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15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE EASTERN DISTRICT OF CALIFORNIA
17 FRESNO DIVISION

18 FRIENDS OF YOSEMITE VALLEY,)
et al.)
19)
20 Plaintiffs,)
21 v.)
22 DIRK KEMPTHORNE, in his official)
capacity as Secretary of the)
Interior, *et al.*,)
23 Defendants.)
24 _____)

Case No. CV-F-00-6191 AWI DLB

DEFENDANTS' REPLY BRIEF
IN SUPPORT OF MOTION FOR STAY
OF INJUNCTION PENDING APPEAL

DATE: March 5, 2007
TIME: 1:30 p.m.
COURT: Courtroom 2
JUDGE: Hon. Anthony W. Ishii

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I. INTRODUCTION

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2 The defendants, Secretary of the Interior Dirk Kempthorne, *et al.*, file this reply brief in
3 support of their motion for a partial stay pending appeal of the Court's November 3, 2006,
4 Memorandum Opinion and Order Re Plaintiffs' Request for Injunction (Injunction Order).
5 Friends of Yosemite Valley v. Kempthorne, 464 F.Supp.2d 993 (E.D.Cal. 2006). The Injunction
6 Order granted plaintiffs' request to enjoin nine projects that the National Park Service (NPS) had
7 proposed to implement in Yosemite National Park (park). The defendants have appealed from
8 the Injunction Order and, on January 26, 2007, moved to stay the order with regard to two of the
9 nine projects, the East Yosemite Valley Utilities Improvement Plan (referred to as the "Utilities
10 Project"), which includes the Capital Improvements Plan (CIP), and the Yosemite Valley Loop
11 Road Project (Loop Road Project). On February 20, the plaintiffs filed their Opposition to that
12 motion (Pl. Opp.). This reply brief addresses the plaintiffs' contentions and explains why a stay
13 of the injunction pending appeal is both warranted and necessary for the two projects at issue.

14 The plaintiffs' Opposition consists of two components: (1) a very lengthy memorandum
15 that needlessly attempts to complicate a number issues surrounding the two projects in question;
16 and (2) three declarations and several exhibits, all of which are legally insufficient, factually
17 deficient, and unsupported by professional experience as grounds to defeat the defendants'
18 evidence demonstrating the need for a stay pending appeal. The facts regarding the Utilities
19 Project and Loop Road Project are nowhere near as complex or convoluted as the plaintiffs
20 pretend. The defendants provide four reply declarations to respond to the plaintiffs' Opposition
21 and demonstrate that the plaintiffs are mistaken on every single important factual allegation.

22 Contrary to the plaintiffs' claims, the defendants have *not* asked the Court to "reconsider"
23 its November 3 Order. Rather, the defendants' opening memorandum and this reply brief seek a
24 stay of that Order by demonstrating, under the applicable standards, that (1) the legal issues
25 presented in the defendants' appeal raises serious questions regarding the Injunction Order and
26 the Court's underlying July 18, 2006 Memorandum Opinion and Order on Summary Judgment,
27 Friends of Yosemite Valley v. Scarlett, 439 F.Supp.2d 1074 (E.D.Cal. 2006), and (2) the balance
28 of harms and public interest strongly favor allowing work on the Utilities Project and Loop Road

1 Project to continue while the Ninth Circuit decides the merits of the appeal. The limited nature
 2 of the relief for these two projects has absolutely nothing to do with “facilitating development” or
 3 implementing projects under the Yosemite Valley Plan (YVP).

4 The defendants have submitted a series of declarations and supporting exhibits that show
 5 a compelling and urgent need for a stay of the injunction to enable the park to move forward
 6 without further delay on the essential Utilities Project and Loop Road Project repair and
 7 rehabilitation work. Granting the motion for stay pending appeal will avoid irreparable harm to
 8 Merced River values, but most assuredly will “facilitate development” in any way, nor will it
 9 prejudice the park’s ultimate decision regarding user capacity in the new CMP under preparation
 10 pursuant to the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271-87.

11 II. DISCUSSION

12 A. The Standard for Review on a Motion for Stay Pending Appeal

13 Although the plaintiffs agree with the defendants regarding the applicable standard of
 14 review,^{1/} they ask the Court to disregard the defendants’ supporting declarations and exhibits on
 15 the grounds that those documents convert the motion for stay into a motion for reconsideration of
 16 the November 3 Injunction Order. That objection lacks any merits. The Court has considerable
 17 discretion in determining whether to grant a stay and must weigh the relevant facts at the time of
 18 its decision. *See A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001),
 19 *citing Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (*en banc*). In considering whether
 20 to grant a stay motion, the court applies the following criteria: 1) whether the applicant has made
 21 a strong showing of likelihood of success on the merits, 2) whether the applicant will be
 22 irreparably injured unless a stay is granted, 3) whether the grant of a stay will substantially injure
 23 the other interested parties, and 4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S.
 24 770, 776 (1987).

25
 26 ^{1/} *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev’d in part on other grounds*, 463
 27 U.S. 1328 (1983). As the defendants noted and as the plaintiffs acknowledge, the governing
 28 injunctive relief in the first instance. *See e.g., Andreiu v. Ashcroft*, 253 F.3d 477, 480 (9th Cir.
 2001) (*en banc*).

1 While the Court clearly has the discretion to consider all available evidence before it to
 2 weigh the equitable balance of harms between the parties' competing interests,^{2/} the defendants
 3 are constrained to emphasize that the plaintiffs are estopped on two grounds from objecting to
 4 the defendants' submission of declarations and exhibits filed in support of the motion for stay of
 5 the injunction pending appeal. First, the plaintiffs filed extensive new evidence with the Court,
 6 in the form of three additional declarations and 11 new documentary exhibits. Thus, they have
 7 no equitable basis to object to evidence filed by the defendants because those documents were
 8 not before the Court at the time of the November 3, 2006 Injunction Order. Second, in an earlier
 9 appeal in this case, the plaintiffs actually filed newly created, post-injunction evidence in support
 10 of their own motion for emergency injunctive relief pending appeal from the Court's March 26,
 11 2004 Order. On April 19, 2004, while their motion was pending before the Ninth Circuit, the
 12 plaintiffs filed a reply brief accompanied by a "Declaration of Greg Adair in Support of Plaintiff-
 13 Appellants' Emergency Motion Under Circuit Rule 27-3 for Injunction Pending Appeal." Mr.
 14 Adair, a member of the plaintiff Friends of Yosemite Valley (FOYV) and a frequent declarant for
 15 the plaintiffs in this litigation, attached as exhibits "seven photographs taken by me between
 16 April 7 and 18, 2004 which depict this very recent activity." Thus, the plaintiffs generated new
 17 evidence after this Court's March 26, 2004 Order, then filed that evidence with the Ninth Circuit
 18 in support of their Emergency Motion for Injunction Pending Appeal. The Ninth Circuit then
 19 granted their motion for injunctive relief. Friends of Yosemite Valley v. Norton, 366 F.3d 731
 20 (9th Cir. 2004). The plaintiffs, therefore, are foreclosed by their own practice and course of
 21 conduct from objecting to the submission of "new" evidence in context of the defendants' motion
 22 for stay pending appeal.

