESA, traffic, air quality [and] odor"
24 impacts. Exh. 6. In notes from a June 2, 2004 meeting, Corps officials stated that it would take
25 "1½ - 2 years" to prepare a NEPA environmental impact statement for the Conceptual Strategy
26 and, notably, that it could "do EA[s for individual projects] tiered off [the Conceptual

27 ³ Like EPA, the Corps and FWS most certainly have files containing facts pertinent to the
28 agencies' administrative process. However, Plaintiffs -- and the Court -- have not had the
opportunity to review those files.

1 Strategy's] EIS." Exh. 7.

2 In short, discovery will disclose the process the three agencies undertook for completing
3 the Conceptual Strategy and adopting Preserve Area boundaries and mitigation ratios for offsite
4 preservation. See Oregon Natural Desert Ass'n, 465 F.3d at 984 (finding facts in administrative
5 record establishe[d]" action was consummation of process).

6 C. How The Agencies Treated The Conceptual Strategy As A Practical Matter Can
7 Render It Final Agency Action

8 The second inquiry under Bennett -- whether the Conceptual Strategy determines rights
9 and obligations for the three agencies or others -- raises factual questions. The second part of
10 the final agency action analysis can be met in several ways and need not alter an agency's legal
11 regime in a strict sense. Oregon Natural Desert Ass'n, 465 F.3d at 987. Rather, the inquiry
12 must be viewed "pragmatically," and courts are to look at how the agencies treat the action. Id.
13 at 985, 987 ("[I]t is the effect of the action and not its label that must be considered" (citations
14 omitted)); Oregon v. Ashcroft, 368 F.3d 1118, 1147 (9th Cir. 2004) (final agency action must
15 applied "in a pragmatic way."); Sierra Club v. Yeutter, 911 F.2d 1405, 1417 (10th Cir. 1990)
16 ("finality is determined pragmatically").

17 Relevant here, an action that binds the agency's future actions is a reviewable final
18 agency action. Nevada ex rel. Loux v. Herrington, 777 F.2d 529, 535 (9th Cir. 1985) (agency
19 guidelines that "control[]" later agency funding decisions are final agency action). In Dungong,
20 the court found that because the challenged action "established the benchmark by which the
21 latter decision to approve or reject Japan's final implementation plans are to be judged," it met
22 the second prong of the final agency action test. Okinawa Dugong, 2005 WL * 17. Similarly,
23 in Spirit of the Sage Council v. Norton, the court held a FWS "policy" that bound future ESA
24 discretionary decisionmaking on permit applications was a final agency action. 294 F.Supp.2d
25 67, 84-85 (D.D.C. 2003). A common example of this type of agency action is an agency's
26 planning document, such as management plans for a National Forest, where the planning
27 decision and the site-specific actions taken in accordance with the planning decision are both
28 separate final agency actions. See 16 U.S.C. § 1604(i) (all Forest Service decisions must be

1 consistent with Forest Plan); Utah Environmental Congress v. Bosworth, 443 F.3d 732, 737
2 (10th Cir. 2006) ("Projects must comply with the applicable forest plan"). The fire
3 management plans at issue in Environment Protection Information Center v. U.S. Forest
4 Service, 2003 WL 22283969 (N.D. Cal. Sept. 5, 2003), provide another example of a court
5 finding final agency action on a planning document that controlled an agency's future site-
6 specific actions. Meanwhile, the Oregon Natural Desert Ass'n case illustrates that two related
7 agency decisions can both be final agency actions. There, the Forest Service issued ten-year
8 grazing permits and then annual authorizations -- called "annual operating instructions" or
9 AOIs. In issuing the permits, the Forest Service established standards and guidelines but
10 reserved the right to impose additional terms and conditions in the AOIs in light of its annual
11 assessment of new or changed conditions and information. The court found both the long-term
12 grazing permits and the annual AOIs to be final agency actions. Oregon Natural Desert Ass'n,
13 465 F.3d at 985.

