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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY; WESTLANDS WATER
DISTRICT,

Plaintiffs,

v.

SALLY JEWEL *et al.*,

Defendants.

and

PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS and
INSTITUTE FOR FISHERIES RESOURCES, non-
profit organizations,

Defendant-Intervenor Applicants.

)
) Case No. 13-1232-LJO-GSA
)
)

) PCFFA'S OPPOSITION TO MOTION
) FOR TEMPORARY RESTRAINING
) ORDER
)

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) Courtroom: TBD
) Hearing Date: TBD
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INTRODUCTION

Defendant-intervenors Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources (“PCFFA”) respectfully submit this opposition to plaintiffs’ motion for a preliminary injunction and temporary restraining order (“TRO motion”). The TRO motion should be denied. First, plaintiffs are unlikely to succeed on the merits. Their belief that the U.S. Bureau of Reclamation (“BOR”) lacks authority to implement the 2013 emergency flow regime is fundamentally mistaken. Section 3406(b)(23) of the 1992 Central Valley Project Improvement Act authorizes the BOR to undertake a comprehensive plan to protect Trinity River fisheries: it does not eliminate BOR’s long-standing obligation to undertake other measures to protect salmon in the lower Klamath River. With respect to NEPA, plaintiffs lack standing to pursue their claim that BOR should have performed an EIS, and even if they did, NEPA is inapplicable to BOR’s ongoing water management decisions.

Second, plaintiffs have failed to demonstrate that they will be irreparably harmed in the absence of an injunction. As the Supreme Court has emphasized, a plaintiff must demonstrate that irreparable harm is likely, not just possible. While plaintiffs TRMFR allege harm from less-than-complete water deliveries, such harm was not caused by the challenged action and will not be remedied by the requested injunction. BOR is under no obligation to provide the water to be used for flow augmentation to the plaintiffs or anyone else, nor is there even any reasonable hope that BOR would exercise its discretion to give plaintiffs that water if it was available.

Finally, the motion should be denied because granting it will significantly increase the risk of another environmentally and commercially devastating fish kill in the lower Klamath River—the very event that BOR’s plan seeks to avoid. As described more fully herein and in PCFFA’s intervention motion, a fish kill in 2002 caused by similar conditions as exist in 2013 had devastating impacts on the west coast commercial fishery. Granting the proposed injunction

1 would risk a reprise of this catastrophe, causing irreparable harm to communities that rely on the
2 sustainable harvest of salmon for their livelihoods.

3 BACKGROUND

4 The history of the government's efforts to recover the Trinity River and its salmon
5 species—nearly wiped out by the construction of the Trinity River Division (“TRD”) of the
6 Central Valley Project (“CVP”) in the 1960s—has been comprehensively discussed in previous
7 decisions of this Court and the Ninth Circuit. *See, e.g., Westlands Water Dist. v. U.S. Dep’t of*
8 *Interior*, 376 F.3d 853, 860-63 (9th Cir. 2004) (“The TRD radically altered the Trinity River
9 environment, destroying or degrading river habitats that supported once-abundant fish
10 populations”); *Westlands Water Dist. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1157, 1168-75
11 (E.D. Cal. 2002) (tracing history of TRD). CVP irrigators once received as much as 90% of the
12 Trinity Basin’s water supply for their own use. *Id.* Unsurprisingly, the once-mighty populations
13 of Trinity River salmon that sustained the coastal economy collapsed. Late 1970s salmon
14 catches averaged millions of pounds; but between 2005 and 2009, that number fell 98%.
15 Hasselman Ex. 1. Today a series of statutes and plans call for more balanced water management
16 and the protection and restoration of wildlife and other fisheries. *Westlands Water Dist.*, 376
17 F.3d at 860-61.