23
 24
 25 ^{2/} The cases cited by plaintiffs do not suggest otherwise. Overstreet v. Thomas Davis
 26 Medical Centers recognized that "the above criteria must be applied individually to the facts of
 27 each case." 978 F.Supp. 1313, 1314 (D.Ariz. 1997). The court in that case found that no record
 28 evidence existed to support the moving party's affidavit, a situation with no parallel here, as the
 park has provided ample supporting documents along with the affidavits to demonstrate the need
 for a stay. The other case, School Dist. No. 1J, Multnomah Co., Oregon v. ACandS, Inc., 5 F.3d
 1255 (9th Cir. 1993), has no relevance at all, as that case involved a motion to reconsider a
 summary judgment order, which is not at issue in the present case.

1 **B. The Court Should Stay the Injunction for the Utilities Project**

2 The defendants moved to stay the Court's injunction against enjoining further work on
3 Phases 2 and 3 of the Integrated Utilities Master Plan (IUMP) and Phase 2 of the Capital
4 Improvement Plan (CIP). Collectively, Phases 1, 2, and 3 of the IUMP and Phases 1 and 2 of the
5 CIP comprise the East Yosemite Valley Utilities Improvement Plan (Utilities Project). In support
6 of that request, the defendants filed the Fifth Declaration of Alexander R. Peterson (Doc. 382)
7 and the Declaration of Jeffrey D. Harsha (Doc. 384) to explain why continuing with the utilities
8 work was critical, both to protect the resources of the Merced River and its values and to ensure
9 compliance with the State of California's 2000 Clean-up and Abatement Order (CAO).

10 In their Opposition, the plaintiffs go to great lengths to confuse and obfuscate the issues.
11 They profess not to understand the precise nature of all of the Utilities Project work that the park
12 has performed to date, as well as the additional work that the park proposes to undertake at this
13 time. While they assert that there "is no injunction preventing the NPS from completing all
14 emergency and immediate repairs," they object to any further work on Phases 2 and 3 of the
15 Utilities Plan or Phase 2 of the CIP, which they submit are "not necessary for compliance with
16 the CAO." Pl. Opp at 30-31. They contend that work on those phases of utilities work "will
17 define the future for land use and capacity." *Id.* at 31:2-3. The plaintiffs rely for support on the
18 Declaration of Jeanne C. Aceto. Ms. Aceto's qualifications, according to her Declaration, are
19 threefold: (1) she is a "Yosemite area resident who has been actively participating in the public
20 planning process for Yosemite National Park for the past 9 years;" (2) she has reviewed the
21 Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Utilities
22 Project; and (3) she has met with park staff to discuss the issues. Aceto Declaration, ¶ 1. She
23 provides no evidence, however, that she has any professional education, training, or experience
24 relevant in any way to utilities design, planning, engineering, or environmental analysis.

25 The plaintiffs have failed to provide any meaningful or persuasive response, much less a
26 valid evidentiary rebuttal, to the defendants' detailed testimony and supporting documents, which
27 provide a compelling basis for staying the injunction pending appeal. The first point that needs
28 to be stressed, in reply, is that the nature of the proposed utilities work, while clearly somewhat

1 technical and detailed in nature, is nowhere near as complex or difficult to understand as the
2 plaintiffs would have the Court believe. *See* Pl. Opp. at 4 & n.2, at 13 & n.4. The defendants
3 provide three additional declarations, which present a straight-forward description of the issues
4 regarding the Utilities Project: (1) the Ninth Declaration of Michael J. Tollefson, Superintendent
5 of Yosemite National Park; (2) the Fifth Declaration of Edward William Delaney, Jr., a civil
6 engineer by training who serves as Chief of Project Management at the park; and (3) the
7 Declaration of Dr. Niki Stephanie Nicholas, Chief of Resources Management and Science at the
8 park. Superintendent Tollefson’s Ninth Declaration, ¶ 10, provides the following description to
9 ensure that the Court has a clear understanding of the plans concerning the utilities work at issue.

10 First, in 2002, the park adopted the Capital Improvement Plan (CIP). The CIP establishes
11 and prioritizes the sewer system repairs necessary to comply with the Cleanup and Abatement
12 Order. A key element of the CIP is that all sewer line repairs would be conducted in their existing
13 location, which includes performing repairs within meadows and wetland areas.

14 Second, in 2003, the park then adopted the Integrated Utilities Master Plan (IUMP), along
15 with an Addendum to the CIP. The IUMP adopts some of the sewer repairs called for in the CIP
16 but, in many cases, it proposes to relocate utilities lines out of sensitive wetlands and meadows as
17 much as possible. This is a critical distinction between the CIP and the IUMP.

18 Third, to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§
19 4321-44, the park completed the 2003 East Yosemite Valley Utilities Improvement Plan
20 Environmental Assessment (EA) and approved a Finding of No Significant Impact (FONSI) .
21 These environmental documents analyze the effects of work outlined in both the CIP and IUMP.

22 Collectively, all phases of the CIP and IUMP are included in the East Yosemite Valley
23 Utilities Improvement Plan EA. For ease of reference in this brief, the defendants refer to this
24 collective plan as the “Utilities Project.”

25 The Delaney Fifth Declaration provides additional descriptions of the several categories
26 of utilities repairs that the park proposed to undertake. Mr. Delaney is “responsible for
27 supervision of design and construction, including the engineering analysis of Yosemite Valley
28 utilities systems.” Delaney Fifth Declaration, ¶ 1. He has reviewed the plaintiffs’ opposition

1 memorandum and their supporting declarations and exhibits. *Id.*, ¶ 2. As he notes, the CIP was
 2 “required as part of the Cleanup and Abatement Order issued in August 2002 by the California
 3 Regional Water Quality Control Board. The CIP includes a condition assessment of the
 4 Yosemite Valley sewer system and identifies priority for repairs to the existing sewer lines in
 5 their current location.” *Id.*, ¶ 3. Mr. Delaney explains that the CIP classified four categories of
 6 repair priority for the sewer system: “emergency,” “immediate,” “intermediate,” and “long-term.”
 7 *Id.* “Emergency repairs were prescribed to be completed as soon as practical. Immediate repairs
 8 were to be completed within one to three years. Intermediate repairs (CIP Phase 2) were to be
 9 completed within three to six years. Long-term repairs (CIP Phase 2) were to be completed
 10 within seven to ten years.” *Id.* “As it is now, four and one-half years since the completion of the
 11 CIP, completion of emergency, immediate, and intermediate repairs are due.” *Id.*^{3/}

12 Contrary to the plaintiffs’ allegations, Mr. Delaney testifies that the park most assuredly
 13 has not delayed its efforts to complete the most pressing repair work in a timely manner in order
 14 to comply with the CAO. Quite the opposite, the park has “proceeded aggressively with
 15 completion of emergency and immediate projects previously approved by the Court, and will
 16 have completed 14,659 of 15,871 linear feet (92 percent) of ‘emergency’ sewer line repairs and
 17 17,546 of 21,552 feet (81 percent) of ‘immediate’ repairs at the end of the current construction
 18 contracts.” *Id.*, ¶ 4. This comprises 11 of 40 segments identified in Exhibit A of the Fifth
 19 Declaration of Alexander R. Peterson (Doc. 382). As Mr. Delaney states, the park is “actively
 20 proceeding with development of remedial actions for the remaining emergency and immediate
 21 segments. Of the remaining immediate segments, 2,801 of 4,006 feet were not included in the
 22 current contracts due to their location in sensitive resource areas.” *Id.* Mr. Delaney’s testimony

23 _____
 24 ^{3/} The plaintiffs and their declarant, Ms. Jeanne Aceto, go to great length to discuss which
 25 specific segments of sewer line in each category have been completed to date and which ones
 26 remain to be completed. That discussion misses the point for two reasons. First, as the Court has
 27 recognized before, it should not be involved in the business of micro-managing the park’s
 28 operations, especially in a highly technical topic such as the repair and replacement of sections of
 sewer pipes. Second, the main point raised by the defendants’ motion for stay is not to determine
 whether every one of 40 separate pipe segments must be completed by a certain date, but instead
 to examine the overall environmental impact of completing the repairs in the existing meadows
 and wetlands areas (as initially proposed in the CIP) versus the far more beneficial impact of
 allowing the park to relocate certain lines outside of those sensitive areas.