14 The Oregon Nat'l Res. Council v. Forsgren, 252 F.Supp.2d 1088, 1097-99 (D. Or. 2003)
15 provides another example of where an action that controls future actions is itself final agency
16 action. There, the court's inquiry focused on whether the Lynx Conservation Assessment and
17 Strategy for the Canada lynx and an accompanying map prepared and adopted by several
18 federal agencies constituted final agency action. Like the Conceptual Strategy here, the Lynx
19 Conservation Assessment and Strategy contained "recommended conservation measures" and
20 "mapping direction" that were to be used by the agencies in approving future site-specific
21 logging projects in the National Forests. Id. In reviewing the factual record before it, the court
22 found that the agencies had relied on the Lynx Conservation Assessment and Strategy in
23 authorizing specific projects and, therefore, concluded the Strategy was final agency action:

24 The revision of the LCAS and new mapping direction have a direct causal relationship
25 to the alleged harm caused to Plaintiffs. The FS's [Forest Service] implementation of
26 the specific timber sales depends on the FS's Biological Assessments, which, in turn,
27 rely on the Revised LCAS and new mapping direction for the conclusion that the timber
28 sales will have no adverse impact on lynx viability and critical habitat. The Court
concludes, therefore, the Revised LCAS and new mapping direction are judicially ripe
for review as final agency action.

28 Id. at 1099.

1 As set forth in these cases, if Federal Defendants treat the Conceptual Strategy as
2 binding on itself, other agencies, or private parties, it has legal and practical consequences and
3 constitutes final agency action, even if nothing on the face of the Strategy document indicates
4 that it is binding. See Appalachian Power v. EPA, 208 F.3d 1015, 1021-23 (D.C. Cir. 2000)
5 (concluding EPA "guidance" was final action despite agency's contrary statements because,
6 based on practice of state regulatory agencies, it was binding for all practical purposes on
7 private parties). Accordingly, it is appropriate to conduct discovery aimed at the site-specific
8 permit approvals in the Sunrise Douglas Planning Area and how the agencies used the
9 Conceptual Strategy in reviewing and approving those projects. Discovery will inquire into the
10 causal relationship between the Conceptual Strategy and: (1) Corps review and approval of
11 individual permits, (2) FWS review and issuance of biological opinions and (3) EPA decisions
12 to elevate projects for further dialogue between EPA headquarters and the Corps' headquarters.
13 Plaintiffs will request factual information as to what happened when a site-specific project
14 deviated from the Conceptual Strategy and, conversely, whether the agencies used compliance
15 with the Conceptual Strategy as a means to approve and justify a site-specific project. If the
16 three federal agencies treated the Conceptual Strategy as binding with respect to on-site
17 avoidance (consistent with the Preserves Areas) and off-site mitigation (consistent with the
18 ratios), then the Conceptual Strategy has legal and practical consequences under Bennett's
19 second prong. If the Corps, FWS, and EPA adhere to the Conceptual Policy when issuing
20 permits, biological opinions, or deciding whether to invoke CWA authority to elevate a project,
21 the Conceptual Policy has legal consequences and determines legal rights and obligation. This
22 is true even if the Conceptual Strategy does not, itself, directly authorize development projects.⁴

23 Accordingly, Plaintiffs seek discovery to determine exactly the role the Conceptual
24 Strategy and its Preserve Area boundaries and mitigation ratio requirements played in Federal
25 Defendants' review of projects in the Sunrise Douglas Planning Area.

26 _____
27 ⁴ Plaintiffs do not intend to conduct discovery as to how the agencies will apply the
28 Conceptual Strategy in future, but only how it has been applied to projects in the Sunrise
Douglas Planning Area, including the nine already-approved projects as well as one project
where the Conceptual Strategy has been applied but the project has not been approved.

1 D. Federal Defendants Conducted "Some" Administrative Process Upon Deciding
2 Not To Review The Conceptual Strategy Under NEPA

3 Discovery is also necessary to develop the factual issues surrounding Federal
4 Defendants' purported "decision" not to put the Strategy through the NEPA process. Twice,
5 Federal Defendants have stated they made a "decision that NEPA was not applicable to the
6 Strategy Document." TRO Opp. at 21:2-3; PI Opp. at 11. In addition, the parties' Joint Case
7 Management Statement from September 2006 provides that Federal Defendants "anticipate[d]
8 filing background documents relating the CLS [Conceptual Strategy]." Dkt. # 14 at 4. As such,
9 Plaintiffs will propound discovery on Federal Defendants to obtain all documents, not just
10 those Federal Defendants attached as their exhibits to a pleading, concerning the process that
11 concluded with the decision to forego NEPA environmental review.