18
19
20 Efforts to recover the Trinity River have taken place within a broader setting of the
21 Klamath Basin as a whole, and the Klamath has seen its own share of controversy between
22 salmon and irrigators. *See, e.g., Pac. Coast Fed’n of Fishermen’s Ass’n v. Bureau of*
23 *Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001) (enjoining Klamath project operations in
24 order to protect salmon); *Kandra v. U.S.*, 145 F. Supp. 2d 1193, 1200-01 (D. Or. 2001) (rejecting
25 irrigator challenge to BOR water deliveries). In the context of efforts to recover Klamath Basin
26 salmonids, the singular event of the last two decades was the 2002 fish kill, an event that wiped
27

1 out a large part of an entire generation of Klamath fall chinook salmon and triggered coast-wide
2 declarations of emergency four years later. Spain Decl. ¶¶ 15-21. The commercial fishing fleet
3 was essentially shut down for hundreds of miles that year. *Id.* The fish kill caused hundreds of
4 millions of dollars in economic damages. *Id.*; see also Declaration of David Bitts, ¶¶ 9-10. The
5 2002 event also killed hundreds of ESA-listed coho salmon—a species that was already at 1% to
6 2% of historic abundance—in the lower Klamath. Spain Decl., Ex. 4 at 2.

7
8 Extensive analysis of the fish kill highlighted the confluence of two factors as the most
9 likely culprit in fostering conditions in which otherwise-common bacterial pathogens were
10 allowed to flourish to lethal extent: high adult returns and low, warm river flows. Spain Decl.,
11 ¶ 16. In 2003, 2004, and 2012, similar conditions to 2002 presented themselves. In each of
12 those three years, BOR responded with a late-summer flow augmentation program to increase
13 flows in the lower Klamath to reduce the threat of another fish kill. In each of those three years,
14 large adult returns of chinook passed through the lower Klamath without notable mortality.
15 BOR, Environmental Assessment on 2013 Lower Klamath River Late –Summer Flow
16 Augmentation from Lewiston Dam (Aug. 2013) (“EA”) at 1.

17
18 This year, fisheries managers expect one of the largest returns of chinook in decades at
19 the same time as drought year river conditions—warm, low flows—yet again threaten to make
20 the habitat inhospitable for those adults. Spain Dec., Ex. 9 at 2 (2013 returns anticipated at
21 271,000 adult fish, the second highest return on record). As it has done successfully three times
22 in the past, BOR proposes to use 62 thousand acre feet (“TAF”), and additional volumes if
23 certain conditions are triggered, to ameliorate this habitat crisis.¹ BOR’s decision was supported
24

25
26 ¹ Plaintiffs incorrectly state that the flow augmentation proposal will be 109 TAF, when that is
27 the maximum possible quantity that will only occur in the event of a disease outbreak. The EA

1 by state, tribal and federal fisheries managers, all of which agreed that the use of such flows were
2 the best and probably only available way to reduce the risk of another fish kill. The flows are
3 scheduled to commence on August 13, 2013.

4 STANDARD OF REVIEW

5 The Supreme Court has deemed a preliminary injunction to be “an extraordinary remedy
6 never awarded as of right.” *Winter v. NRDC*, 555 U.S. 7, 24 (2008). In order to obtain
7 preliminary injunctive relief, including a TRO, a plaintiff must show that: a) it is likely to
8 succeed on the merits; b) it is likely to suffer irreparable harm in the absence of relief; c) the
9 balance of equities tips in its favor; and d) an injunction is in the public interest. *Id.* at 20.
10 Overruling Ninth Circuit law to the contrary, the *Winter* majority affirmed that irreparable harm
11 has to be “likely” as opposed to just “possible.” *Id.* at 22; *see Alliance for the Wild Rockies v.*
12 *Cottrell*, 632 F.3d 1127 (9th Cir. 2011) (in light of *Winter*, without a showing of irreparable harm
13 in the first instance, no balancing of remaining factors is permitted). Injunctions must be
14 “narrowly tailored ... to remedy only the specific harms shown by the plaintiffs.” *Price v. City*
15 *of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004).

17 ARGUMENT

18 Plaintiffs fail each element of the Ninth Circuit’s test for preliminary injunctive relief.
19 They are unlikely to succeed on the merits, they have failed to show irreparable harm in the
20 absence of an injunction, and the balance of the equities and the public interest militate strongly
21 against the requested relief. Any one of these failings is a sufficient basis on which to reject
22 plaintiffs’ motion.
23

24
25
26 characterizes such emergency releases as “very unlikely.” EA at 6. The only amount currently
27 planned is 62 TAF.