1 thus establishes that more than 90% of the emergency sewer line repairs have been completed or
2 are now underway, and he explains that the segments remaining to be completed involve sections
3 of pipe located in sensitive resource areas such as meadows, wetlands, and riverine habitat.

4 To assist the Court, Mr. Delaney provides Exhibit A to his Fifth Declaration, which is a
5 schematic map that “shows the remaining CIP repairs, including CIP Phase 2, after the current
6 construction contracts are complete, as well as three specific Integrated Utilities Master Plan
7 (IUMP) routes to avoid sensitive resource areas.” *Id.*, ¶ 5. As he reiterates, the “IUMP was
8 prepared to: 1) identify alternatives for utility routing to rectify deficiencies identified in the CIP,
9 and 2) optimize utility routing to avoid sensitive resource areas, such as meadows, wetlands, and
10 riverine areas.” *Id.* Exhibit A also indicates and portrays the “locations and boundaries of
11 meadows, wetlands, and other sensitive resource areas,” so that the Court will have a clear
12 understanding of the physical relationship and proximity between the location of sewer and
13 utilities lines and the ecologically sensitive areas that the park is trying to protect.

14 The principal reason why the park seeks to stay the injunction and secure permission to
15 proceed with the Utilities Project is that, in many cases, “the remaining immediate, intermediate
16 and long-term classified segments of sewer line, if repaired in accordance with the CIP, would
17 involve construction activity in their existing locations in meadows, wetlands, riverine areas and
18 a river crossing.” *Id.*, ¶ 6. In contrast, he testifies, “repairs routed in accordance with the IUMP
19 in the three specific areas shown in Exhibit A, would avoid the damaging activity in Ahwahnee
20 Meadow and Cooks Meadow, and eliminate a river crossing by relocating lines around these
21 sensitive areas and into already hardened roadways and developed areas.” *Id.* Contrary to the
22 concerns expressed by the plaintiffs, these “specific IUMP routes would not change or expand
23 any services provided, or alter the origin and terminus of sewage collection services. Simply put,
24 whether repaired under the CIP or the IUMP, the lines will start and end at the same points along
25 the existing pipelines.” *Id.* “The only difference would be the route: either under roadways for
26 the IUMP or in ecologically sensitive areas, like meadows and wetlands for the CIP.” *Id.*
27 Regardless of which route results, Mr. Delaney explains, “the location of the lines will in no way
28 ‘facilitate development,’ as claimed by the plaintiffs (Opposition Memo 16:23).” *Id.* For this

1 reason, the plaintiffs' fixation on counting the number of segments of sewer repairs completed
2 and remaining is irrelevant to the real issue, namely, whether to force the park to continue certain
3 repairs in meadows and wetlands, as the plaintiffs insist, or whether to allow the park to
4 undertake the alternative proposal analyzed in the IUMP of removing those sewer lines from the
5 meadows and wetlands.

6 The plaintiffs contend, without any supporting evidence, that continuing with CIP Phase
7 2 is not necessary to comply with the CAO. Mr. Delaney soundly refutes that charge, testifying
8 that "complete implementation of sewer system repairs, including CIP Phase 2, is critical to
9 ensure compliance with the August 2000 Cleanup and Abatement Order and to prevent public
10 health hazards and harm to natural resources." *Id.* This is true because the "CIP timeframes
11 presented to the California Regional Water Quality Control Board indicate that most categories
12 of repairs are overdue or due now. Integrating the three key IUMP routes with the remaining CIP
13 repairs is the most sensible and responsible solution that addresses Cleanup and Abatement
14 Order needs and does not change or expand facilities or services." *Id.* "Without approval to
15 integrate the IUMP routes with the remaining CIP repairs, CIP repairs in sensitive areas in the
16 Merced River corridor will regrettably be undertaken, resulting in unending wetland and meadow
17 disturbance both from initial repair activity and future maintenance activities." *Id.*

18 Mr. Delaney's testimony, from a civil engineer's perspective, is fully corroborated by the
19 park's Chief of Resources Management and Science, Dr. Niki Nicholas. Dr. Nicholas has served
20 in that position for the past three years, and she oversees "a staff of more than 100 cultural and
21 natural resource science professionals including (but not limited to) park archeologists, historical
22 landscape architects, hydrologists, geologists, ecologists, botanists, wildlife biologists, and
23 ecological restoration specialists." Nicholas Declaration, ¶ 1. She is well-qualified to offer the
24 testimony of an expert in ecology, as she earned "a Bachelor's degree in Biology from
25 Northwestern University, a Master's degree in Ecology from The University of Tennessee, and a
26 Doctorate in Forest Biology from Virginia Tech." *Id.* Dr. Nicholas has accumulated "more than
27 25 years of experience in ecological assessment and research" and is "one of approximately 250
28 individuals with the certification of Senior Ecologist by the Ecological Society of America." *Id.*

1 Dr. Nicholas, like Mr. Delaney, has reviewed the plaintiffs' opposition memorandum and
2 their supporting evidence, and she offers her sworn testimony to "provide information about why
3 a vital sewer line replacement project enjoined by the U.S. District Court must be allowed to
4 proceed while the NPS prepares a new Merced Wild and Scenic River Comprehensive
5 Management Plan (Merced River Plan)." *Id.*, ¶ 2. In Dr. Nicholas's view, the utilities work
6 currently enjoined by the Court "must move forward in order to allow for the ecological
7 restoration of Yosemite Valley's wet meadows. Right now, there is a spaghetti-like network of
8 deteriorated sewer lines of different ages through meadows and other sensitive habitats in the
9 Valley. These lines act as a conduit, draining the meadows and negatively impacting
10 groundwater flow. The lines are old, and if left in place and in continued use, will require
11 constant maintenance and repair." *Id.*, ¶ 3.