12 The Ninth Circuit has ruled that a decision on how to comply with NEPA is itself a final
13 agency action under the APA. Hall v. Norton, 266 F.3d 969, 975 n. 5 (9th Cir. 2001) ("the
14 BLM's decision not to prepare an EIS is a final agency action"). The Court's July 10, 2007
15 Order correctly notes that Hall involved an agency decision not to prepare an environmental
16 impact statement, and instead to rely on an environmental assessment in concluding that there
17 were no significant impacts. However, the type of NEPA decision does not distinguish the Hall
18 ruling from the present situation because the agencies here "decided" that NEPA did not apply,
19 just as the agency in Hall decided that because there were no significant impacts, an
20 environmental assessment would suffice. Indeed, as another district court held in reliance on
21 Hall, "an agency's decision that NEPA is inapplicable is itself a final agency action." Forest
22 Service Employees for Environmental Ethics v. U.S. Forest Service, 397 F.Supp.2d 1241,
23 1248-49 (D. Mont. 2005) (Forest Service prepared no NEPA document).

24 Not until the factual details of the agencies' decision not to perform NEPA on the
25 Conceptual Strategy is revealed can it be determined whether that decision is a final agency
26 action. Documents in Plaintiffs' possession indicate there was internal agency controversy as to
27 whether the Conceptual Strategy required NEPA compliance. Exh. 6 (May 17, 2004 meeting
28 notes discussion NEPA compliance); Exh. 7 (June 2, 2004 meeting notes also discuss ways to

1 comply with NEPA). Regardless of the correctness of the ultimate decision, it is clear from
2 these documents that there must have been some process that led to the ultimate conclusion not
3 to conduct a NEPA review. Discovery would seek to determine facts related to that process.⁵

4 E. Discovery Would Delve Into Similar Agency "Actions" That Triggered NEPA
5 Or Section 7 Consultations

6 The federal agencies involved in this litigation have taken regional approaches to
7 habitat planning similar to that for the Sunrise Douglas Planning Area. Plaintiffs intend to
8 pursue discovery on those related processes, where, unlike here, the agencies conducted
9 environmental review under NEPA and section 7 of the ESA. In so doing, the agencies
10 recognized that a regional planning strategy is an "agency action."

11 For example, in 1996, FWS developed a programmatic strategy for mitigating impacts
12 to vernal pools that are less than one acre in size. Exh. 8. Significantly, this strategy does not
13 apply to any particular project, but rather applies to all future development projects that meet a
14 size limitation in California's Central Valley. Exh. 8_at 1 (applying to "[f]uture projects that
15 meet the conditions specified below"). As part of the process for adopting this programmatic
16 strategy, which primarily consisted of adopting mitigation ratios, FWS underwent a section 7
17 consultation process and prepared a biological opinion. Exh. 8. Discovery would request
18 information on the basis for undergoing consultation on a strategy that did not itself authorize
19 any site-specific development projects.

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22 ⁵ In its July 10, 2007, the Court went beyond the issue of whether the Conceptual
23 Strategy is final agency action and addressed the merits of plaintiffs' First Claim that the
24 Conceptual Strategy had to go through the NEPA review process. Notably, the Court
25 concluded that even if "there was a final agency decision not to undertake NEPA review of the
26 Conceptual Strategy, the Court finds that any such decision was reasonable." Doc. #128 at 20.
27 While this was a preliminary ruling on the merits of the First Claim, it underscores the notion
28 that either Federal Defendants must produce the whole administrative record for the Conceptual
Strategy as the law requires, see 5 U.S.C. § 706 ("the court shall review the whole record or
those parts of it [the whole record] cited by a party"), or Plaintiffs must be permitted to conduct
discovery going to the merits of their First Claim. The notion that the Court can rule of the
merits of this claim without the benefit of the full factual record, not just the portions of it that
Federal Defendants proffered to the Court, does not provide Plaintiffs a fair opportunity to
litigate this claim.

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court allow them to conduct discovery into the disputed factual issue of whether the Court has APA jurisdiction over Plaintiffs' First Claim.

Respectfully submitted,

DATED: July 31, 2007

/s/ Neil Levine
Neil Levine
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