1 I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

2 A. The 2013 Flow Plan Does Not Violate the CVPIA.

3 At the heart of plaintiffs' CVPIA argument lies a fundamental confusion: that CVPIA
4 § 3406(b)(23) imposes binding, inflexible constraints that restrict the BOR from taking any
5 action that affects the Trinity River, no matter its purpose. That belief is wrong. Section
6 3406(b)(23) authorizes the Secretary, among other things, to implement a flow recovery plan for
7 the purpose of restoring Trinity River salmon. The Trinity River Mainstem Fishery Restoration
8 plan ("TRMFR") was developed over many years of cooperation by many entities. It has
9 withstood close scrutiny by this Court and the Ninth Circuit. *See Westlands Water Dist.*, 376
10 F.3d at 878. BOR is continuing to implement that plan, as it should. *See Ex. 1 to Complaint*
11 (Record of Decision for TRMFR).
12

13 The 2013 flow proposal is completely separate from Interior's § 3406(b)(23) obligations
14 and the TRMFR. Rather, the 2013 emergency flows are being implemented to protect chiefly
15 Klamath River salmon in habitat downstream of the confluence with the Trinity River. *See EA*
16 at 10. Nothing in § 3406(b)(23) or the adopted plan to recover Trinity mainstem species limits
17 BOR's residual authority to implement measures to protect these salmon, including emergency
18 flow augmentation to prevent adverse conditions for returning adults. Indeed, such statutory
19 authority is explicit: Section 2 of the 1955 Act authorizes BOR to take "appropriate measures to
20 insure the preservation and propagation of fish and wildlife." P.L. 84-386, 69 Stat. 719
21 (Aug. 12, 1955). BOR relies upon this authority in its decision to augment flows for 2013. *EA*
22 at 2 (CVPIA "gives precedence to in-basin needs"). While the 1992 amendments to the CVP
23 authorizing legislation directed BOR to implement a Trinity mainstem fisheries recovery plan,
24 they neither explicitly nor implicitly repealed BOR's broader § 2 authority to take measures to
25 preserve and protect salmon in the Klamath Basin as a whole. *Id.* As the Ninth Circuit has
26
27

1 noted, BOR is entitled to some discretion in interpreting these statutes, which direct the agency
2 to meet multiple competing objectives. *Westland Water Dist. v. Firebaugh Canal*, 10 F.3d 667,
3 671 (9th Cir. 1993).²

4 The fact that § 3406(b)(23) of the 1992 Act is directed explicitly to the Trinity River
5 fishery—rather than the entire Klamath Basin—is demonstrated in the decision documents for
6 the TRMFR. The plan itself is plainly all about the Trinity River mainstem, not the entire basin.
7 *See Hasselman Decl.*, Ex. 2 at 1-10 (map of EIS area includes only Trinity Basin). Similarly, the
8 ROD for the TRMFR makes clear that the purpose was to protect and restore the Trinity River’s
9 anadromous fishery, not the entire Klamath Basin. ROD at 2 (attached as Exhibit 1 to plaintiffs’
10 complaint). In the EIS, BOR and other agencies considered the impacts of various flow
11 alternatives separately on salmon species in the Trinity River, the lower Klamath River, and the
12 Central Valley. *See Hasselman Ex. 6 at Table B-1.*

14 The EA, in contrast, makes abundantly clear that the purpose of this emergency flow
15 increase is to protect fall chinook salmon in the lower Klamath River, not the Trinity mainstem.
16 EA at 1-3. Flow levels in the lower Klamath are the product of far more than TRD operations
17 alone, as they are influenced by BOR’s Klamath Project as well as flows in a number of other
18 Klamath tributaries besides the Trinity.³ Accordingly, plaintiffs’ complaint (at TRO Memo. p.3)
19 that the TRMFR EIS didn’t evaluate flow augmentation in the lower Klamath is simply
20

21 ² Separately, the 1955 statute also directs BOR to provide “not less than 50,000 acre-feet” for
22 Humboldt County and downstream users. P.L. 84-386, § 2. In a letter to the Department of the
23 Interior, three U.S. representatives from the affected region argued that this provision is an
24 additional obligation imposed by law that has not been honored, and that supports the 2013 flow
25 proposal. *See Hasselman Decl.*, Ex. 4. Although the legal issue remains unresolved, the
26 existence of this provision supports PCFFA’s position that BOR has greater flexibility to provide
27 additional downstream water from the TRD than plaintiffs claim.

28 ³ BOR considered but rejected the alternative of using water from the upper Klamath Basin to
supplement flows this summer, finding such water was not available in light of competing needs.
EA at 8.