12 As an experienced, professional ecologist, Dr. Nicholas has to take into account both the
13 long-term and the short-term impacts of the proposed actions. "In the long-term, the action of
14 digging up lines to repair them is significantly more damaging to the meadows and wetland areas
15 than the relocation of the lines out of these very ecologically sensitive areas. Before natural
16 process can be restored to these areas, which is the goal of ecological restoration, these lines need
17 to be removed or collapsed in place and plugged." *Id.* She also explains that the "short-term
18 effect of relocation is the only way to achieve long-term benefits and restore natural processes.
19 The overall goal of the Utilities Project is to replace deteriorated utility lines and remove them
20 from these sensitive resource areas." *Id.*

21 If the injunction remains in place, a number of adverse environmental impacts will occur
22 to the Merced River values. One example is that underground utility lines will "compromise the
23 health of meadows and wetlands in a number of ways. Cracked sewage pipes not only leak, but
24 they can collect water and act as a conduit to move groundwater down-gradient, which moves
25 water *out* of meadows and wetlands. Ultimately, the water that seeps into pipes ends up at the
26 sewage treatment plant instead of staying in the meadows." *Id.*, ¶ 4. The continuing presence of
27 these sewer lines in meadows and wetlands is particularly disruptive to restoring a healthy
28 ecosystem because "[I]ate-season, high water tables are the most important environmental factor

1 necessary to maintain meadows in Yosemite Valley.” *Id.* In her opinion, much of the excess
2 water that arrives during high water season in the El Portal sewage treatment plant is “most likely
3 due to infiltration of water from wetlands and meadows into leaky and cracked sewer pipes at
4 times of inundation. Thus, those sewage pipes are contributing to the drying out of the
5 meadows.” *Id.* “Removal of leaky sewer pipes will keep groundwater in the meadows, avoid
6 possible release of contaminated waters, and remove the risk of altered water tables in meadows
7 and wetlands.” *Id.*

8 Restoring those meadows and wetlands is a principal objective of moving the sewer lines
9 out of the sensitive areas, which can only occur if the injunction is stayed so that the park can
10 relocate the existing sewer lines, rather than being forced continually to perform repairs in the
11 meadows and wetlands on an ongoing basis. As Dr. Nicholas observes, however, the plaintiffs’
12 position “promoting repeated emergency repair of the sewage lines would result in a two-fold
13 degradation of the ecologically sensitive meadows and wetlands. Not only would there continue
14 to be significant risk of further leakage occurring elsewhere in these fragile areas, but also there
15 would be potentially unlimited repeated considerable ground disturbance to these sensitive
16 resource areas.” *Id.*, ¶ 5.

17 The plaintiffs indicate that the Utilities Plan Environmental Assessment (EA) supports
18 their claim that implementation of the Preferred Alternative (Alternative 2) in the Utilities Plan
19 EA will degrade conditions in the river corridor as compared to the No Action alternative. Pl.
20 Opp. at 18-31. Dr. Nicholas thoroughly refutes this charge, noting that the “EA establishes that
21 conducting sewer repairs only in accordance with the CIP, which is what is described in the No
22 Action alternative, would lead to long-term damage and disturbance to sensitive ecological
23 areas.” Nicholas Declaration, ¶ 7. “By contrast, conducting the work in the manner described in
24 Utilities Plan Phases 2 and 3 will lead to long-term *beneficial* impacts to wetlands, vegetation,
25 and wildlife resources, to name just a few.” *Id.* She then provides several examples to support
26 her conclusion.

27 Dr. Nicholas also points out that other EA excerpts relied on by plaintiffs omit language
28 proving that there are no adverse effects associated with select project areas in Alternative 2. *Id.*,

¶ 8. She again illustrates her point, noting for example that the “EA clearly states that no wetland or aquatic habitats exist in the Happy Isles area of the project.” *Id.*; EA page IV-86. She also demonstrates the “plaintiffs’ lack of understanding of the science documented in the EA.” Nicholas Declaration, ¶ 9. Whereas the plaintiffs cite pages of the EA for the proposition that “Alternative 2 will adversely impact approximately 50 acres soils, vegetation and habitat in the Ecological Restoration Area, *see* Pl. Opp. at 27, Dr. Nicholas states that “[n]othing could be further from the truth. A careful reading of the actual text of the EA (as opposed to plaintiffs’ paraphrasing of that text) demonstrates that the types of ‘effects’ that would occur in the Ecological Restoration area are effects from the removal or crushing of old, deteriorated sewer lines.” Nicholas Declaration, ¶ 9. As she explained in ¶ 3 of her declaration, “the NPS cannot fully restore wet meadow hydrology and plant new vegetation until the old sewer lines are removed or collapsed in-place. This is exactly what would happen if the utility work outlined in Alternative 2 for the Ecological Restoration area is allowed to proceed.” *Id.*

The park staff as a whole, and Dr. Nicholas in particular, are hard-pressed to believe that the plaintiffs actually want to impose those harmful impacts on the ecology of the Merced River, but that is precisely and unquestionably the result that their obdurate and myopic litigation tactics will require. She concludes her testimony by stating that “[r]elocation of existing underground utilities out of the sensitive resource areas is the first step toward restoration of meadow and wetland communities in Yosemite Valley. Ecological restoration endeavors to restore the processes that sustain natural communities. Ground water and flood flow regimes must be intact to truly restore the vegetation and wildlife in natural areas.” *Id.*, ¶ 10. The defendants submit that Dr. Nicholas’s Declaration provides compelling, irrefutable testimony regarding the ongoing harm resulting from the injunction against the Utilities Project and the clear environmental benefits that could result from a stay of that injunction while the park completes its new CMP.

C. The Court Should Stay the Injunction for the Valley Loop Road Project

The defendants also moved to stay the injunction with regard to the Yosemite Valley Loop Road Project. In support of this request, the defendants filed the Declaration of Patrick J. Flynn (Doc. 381), a licensed professional civil engineer who has 26 years’ experience with the

1 Federal Highway Administration (FHWA) and who is personally familiar with and responsible
2 for managing the roadway design and construction projects in the park. Mr. Flynn testified
3 regarding the pressing need for immediate repairs to the Loop Road to prevent further
4 deterioration from the clearly demonstrable evidence that the road is now in “poor” condition and
5 is certain to degrade further, at a rapidly deteriorating rate if repairs remain enjoined for several
6 more years.

7 The plaintiffs oppose this request and demand that the injunction remain intact at least for
8 three more years, while the park completes a new CMP. Rather than attempting to refute Mr.
9 Flynn’s testimony with any credible engineering evidence, the plaintiffs rely entirely on the
10 “experience of Bridget Kerr, who has been regularly traveling the road for several years.” Pl.
11 Opp. at 32:13-14. Ms. Kerr does not provide any credentials whatsoever, other than the fact that
12 she is a local resident of El Portal and a member of the plaintiff FOYV who travels the Loop
13 Road on a regular basis. Without any effort to document a factual or scientific basis for her view,
14 she offers the wholly unsubstantiated opinion that “Yosemite residents would agree that the
15 roadway is better now than it has been in many years.” Pl. Opp. at 32:19-20. She incorrectly
16 cites to and misinterprets the Environmental Assessment (EA) for the Loop Road Project to
17 contend that raising the road by adding four inches of asphalt on top “would necessitate
18 widening” the road, which she asserts is a deliberate effort by the park to upgrade the roadways
19 in Yosemite Valley “in order to accommodate heavier mass-transit vehicle traffic and growth in
20 the number of visitors in Yosemite Valley.” Pl. Opp. at 35-36. Finally, she grossly distorts the
21 facts and the park’s record of environmental analysis in the EA to assert that the project will
22 adversely impact the environment. Pl. Opp. at 36-37.