1 nonsensical: flow augmentation for the lower Klamath, which could come from the Klamath
2 Project and other sources besides TRD, was beyond the scope of that document. Hasselman
3 Decl. Ex. 2.

4 Notably, the use of significant quantities of supplemental water from the Trinity
5 Reservoir—above and beyond the flow regime laid out in the TRMFR—occurs every other year.
6 See EA at 5, 10 (discussing use of supplemental water to support tribal ceremony in lower
7 Trinity River). To PCFFA’s knowledge, plaintiffs have never challenged BOR’s authority to
8 make such additional water available for these other purposes. If BOR has authority to release
9 water for tribal ceremonial purposes, regardless of the flow schedule in the TRMFR, it has
10 authority to release water to prevent a fish kill in the lower Klamath.⁴

11
12 B. Plaintiffs Are Not Entitled to an Injunction Under NEPA.

13 Because NEPA does not provide a private right of action, plaintiffs must bring NEPA
14 claims under the Administrative Procedures Act (“APA”). *Nw Res. Info. Ctr. v. NMFS*, 56 F.3d
15 1060, 1066 (9th Cir. 1995). The APA requires that plaintiffs demonstrate that they are
16 “adversely affected or aggrieved ... within the meaning of a relevant statute.” 5 U.S.C. § 702.
17 To meet this requirement, a plaintiff “must allege that its injury is within the zone of interests
18 protected by NEPA.” *Nev. Land Ass’n v. U.S. Forest Serv.*, 8 F.2d 713, 716 (9th Cir. 1993). It is
19 well established that the purpose of NEPA is to protect the environment, not the economic
20

21 ⁴ Plaintiffs also claim that the Bureau is violating provisions of federal law requiring
22 modification of state water rights permits. TRO Memo at 12-13. This argument is also unlikely
23 to prevail. The State Water Resources Control Board confirmed on October 4, 2012 that a
24 “change in place of use is not required for Reclamation to release water stored in Trinity
25 Reservoir for fish and wildlife enhancement purposes downstream of the Trinity Dam.” See
26 Ex. 5 (emphasis added). As discussed further below, the Bureau has discretion to divert water
27 resources as necessary to comply with the CVPIA’s fish restoration goals. *Westland Water Dist.*
28 *v. U.S.*, 153 F. Supp. 2d 1133, 1144 (E.D. Cal. 2001); *Cent. Valley Water Agency v. U.S.*, 327 F.
Supp. 2d 1180, 1217 (E.D. Cal. 2004) (“The three subsections of CVPIA § 3406(b) all relate to
requirements that the [CVP] divert water so as to increase water supply in fishery areas...”).

1 interests of those adversely affected by agency decisions. *W. Radio Serv. v. Espy*, 79 F.3d 896,
2 902 (9th Cir. 1996); *Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979) (purely financial
3 interests are outside of NEPA’s zone of interests).

4 In *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-40 (9th Cir. 2005), the
5 Ninth Circuit reiterated the “long-standing rule” that plaintiffs that seek to promote purely
6 economic interests do not fall within NEPA’s zone of interests. In that case, the Ninth Circuit
7 rejected a challenge from a mining company to an environmental impact statement for a project
8 that affected its commercial interests. The court found that plaintiff was not interested in
9 bringing the case to protect the environment, but rather to advance its mining business. Citing a
10 long line of Ninth Circuit caselaw, the Court held that plaintiffs lacked standing to challenge the
11 EIS. *Id.*, citing *Ranchers Cattlemen Action Legal Fund v. U.S. Dep’t of Agric.*, 415 F.3d 1078,
12 1103-04 (9th Cir. 2005) (“economic injury alone will not support a claim under NEPA”); *Nev.*
13 *Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (“A plaintiff who asserts
14 purely economic injuries does not have standing to challenge an agency action under NEPA.”);
15 *see also Hurd Urban Dev. v. Fed. Highway Admin.*, 33 F. Supp. 2d 570, 573 (S.D. Tex. 1998)
16 (listing cases and concluding: “all NEPA claims based on economic harm must be dismissed for
17 lack of jurisdiction”). This is true even where a plaintiff argues that its business is “intertwined”
18 with the environment. *Am. Indep. Mines & Minerals Co. v. U.S. Dep’t of Agric.*, 494 Fed. Appx.
19 724 (9th Cir. 2012) (mining companies lack standing because their environmental-related
20 concerns “are undertaken only as part of the pursuit of [plaintiffs’] economic interests in
21 mining...”).

24 Accordingly, plaintiffs do not have standing to pursue their NEPA claims that BOR
25 should have prepared a full EIS before implementing the 2013 flow plan. Plaintiffs are entities
26

1 devoted to distributing water from the CVP, primarily for agricultural uses. *See* Complaint, at
2 ¶¶ 15-16. As their declarations make abundantly clear, their interest in this case is not in the
3 protection of the environment. Rather, their goal is to obtain the 2013 flow augmentation water
4 for their own commercial purposes. Plaintiffs' complaint that the 2013 flow proposal will harm
5 western pond turtles and yellow-legged frogs border on the absurd: neither they nor their
6 members have shown any stated interest in the protection of these species or other environmental
7 values. The many declarations filed by plaintiffs do not contain even a single mention that
8 plaintiffs or their members are concerned about the fate of such species. To the contrary,
9 plaintiffs have been unrelenting foes of measures to protect the environment in the Klamath and
10 Central Valley where such measures interfere with their commercial interests. *See Westlands*
11 *Water Dist.*, 376 F.3d at 853 (rejecting most challenges to TRFRP); *San Luis & Delta-Mendota*
12 *Water Auth. v. Salazar*, 666 F. Supp. 2d 1137 (E.D. Cal. 2009) (challenges to CVP ESA
13 protections); *In re Consol. Salmon Cases*, 719 F. Supp. 2d 802 (E.D. Cal. 2010) (challenges to
14 CVP biological opinions). Because plaintiffs are not within NEPA's zone of interests, this Court
15 has no jurisdiction over their NEPA claims.
16

17 Even if plaintiffs had standing, they would be unlikely to prevail on the merits because
18 NEPA does not even apply in the first instance. Because NEPA does not apply retroactively, it
19 only applies to the ongoing operations of a pre-NEPA project where the agency plans to depart
20 so significantly from historic parameters that such change itself constitutes a "major federal
21 action." *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234-35 (9th Cir.
22 1990); *Kandra*, 145 F. Supp. 2d at 1204. The action contemplated here does not constitute major
23 federal action because it is well within historic parameters. *Id.* BOR has provided additional
24 water to protect lower Klamath River species in at least three prior years, and provides
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1 supplemental water from the TRD to meet other goals all the time. EA at 1; *see also id.* at 3
2 (“The release of flows from Lewiston Dam would be within the normal release flow range and
3 water levels along the Trinity River and would not exceed the historic range of flows in the
4 Trinity River.”).

5 As such, BOR is simply proposing to operate the TRD (which predates NEPA) without a
6 major change requiring NEPA scrutiny—precisely the situation the Ninth Circuit deemed
7 exempt from NEPA in *Upper Snake River*, 921 F.2d at 234. Similarly, in *Kandra*, a case with
8 many similarities to this one, the district court rejected the argument that a change in Klamath
9 Project operations required an EIS, noting that BOR’s change in operations was required in order
10 to meet its tribal trust and ESA obligations—and hence NEPA simply did not apply. 145 F.
11 Supp. 2d at 1204-05. The *Kandra* court also held that since conducting a full EIS on an annual
12 operation plan (one that could only be developed shortly before implementation) was effectively
13 impossible, an EIS would not be required. “It makes no sense to impose upon Reclamation a
14 requirement it can never fulfill.” *Id.* at 1205.

15
16 Finally, even if plaintiffs had standing, and even if they could show a violation of
17 NEPA—neither of which is true—that does not mean they are entitled to the extraordinary
18 remedy of enjoining the 2013 emergency flows. As the Supreme Court has made clear, even
19 where a violation of the law has been established, a court must still balance the equities before
20 issuing an injunction. *Amoco Prod. Co. v. Village of Gambrell*, 480 U.S. 531, 542 (1987). And
21 in the Ninth Circuit, courts must be particularly cautious where NEPA is invoked to block
22 actions undertaken for the protection of the environment. In *Am. Motorcyclist Ass’n v. Watt*,
23 714 F.2d 962 (9th Cir. 1983), the Ninth Circuit agreed that no injunction was appropriate—
24 despite a substantive violation of NEPA—where the requested injunction would do more
25
26