23 There is absolutely no truth to, nor any factual basis for, Ms. Kerr’s unsupported
24 allegations or the plaintiffs’ opposition to the Loop Road repairs. To refute the Kerr Declaration,
25 the defendants provide the Court with the Declaration of Elexis J. Mayer, the NPS lead
26 Compliance Specialist for the Loop Road Project. Ms. Mayer testifies that she is “extensively
27 and intimately familiar with the Loop Road Project’s affected environment; the proposed action
28 alternative; design elements associated with each stage of development; environmental impacts;

1 mitigation measures and Best Management Practices to be followed prior to, during, and post
2 construction; as well as all of the interests that arose from public scoping and public review and
3 comment periods.” Mayer Declaration, ¶ 2. She has reviewed the plaintiffs’ memorandum and
4 the Whitmore and Kerr Declarations and explains in detail why their testimony lacks any
5 credibility.

6 As an initial matter, Ms. Mayer explains that, contrary to the plaintiffs’ contention, there
7 is “absolutely no connection” between the CIP and IUMP projects and the work called for in the
8 Loop Road project, except that some utilities repairs previously authorized by the Court now lie
9 beneath the Loop Road, which required temporary repaving of those sections of road to provide a
10 safe travel surface. Mayer Declaration, ¶ 4. That spot repaving work and the recent micro-seal
11 surface cover that Mr. Flynn discussed, however, “addressed neither the drainage deficiencies nor
12 the substructure of the surrounding roadway pavement,” *id.*, which are two of the principal
13 reasons why the Loop Road repairs are now long overdue and badly needed, for the reasons
14 explained in the Flynn Declaration.

15 With regard to the careful scientific and engineering analysis provided for the Loop Road
16 Project, Ms. Mayer demonstrates, based on her personal knowledge and experience, that a
17 “cadre” of professionals from both NPS and FHWA devoted considerable time and expertise to
18 designing and developing the project, including a year-long, interdisciplinary design development
19 process with five separate project design phases. Mayer Declaration, ¶ 5. That process included
20 input not only from civil and hydraulic engineers, but also from “hydrologists, botanists,
21 archeologists, landscape architects and ecologists, historic architects, wildlife biologists, and
22 protection and traffic management rangers” on the NPS staff. *Id.* Mayer Declaration, ¶ 5. As
23 her testimony demonstrates, this collective professional expertise, along with the knowledge and
24 opinion of Mr. Flynn as a Registered Professional Engineer, clearly supports the need for culvert
25 repair and replacement and far outweighs the anecdotal and unqualified personal observations of
26 Ms. Kerr as a “regular traveler” on the road. Mayer Declaration, ¶ 6. Ms. Kerr lacks any
27 background in roadway design, engineering, or hydraulics, and her “clouded non-professional
28 observation pales in comparison to the collective knowledge and expertise of those with whom

1 the NPS collaborated to determine the necessity for the long overdue Loop Road maintenance
2 and repair.” *Id.* Nothing in the Kerr Declaration remotely equates with the quantitative
3 assessment of the deteriorated road condition provided by Mr. Flynn, based on his 26 years’ of
4 experience and his professional opinion, which is supported by the FHWA reports that he filed.

5 As to the plaintiffs’ assertion that the project will adversely affect the Merced River
6 environment, Ms. Mayer first notes that they “have failed to provide a single substantive example
7 in all previous declarations” of how the Loop Road project will adversely impact the values of
8 the Merced Wild and Scenic River. Mayer Declaration, ¶ 7. Moreover, they failed to provide
9 any specific examples in their comment letters on the project, relying exclusively on “only
10 general and exaggerated allegations.” Apart from three letters submitted by Mr. Whitmore and
11 FOYV, the remaining public comments provided “overwhelming support of the proposed
12 roadway repairs, and the general public had no problem understanding the proposed actions.” *Id.*

13 The plaintiffs’ claim that the park has not been forthcoming with accurate information
14 about the project is likewise a patent falsehood. One very laudable aspect of the Loop Road
15 Project is the extensive degree of public input and the open public access to information
16 throughout the entire process. Ms. Mayer states that design drawings were distributed at NPS
17 Open Houses, both before and during the public scoping period. “Both Mr. George Whitmore
18 and Ms. Bridget Kerr attended over seven of these public meetings and were provided extensive
19 information at these meetings, in telephone conversations, and in email, about the design plans
20 for the Loop Road Project.” Mayer Declaration, ¶ 8. Public comments also were incorporated
21 into the project design. Mayer Declaration, ¶ 9. Moreover, both Ms. Mayer and the NPS Project
22 Manager spent extensive time meeting directly with Mr. Whitmore and Ms. Kerr, walking
23 sections of the road and discussing actions called for in the EA review. Mayer Declaration, ¶ 10.

24 While the plaintiffs’ two declarants now make “unfounded assertions that the Loop Road
25 project proposes to increase capacity through roadway widening and the addition of parking,”
26 those assertions are completely unfounded and incorrect. As Ms. Mayer notes, their declarations
27 “fail to mention that design elements were changed as a result of their suggestions to keep and
28 widen one pullout adjacent to the river in the name of public access.” Mayer Declaration, ¶ 11.

1 Further, the Sierra Club Yosemite Committee to which Mr. Whitmore and Ms. Kerr belong “has
2 stood by and agreed with the NPS to pave specific roadside pullouts, in order to curtail their
3 further expansion into wetland features.” *Id.* Mr. Whitmore and the Committee participated in a
4 field review provided by NPS to measure the roadway width. As a result of that “ground-truthing
5 exercise,” Mr. Whitmore and others agreed with the park “that the existing road was much wider
6 than they originally had realized, and that standardizing lane widths to ten feet, with one foot
7 paved shoulders would not widen the road, when compared to existing conditions.” *Id.* There is
8 no truth and no merit to the plaintiffs’ post-hoc, litigation driven efforts to allege that the project
9 will widen the Loop Road in order to accommodate more traffic or visitor use.

10 Ms. Mayer’s Declaration is a testament to the truly extraordinary public outreach
11 measures that the park has undertaken to provide the public in general – and the plaintiffs in
12 particular – with all information necessary to understand the very limited impact of this road
13 rehabilitation project. Mayer Declaration, ¶ 12. Despite the park’s efforts, the plaintiffs have
14 decided to engage in what can only be termed a deliberate and knowing effort to misrepresent the
15 facts. For example, the plaintiffs’ claim that the proposal to add several inches of asphalt to the
16 roadway somehow constitutes an attempt to raise the entire roadway elevation and grade. Ms.
17 Mayer explains that she has had “numerous detailed technical conversations with Mr. Whitmore
18 and Ms. Kerr regarding the difference between raising the entire roadway structure (i.e., base,
19 sub-base, and pavement) versus the addition of four and one-half inches of new asphalt.” Mayer
20 Declaration, ¶ 13. Notwithstanding the park’s public information and outreach efforts, however,
21 the Committee has “continually miscommunicated, exaggerated, and provided false information
22 in comment letters, emails, and public meetings about this issue.” *Id.* The validity of Ms.
23 Mayer’s position, as the park’s lead Compliance Specialist for the project, is borne out by Exhibit
24 B to her Declaration, a cross-section figure taken directly from the Loop Road EA and design
25 drawings – and seen by Mr. Whitmore – which clearly shows precisely how four and one-half
26 inches of asphalt would be placed on top of the existing pavement, without any increase in the
27 width of the roadway structure. *Id.*, ¶ 13 & Exhibit B.

1 Any possible doubt regarding the validity of Ms. Mayer's testimony and the falsity of the
2 plaintiffs' declarations on the issue of roadway elevation is resolved conclusively by the EA
3 itself, which notes that "Change in Roadway Elevation" in the manner that the plaintiffs now
4 contend was expressly identified as an "Alternative Considered But Dismissed" from further
5 analysis by the park. Mayer Declaration, ¶ 14. "The Loop Road EA very clearly states that the
6 type of reconstruction effort that would be necessary to raise the roadway structure, requiring
7 widening the roadway prism, is beyond the purpose and need for this rehabilitation project." *Id.*
8 "Rehabilitation,' commonly referred to as a 'R3' project by FHWA standards consists of
9 repairing, rehabilitating and resurfacing roadways. This type of roadway project, such as the
10 Loop Road Project, is distinctively different than a 'reconstruction,' or 'R4' project which has the
11 added component of reconstructing portions of a roadway." *Id.* The Court must reject the
12 plaintiffs' misleading and factually incorrect testimony on this topic.

13 Next, Ms. Mayer refutes the plaintiffs' contentions regarding the concerns over culvert
14 placement, location, and length. Mayer Declaration, ¶ 16. "Because one of the objectives of
15 rehabilitating the Loop Road is to improve safety, numerous existing culvert pipes and headwalls
16 were extended beyond their current location in order to prevent snow plow damage to headwalls,
17 as well as to create a safe distance between the edge of the roadway pavement and the drop-off
18 created by a headwall." *Id.* She notes that the NPS is rehabilitating the Loop Road strictly in
19 accordance with the EA and in compliance with the design drawings. Although Mr. Whitmore
20 inspected portions of the culvert work before it was completed, he has falsely alleged this work is
21 intended to "anticipate the road widening." Whitmore Declaration at 4:25. Ms. Mayer provides
22 the Court with Exhibit C, a "sheet from the 95% design drawings depicting a classic set of
23 instructions for replacing an existing culvert pipe with a longer pipe between El Capitan Cross-
24 over and Sentinel Drive, on Southside Drive." Mayer Declaration, ¶ 16. As she notes, "this
25 information has been publicly available and reviewed by Mr. Whitmore throughout the duration
26 of the project." *Id.* She confirms that the NPS and FHWA "will ensure that all culverts are the
27 appropriate distance from the roadway edge when the project is complete. Mr. Whitmore's
28 allegations about the culvert width are therefore premature." Mayer Declaration, ¶ 17.

1 In response to the one example noted by Mr. Whitmore regarding a culvert that extended
2 out farther from that roadway than he had expected, the NPS had already taken corrective action
3 – prior to submission of the Whitmore Declaration – to direct the contractor to relocate certain
4 culverts closer to the edge of the existing roadway pavement. *Id.* Thus, Ms. Mayer testifies that
5 the “work being conducted on the Loop Road *is* being implemented in accordance with the stated
6 proposed actions as called for in the Loop Road EA, and the NPS and FHWA will ensure that all
7 actions are correctly constructed.” *Id.* There is no merit whatever to the plaintiffs’ claims that
8 the Loop Road Project is not being conducted in full compliance with the EA and design
9 requirements, which have been fully exposed to public scrutiny and explained to the plaintiffs’
10 representatives at every single stage of the process.

11 Finally, Ms. Mayer refutes the plaintiffs’ contentions regarding roadside pullout
12 improvements as part of the Loop Road Project. She attaches, as Exhibit D to her Declaration, a
13 copy of Figure II-6: Alternative 2 Proposed Roadside Parking Actions from the EA, which
14 demonstrates that “the NPS has provided a substantial amount of information regarding proposed
15 actions to *existing* pullouts. Both the table and figure work in tandem to present precise locations,
16 the existing condition, and the proposed actions called for in every single roadside pullout within
17 the project area. Nothing in the Loop Road EA or FONSI, nor in a single set of design drawings
18 for this project, has *ever* identified *new* areas for roadside pullouts.” Mayer Declaration, ¶ 19. In
19 fact, as she notes, in a few areas, the NPS actually had proposed *removing* unsafe roadside
20 pullouts, only to receive objections from both Mr. Whitmore and Ms. Kerr, who argued in favor
21 of keeping these pullouts “in order to preserve access,” *id.*, *citing* Exhibit E (an excerpt from the
22 Yosemite Committee’s comment letter on the Loop Road EA) requesting that “two specific
23 roadside pullouts which are currently unpaved, be paved (i.e., numbers 5 and 51).” This
24 testimony and the supporting documentation directly undermine the plaintiffs’ current attack,
25 which incorrectly alleges that the park is attempting to increase access to the river and other
26 recreational areas by adding and paving turnouts.

27 Ms. Mayer also states that the “NPS believes that making a few very popular and scenic
28 roadside pullouts (such as those along the area known as Bridalveil Straight) accessible to people

1 with disabilities is a requirement of the Americans with Disabilities Act as well as part of *our*
2 mission.” Mayer Declaration, ¶ 19. She notes that the park consistently receives public comment
3 letters requesting “uniform access for all,” and she observes that “the Loop Road Project
4 provides opportunities to address these requests.” *Id.* The plaintiffs are simply wrong in
5 asserting that these improvements somehow serve to increase user capacity. *Id.* To the contrary,
6 the actions proposed to improve parking controls such as curbing and barrier stones are designed
7 “to curtail the expansion of certain roadside pullouts into *sensitive* resource areas,” not to expand
8 roadside parking and increase capacity. As the design drawings clearly show, “all work
9 associated with roadside pullouts is to remain within the *existing* footprint.” *Id.*

10 Park Superintendent Tollefson confirms the testimony in the Mayer Declaration. As he
11 testifies, “a full analysis of both floodplain and wetland values has been documented in the Loop
12 Road EA and FONSI, and the park has concluded that there will be beneficial effects to both
13 resources. (Loop Road FONSI, P1-11.)” Tollefson Ninth Declaration, ¶ 6. “Thus, the Loop
14 Road project will correct and restore hydrologic functions within the river corridor.” *Id.* He
15 concludes that “the existing injunction would further exacerbate the adverse effects to the river,
16 whereas allowing the road maintenance will help protect and enhance its hydrological and
17 biological values.” *Id.* With regard to the allegations that the project will result in increased use,
18 he reiterates that “there will be *no* increase or change of user capacity within the river corridor,
19 *nor* will the project predetermine or prejudice in any way the user capacity in the Merced River
20 corridor.” Tollefson Ninth Declaration, ¶ 8. In particular, he confirms to the Court that there
21 “will be *no* increase in the number of parking spaces. As the EA establishes, and as I have
22 confirmed: 1) all of the turnouts involved in the Loop Road Project exist now and are accessed
23 by park visitors, 2) the Loop Road Project will *not* cause any increased use of the river corridor,
24 and 3) the Loop Road Project is *not* tiered or connected to Yosemite Valley Plan.” *Id.*

25 The Mayer and Flynn Declarations, supported by Superintendent Tollefson’s two
26 declarations, present clear and compelling evidence of the need to stay the injunction pending
27 appeal so that the park can move forward with the urgently needed and overdue roadway
28 rehabilitation work on the Loop Road Project without suffering three more years of continued

1 and increasing deterioration of the only access route for Yosemite Valley. The defendants'
2 declarations convincingly demonstrate that every single one of the plaintiffs' allegations is
3 completely without foundation or credibility. The defendants therefore request that the Court
4 stay ¶ 12 of the November 3 Injunction Order.