1 environmental harm than good. *Id.* at 966. Its holding was hardly unique. *See Save Our*
2 *Ecosystems v. Clark*, 747 F.2d 1240, 1250 n.16 (9th Cir. 1984) (NEPA injunction should not be
3 issued where “enjoining government action allegedly in violation of NEPA might actually
4 jeopardize natural resources.”); *Alpine Lakes Prot. Soc’y v. Schlapfer*, 518 F.2d 1089, 1090 (9th
5 Cir. 1975) (denying injunctive relief in NEPA case where more harm could occur to forest from
6 disease if injunction granted). The Ninth Circuit’s approach is consistent with that of other
7 circuits, which are generally “reluctant to make NEPA more of an obstructionist tactic to prevent
8 environment-enhancing action than it may already have become.” *Pac. Legal Found. v. Andrus*,
9 657 F.2d 829, 838 (6th Cir. 1981).

11 Such caution is warranted here. The challenged action is exclusively for the protection of
12 salmon in the lower Klamath River. It is universally supported by state and federal fisheries
13 managers, tribes, and environmental groups. Plaintiffs seek to block it, complaining that BOR
14 failed to evaluate the impacts of such action on turtles, frogs, and other environmental values, but
15 really are solely concerned with using that water for their own commercial purposes. Under
16 Ninth Circuit law, that is not an appropriate basis for an injunction under NEPA.

17 II. PLAINTIFFS WILL NOT BE IRREPARABLY HARMED IN THE ABSENCE OF A
18 TRO.

19 PCFFA does not dispute that drought conditions have had adverse economic effects in
20 the Central Valley—commercial fishermen on the west coast are regrettably familiar with the
21 dislocation experienced by some communities in the Central Valley. Plainly, there is not enough
22 water to go around during this unusually dry year. However, at the heart of plaintiffs’ motion
23 lies a fundamental flaw: their assumption that, if enjoined, BOR will exercise its discretion to
24 divert the proposed 2013 flow augmentation water out of the basin and deliver it to the plaintiffs,
25 either now or in the future. This assumption is unwarranted for several reasons.
26

1 First, plaintiffs cite to nothing in the law that requires BOR to provide the 2013 flow
2 augmentation water to any CVP contractor, let alone them in particular. BOR is directed by law
3 to manage its projects to meet multiple objectives, including satisfying contracts and providing
4 water for environmental and tribal needs. It is well established that the needs of salmon species
5 and tribal treaty obligations are superior to the contract rights of irrigators. *See, e.g., Klamath*
6 *Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir.), *cert denied*, 121 S. Ct. 44
7 (2000); *O'Neill v. U.S.*, 50 F.3d 677, 686 (9th Cir. 1995) (CVPIA “marks a shift in reclamation
8 law modifying the priority of water uses”); *Kandra v. U.S.*, 145 F. Supp. 2d at 1201 (irrigators
9 “cannot assert breach of contract based on [BOR’s] allocation of water to protect” fish).⁵ Indeed,
10 plaintiffs’ declarants and briefs assert only that BOR “could” make flow augmentation volumes
11 available to plaintiffs. *See, e.g.,* Snow Decl. ¶ 4(a), 7 (TRD water conveyed to Central Valley “is
12 potentially available for delivery to the Authority’s members through CVP facilities, among
13 other users”) (emphasis added); TRO Motion at 8.

15 It is equally plausible, of course, that BOR could decline to exercise its discretion in this
16 manner, reserving the 2013 flow augmentation volumes for other purposes, including its legal
17 obligations to protect fisheries. *Westland Water Dist. v. U.S.*, 153 F. Supp. 2d 1133, 1144 (E.D.
18 Cal. 2001) (BOR has “contractual authority and administrative discretion over how it provides
19 water service among the CVP’s water and power-users, and how it fixes priorities among
20 them.”). In fact, BOR has already stated exactly that: if the 2013 flow augmentation proposal
21 were not implemented, that water would remain in the reservoir and not be used for additional
22 agricultural allocations in 2013. EA at 13. As the Court in *Kandra* recognized, even if the 2013

24 _____
25 ⁵ Plaintiffs cite selectively to a provision in a water service contract requiring BOR to make “all
26 reasonable efforts” to optimize deliveries. TRO Memo. at 8, citing Ex. 6 to Ackroyd Decl., p.31.
27 In fact, that provision is explicitly subject to other requirements of federal law, and BOR’s other
28 contract obligations.