5 **D. The Court Should Strike, Disregard, and Discount Plaintiffs' Declarations**

6 The defendants object to the plaintiffs declarations filed by Mr. George W. Whitmore,
7 Ms. Bridget McGinniss Kerr, and Ms. Jeanne C. Aceto. As the plaintiffs frequently have
8 asserted throughout this litigation, evidence offered in opposition to a motion must meet all the
9 requirements for admissibility of evidence as if offered at trial under the Federal Rules of
10 Evidence (FRE). The plaintiffs' declarations fail to meet the standards for admissibility.

11 Mr. Whitmore submitted his declaration on behalf of the Sierra Club and its Yosemite
12 Committee. The Sierra Club, however, is not a party to this litigation and has not participated in
13 this litigation since the filing of two *amicus curiae* briefs, first in September 2001 in this Court,
14 then in September 2003 in the Ninth Circuit. The Sierra Club, however, has not participated in
15 this litigation in this Court in more than five years, and Mr. Whitmore provides no foundation to
16 establish that he currently is authorized to speak as a representative of the Sierra Club as a
17 participant in this litigation at the present time. The opinions expressed by Mr. Whitmore in ¶¶
18 5, 6, and 7 of his declaration lack any foundation to qualify as either a lay opinion under FRE 701
19 or an expert opinion under FRE 702. His testimony refers vaguely to "development," but he
20 gives no definition or explanation of what he means by this term, nor does he provide a
21 foundation for an opinion distinguishing "development" from repair, maintenance, and
22 rehabilitation activities that the park is undertaking. In ¶ 8 and again in ¶ 11, he states that the
23 Utilities Project and the Loop Road Project "have the potential to impact ORV's" and "the
24 potential to affect user capacity," but he does not identify any ORV, explain how the two projects
25 might affect the ORV, or discuss the circumstances in which the potential impact might occur.
26 In ¶ 9, he states the "we" (presumably the Sierra Club) lack confidence in the NPS processes and
27 "are dubious" about the two projects, but he gives no foundation for offering any opinion to
28 support that vague conjecture. In ¶ 10, he speculates, without foundation, that culvert drainage

1 work might be done “in anticipation of the eventual widening of the road,” but provides no
2 evidence to support that speculation. In ¶ 12, he provides no factual basis or foundation for the
3 concern he expresses that “the NPS has tendency to call something an ‘emergency,’ get
4 permission to address the problem, and then take so long to do the work that they clearly did not
5 really believe it to be an emergency.” The only “example” he cites is a recent proposal to
6 reconstruct a segment of the El Portal Road that is not an issue before the Court. Finally, in ¶ 13,
7 he suggests that “[w]e are not opposed to routine maintenance activities,” but offers no testimony
8 to explain to the Court how he (or the Sierra Club) define that term. For these reasons, the Court
9 should strike, disregard, or discount Mr. Whitmore’s testimony, which consists of inadmissible
10 opinion testimony that is neither a lay opinion rationally based upon perceptions under FRE 701,
11 nor a valid expert opinion under FRE 702.

12 The defendants have similar objections to the Kerr Declaration. Ms. Kerr notes that he
13 has worked as a college instructor and engages in a variety of recreational activities, but she does
14 not provide any evidence of education, training, or experience to support her unfounded lay
15 opinions regarding the condition of the Loop Road. In ¶ 4, she provides no foundation for her
16 opinion disputing the views of Mr. Patrick Flynn, a registered civil engineer with 26 years of
17 experience with the Federal Highway Administration in roadway design and construction, other
18 than to opine that Mr. Flynn’s testimony “just does not square with my personal experience of
19 traveling the roads through Yosemite Valley.” She offers no foundation for her opinion that the
20 current driving surface “is actually smoother than it has been in recent years,” and she does not
21 address or rebut Mr. Flynn’s testimony regarding the fact that the micro-seal treatment does not
22 correct underlying structural problems that the FHWA has documented in its reports on the road
23 condition, as well as Mr. Flynn’s expert engineering testimony. In ¶ 5, Ms. Kerr provides no
24 basis or foundation for her opinion that “much of the extreme wear and tear” on Yosemite Valley
25 roads results from “the increased frequency of cement and gravel trucks tied to these
26 questionable construction projects.” She nowhere identifies these “questionable projects,” nor
27 does she provide any evidence of such traffic to support her lay opinions on this subject. While
28 Ms. Kerr discusses several documents in ¶¶ 6-11 of her declaration, those documents are the best

1 evidence of their contents and speak for themselves, and her testimony regarding those
2 documents cannot substitute for the text of the documents. FRE 1004. For these reasons, the
3 Court should strike, disregard, or discount Ms. Kerr's testimony, which consists of inadmissible
4 opinion testimony that is neither a lay opinion rationally based upon perceptions under FRE 701,
5 nor a valid expert opinion under FRE 702.

6 The defendants have similar objections to the Aceto Declaration. Ms. Aceto addressed
7 the Utilities Project, but she does not provide any evidence of education, training, or experience
8 to support her unfounded lay opinions regarding the nature of the work performed or proposed by
9 the park. In light of her evident lack of understanding, she professes confusion in ¶ 3 regarding
10 the CIP repairs and the Utilities Project EA, but she provides no foundation for her lay opinion
11 that it "is impossible for the public to understanding the correlation" between the two documents.
12 With regard to the testimony in ¶¶ 3-7 of her declaration, Ms. Aceto provides no qualifications
13 for the work she performed in assembling Exhibit G to her declaration, which purports to show
14 various segments of utilities work performed by the park. In particular, she provides no
15 foundation for disputing the views of civil engineers familiar with the Utilities Project, who have
16 provided declarations for the defendants, including Mr. Alexander R. Peterson and Mr. Jeffrey D.
17 Harsha. For these reasons, the Court should strike, disregard, or discount Ms. Aceto's testimony,
18 which consists of inadmissible opinion testimony that is neither a lay opinion rationally based
19 upon perceptions under FRE 701, nor a valid expert opinion under FRE 702.

20 **E. Defendants Present Serious Questions on the Merits of the Appeal**

21 In addition to providing detailed, credible, and entirely unrefuted evidence regarding the
22 harm to the Merced River values and the public interest that will result from the injunction, the
23 defendants' opening memorandum outlined the nature of the issues that the Ninth Circuit will
24 consider on appeal, explaining the specific serious questions that they will present to the Ninth
25 Circuit regarding the application of WSRA and NEPA and the prior Ninth Circuit orders. NPS
26 Memo at 17-21. The plaintiffs have chosen not to respond substantively to the defendants'
27 showing and instead rely entirely on the fact that the Court granted them summary judgment on
28 these issues. Pl. Opp at 37. In doing so, however, they misconstrue this element of the

1 applicable legal standard. The issue now before the Court, in connection with the motion for stay
2 of the injunction pending appeal, is not simply whether the Court ruled for the plaintiffs on the
3 merits of their WSRA and NEPA claims, but whether the defendants have presented “serious
4 questions” on the substance of those issues now on appeal.

5 The defendants’ appeal presents an issue regarding the proper application of the WSRA
6 “user capacities” language to the 2005 Revised Merced River Plan, which must be assessed in
7 light of the new measures that the park included in that Revised Plan in response to the Ninth
8 Circuit’s earlier ruling. That issue of statutory construction and application to the particular
9 administrative record for the Revised Plan is an issue that has never been addressed by the Ninth
10 Circuit or any other court of appeals. The appeal also presents a novel issue regarding the nature
11 of the quantitative interim limits that the park adopted, again in response to the Ninth Circuit’s
12 earlier opinion. Further, the appeal raises a question of NEPA compliance as applied to the
13 preparation of a revised CMP under WSRA, an issue that no court of appeals has decided.
14 Notwithstanding the fact that this Court ruled for the plaintiffs on these WSRA and NEPA
15 issues, the issues presented on the defendants’ appeal unquestionably raise serious and important
16 issues that will guide the future application of WSRA, not only in the development of the CMP
17 for the Merced River, but for many other Wild and Scenic Rivers in the Ninth Circuit and around
18 the nation.

19 **F. The Balance of Harm and Public Interest Favor a Stay Pending Appeal**

20 In reviewing motions concerning injunctive relief in cases involving the public interest, a
21 court must consider whether the “public interest favors the [movant.]” *See Sammartano v. First*
22 *Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 965 (9th Cir. 2002),
23 *citing Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). Here, the overwhelming
24 weight of evidence before the Court shows that continuing the injunction for the Utilities Project
25 and Loop Road Project would harm the public interest in a number of ways.

26 To demonstrate the compelling public interest in having these two vital repair projects,
27 currently enjoined by the Court, proceed during the pendency of the appeal while the NPS
28 prepares a new CMP, the defendants previously submitted the Eighth Declaration of Michael J.

1 Tollefson, Superintendent of Yosemite National Park. Doc. 383. Mr. Tollefson, as the
 2 responsible NPS official at Yosemite, explained how the injunction with respect to the Utilities
 3 Project was harming the public interest by increasing the likelihood of sewage spills and forcing
 4 the NPS to take actions that unnecessarily result in serious ecological damage. Doc. 383, ¶¶ 14,
 5 23. He also demonstrated that the injunction against the Loop Road Project repairs is critically
 6 important because it is “the only road into and out of Yosemite Valley and is used by all Valley
 7 visitors,” as well as providing a vital route for essential park operations including law
 8 enforcement, fire management, emergency medical services, and facilities maintenance. *Id.*, ¶ 6.
 9 If the injunction is not stayed and remains in place for several more years, the road would limit
 10 vehicle access to Yosemite Valley and “some sections of the roadway may need lead to be closed
 11 to traffic altogether.” *Id.*

12 In response, the plaintiffs assert, incorrectly, that “the NPS has been allowed to complete
 13 the emergency and immediate utility repair work that it told the Court was essential in 2004. If it
 14 has not completed those repairs, it is only the NPS’ failure.” Pl. Opp. at 38:2-4. With regard to
 15 the Loop Road Project, they assert, again incorrectly, that recent repair and repaving work has
 16 made the road “in better condition today than it has been in years.” *Id.* at 38:10.^{4/} Finally, the
 17 plaintiffs refer to the Declaration of Mr. Whitmore – who is not a member of either plaintiff
 18 organization, but instead purports to represent the interest of the Sierra Club, which is not a party
 19 to this litigation – to allege that the Sierra Club is concerned about the level of “development,”
 20 *id.* at 39:7, and to charge that “the NPS is continually changing the story of the nature of projects
 21 in order to suit its agenda.” *Id.* at 40:11-12.

22 To refute the plaintiffs’ allegations and further demonstrate that the public interest
 23 strongly favors a stay to allow work on these two projects, the defendants now provide the
 24

25 ^{4/} The plaintiffs submit that the park is free to complete the emergency and immediate
 26 repairs concerning the Utilities Project and contend that they do not oppose “routine repairs” on
 27 the Loop Road. The Court’s November 3 Injunction Order, however, does not recognize any
 28 such exceptions, but instead broadly enjoins the defendants from proceeding on the both utilities
 work and the Loop Road “until after the adoption of a valid CMP for the Merced Wild and
 Scenic River.” Friends of Yosemite Valley v. Kempthorne, 464 F.Supp.2d at 1013. As both
 parties have stipulated, the CMP is not scheduled for completion until September 2009.

1 Superintendent Tollefson’s Ninth Declaration. With regard to the Loop Road, Mr. Tollefson
2 notes that, even though the plaintiffs have never challenged the park’s NEPA compliance for that
3 project, “a full analysis of both floodplain and wetland values has been documented in the Loop
4 Road EA and FONSI, and the park has concluded that there will be beneficial effects to both
5 resources. (Loop Road FONSI, P1-11.)” Tollefson Ninth Declaration, ¶ 6. He then explains
6 why the balance of harms for this project favors a stay. “The Loop Road project will correct and
7 restore hydrologic functions within the river corridor. Thus, the existing injunction would further
8 exacerbate the adverse effects to the river, whereas allowing the road maintenance will help
9 protect and enhance its hydrological and biological values.”

10 Superintendent Tollefson also addresses the overriding public interest as it relates to the
11 impact of the injunction on the Utilities Project. “Much of the Valley’s sewer system was
12 installed decades ago, and the existing system bisects meadows, riparian areas, and other
13 sensitive resource areas. Recognizing that repairing these facilities in sensitive resource areas
14 would perpetuate adverse environmental impacts, the NPS prepared the IUMP to identify
15 alternatives for utility routing so that utilities could be removed from meadows and sensitive
16 resource areas (such as within the Merced River corridor), while also rectifying system
17 deficiencies identified in the CIP.” Tollefson Ninth Declaration, ¶ 12. “The NPS is thus faced
18 with the choice of: 1) repairing these lines in place per the CIP, or 2) repairing these lines in a
19 more environmentally responsible manner. Rehabilitating sewer lines that are currently located in
20 sensitive resource areas will result in the continued presence of these utility corridors in
21 meadows and riparian areas for decades to come—which most assuredly would *not* protect and
22 enhance Merced River values.” *Id.* Moreover, as the Superintendent explains, “to delay these
23 projects for as long as two or three years while a new Merced River Plan is completed will
24 almost certainly cause harm to the meadow and river system, and public health and safety by
25 exposing people and natural resources to the risk of accidentally-spilled untreated sewage and
26 contaminated surface and ground water. Implementation of these projects is also in the public
27 interest because these projects will allow natural resource restoration to occur in meadow and
28 wetland areas along the river.” *Id.*

1 No matter how fervently and persistently they oppose the park's efforts, the plaintiffs
2 cannot overcome the overwhelming weight of credible scientific evidence, which demonstrates
3 that continuing to enjoin work on the Loop Road and the Utilities Projects for the next several
4 years will cause significantly greater environmental harm to the river's resources than allowing
5 the park's well-designed, carefully analyzed projects to continue, while the park completes a new
6 CMP. The balance of harms and public interest strongly favor a stay of the injunction.

7 **III. CONCLUSION**

8 The defendants request that the Court grant the defendants' motion for a stay of the
9 permanent injunction pending appeal with regard to the Utilities and the Loop Road Projects.

10 Respectfully submitted this 26th day of February, 2007.

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