1 flow decision were legally flawed, BOR has superior obligations to protect tribal trust resources
2 and endangered species that preclude the use of those flows for irrigation. *Kandra*, 145 F. Supp.
3 2d at 1205-06.

4 Similarly, plaintiffs presume that they are the only parties who hold contracts with the
5 government for Central Valley water and that, hence, if the injunction were issued, the 2013 flow
6 augmentation would be directed to them and them alone. But of course this is not the case—
7 there are literally hundreds of parties who hold contractual entitlement to CVP water. *See*
8 Hasselman Decl., Ex. 7 (list of CVP contractors); *Westland Water Dist. v. U.S.*, 153 F. Supp. 2d
9 1133, 1172 (E.D. Cal. 2001). Indeed, some of those parties stand closer to the front of the line
10 than plaintiffs, e.g., hold senior water rights or claims to those of plaintiffs. *Id.* at 1178;
11 Hasselman Decl. Ex. 8 at 3-57 (EIS discussing how different water rights holders are subject to
12 different levels of curtailment: plaintiffs belong to the lowest priority class, with up to 100%
13 curtailment possible). Thus, even if the 2013 flow augmentation water was pumped out of the
14 basin to the CVP for other uses, it is quite possible that plaintiffs would receive none of it.

15
16 Finally, whether 2013 flow augmentation will affect plaintiffs next year is simply
17 unknowable. EA at 14 (“it is not possible to meaningfully evaluate how a potential slightly
18 lower Trinity Reservoir storage in 2014 may exacerbate system-wide supply conditions in the
19 future”). As plaintiffs concede, a wet year in 2014 would mean no impact at all. 2014 water
20 allocations will be made months from now, depending on a complex formula involving many
21 different parameters, and affecting many different users of the system.⁶ Plaintiffs assume that 62
22 TAF of water used for flow augmentation in 2013 means 62 TAF less allocation for them and
23 them alone in 2014. That is not borne out by the record. EA at 23 (“Since the CVP facilities are
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25
26 ⁶ For example, if BOR is required to implement “safety of dams” releases this winter, as
27 occurred last winter, the effect of the 2013 proposal would be effectively zero. EA at 10, 13, 15.

1 operated in a coordinated fashion, and annual water allocations to contractors are determined by
2 supply conditions throughout the system, it is unlikely that any allocations to individual
3 contractors would be reduced in the future due to implementation of the proposed action.”)
4 (emphasis added).

5 In short, plaintiffs demonstrate only that an injunction on the 2013 flow augmentation
6 plan might theoretically benefit them—if BOR elects to make that water available to CVP
7 irrigators in 2013 or 2014, if 2014 water year conditions warrant, and if superior water rights
8 holders and/or other system users don’t access the water first. Such a speculative showing is a
9 far cry from what is required for preliminary injunctive relief. *Caribbean Marine Servs. Co. v.*
10 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Nw Env’tl. Def. Ctr. v. U.S. Army Corps of Eng’rs*,
11 817 F. Supp. 2d 1290, 1314 (D. Or. 2011) (“Speculative harm resulting from undefined future
12 plans does not amount to irreparable harm.”).

13 Because BOR is not taking away water that would otherwise be theirs, the use of the
14 2013 flow augmentation will not “irreparably harm” plaintiffs. While plainly they would prefer
15 that the 2013 flow augmentation volumes be given to them, rather than for the protection of the
16 species, that is not an adequate basis on which to seek preliminary injunctive relief.
17

18 III. GRANTING PLAINTIFFS’ TRO REQUEST COULD TRIGGER ANOTHER
19 FISHERIES DISASTER IN THE LOWER KLAMATH.

20 Finally, this Court is also required to consider the balance of the equities and the public
21 interest in considering a request for a TRO or preliminary injunction. *See, e.g., Kandra v. U.S.*,
22 145 F. Supp. 2d at 1200-01 (even where BOR water curtailments will cause “severe economic
23 hardship” to irrigators, balance of hardships does not tip in their favor in light of harm to tribes,
24 commercial fishermen, and endangered species). Even if plaintiffs could show a violation of
25 NEPA (which they can’t) and a likelihood of irreparable harm (which they haven’t), an
26

1 injunction should not issue because it would cause irreparable harm to the environment,
2 economy, and the public interest. In 2002, a devastating fish kill in the lower Klamath River
3 wiped out a majority of the returning fall chinook run, as well as ESA-listed coho and other
4 species. That fish kill triggered serious fishing restrictions between 2005 and 2007, including an
5 all-but-complete closure for hundreds of miles of coast in 2006. Spain Decl., ¶¶ 15-21; Bitts
6 Decl. ¶¶ 9-10. These closures had devastating economic impacts on commercial fishing families
7 on the west coast. *Id.*; *see also* Hasselman Decl. Ex 1 (“This precipitous decline has brought the
8 shuttering of commercial processing facilities, the shuttering of onshore jobs, an ever-dwindling
9 fishing fleet, and pain and suffering in the families in our fishing communities.”); EA at 21 (a
10 2013 fish kill similar to 2002 “would be devastating for the tribal trust fisheries in the Klamath
11 and Trinity Rivers”).

13 The very purpose of the 2013 flow augmentation program is to avoid conditions which
14 are alarmingly similar to those in 2002: a confluence of high anticipated returns of adult Klamath
15 chinook (a product of good ocean conditions) and unusually low instream flows (a product of a
16 very dry year in the basin). Indeed, fisheries managers predict that the return of adults to the
17 Klamath Basin will be one of the highest on record, even as flows drop to critical levels and
18 temperatures spike. Conditions are setting up to be even worse for returning chinook than they
19 were in 2002.

21 Plaintiffs seek to denigrate the science behind BOR’s conclusions, asserting that there is
22 no definitive proof that 2013 augmentation flows are necessary to prevent another fish kill in the
23 lower Klamath. *See* Hanson Decl. But no amount of studies or evaluation could ever provide
24 absolute certainty that flow augmentation will avoid another disaster in the lower Klamath. EA
25 at 18. Rather, the question is one of best available science and sound resource management in
26

1 light of the risks. Virtually all of the evidence before the agency supports BOR's proposal. The
2 proposal was developed in consultation with federal advisory groups established through the
3 TRMFR. EA at 24. The National Marine Fisheries Service ("NMFS"), the expert federal
4 wildlife agency charged with protecting salmon, was involved in the recommendations on which
5 the plan is based. *Id.* at 25. Tribal fisheries agencies and intergovernmental fisheries managers
6 all have weighed in with support for the 2013 flow proposal; for example, the Pacific Fishery
7 Management Council ("PFMC") congratulated BOR on the 2012 flow augmentation plan,
8 calling it a "very successful example of proactive conservation," and urged BOR to implement a
9 similar plan for 2013 in light of conditions. Spain Ex. 9 at 1. The PFMC observed that, "The
10 evidence is compelling that lower-than-average hydrology and greater-than-average fish
11 densities may once again compromise the safe passage of adult fall chinook in 2013." *Id.* at 2.
12 The Yurok Tribe, which has extensive scientific expertise in salmon biology, called the proposal
13 "crucial" for the protection of salmon and recommended even higher flows than proposed here.
14 Hasselman Ex. 3. Plaintiffs bear the burden of showing an entitlement to preliminary injunctive
15 relief, and their generalized complaints about the lack of certainty that a fish kill will occur
16 without the 2013 flow augmentation fail to meet that burden.⁷

19 CONCLUSION

20 Plainly, plaintiffs wish that they could obtain for their own uses the water BOR will use
21 to protect salmon in the lower Klamath. That wish is not an adequate basis on which to ask this
22 Court for the extraordinary remedy of preliminary injunctive relief. *Kandra*, 145 F. Supp. 2d at
23 1211 ("plaintiffs request that this court stand in the place of [BOR] as the operator of the Project

24 _____
25 ⁷ Plaintiffs' consultant agrees generally that the best available science confirms a relationship
26 between low summer flows and an increased risk of fish kill, and observes that several experts
27 have recommended late summer flushing flows to reduce the risk to chinook. Hanson Decl.,
28 ¶¶ 19-20.

1 and reallocate Project water in a manner that is inconsistent with governing law”). Plaintiffs’
2 requested injunction could trigger a reprise of the 2002 fish kill and 2006 fisheries catastrophe,
3 with consequent irreparable harm to commercial fishermen represented by PCFFA.

4 Accordingly, PCFFA respectfully requests that the TRO motion be denied in its entirety.

5 Respectfully submitted this 13th day of August, 2013.

6
7
8 /s/ Trent W. Orr

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