

1 ROBERT G. DREHER  
2 Acting Assistant Attorney General  
3 U.S. Department of Justice  
4 Environment and Natural Resources Division

5 ANNA K. STIMMEL (NC Bar #37770)  
6 Trial Attorney  
7 Environment and Natural Resources Division  
8 Natural Resources Section  
9 P.O. Box 7611  
10 Washington D.C. 20044  
11 Tel: 202-305-3895  
12 Fax: 202-305-0506  
13 anna.stimmel@usdoj.gov

14 *Counsel for Federal Defendants*

15 UNITED STATES DISTRICT COURT  
16 EASTERN DISTRICT OF CALIFORNIA

17 SAN LUIS & DELTA-MENDOTA WATER  
18 AUTHORITY and WESTLANDS WATER  
19 DISTRICT,

20 Plaintiffs,

21 v.

22 SALLY JEWELL, as Secretary of the U.S.  
23 Department of the Interior; U.S.  
24 DEPARTMENT OF THE INTERIOR; U.S.  
25 BUREAU OF RECLAMATION; MICHAEL L.  
26 CONNER, as Commissioner, Bureau of  
27 Reclamation, U.S. Department of the Interior;  
28 and DAVID MURILLO, as Regional Director,  
Mid-Pacific Region, Bureau of Reclamation,  
U.S. Department of the Interior,

Defendants.

CASE NO. 1:13-cv-1232-LJO-GSA

**FEDERAL DEFENDANTS’  
OPPOSITION TO PLAINTIFFS’  
MOTIONS FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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**I. INTRODUCTION**

1  
2 In 2002, a massive die-off of fall-run Chinook and other salmonids occurred on the lower  
3 Klamath River. A large returning run of fish, low flow conditions, and poor water quality led to  
4 the crowding of fish in pools, which in turn created conditions that allowed disease spread  
5 rapidly. Some 34,000 salmonids died according to conservative estimates. This year, the lower  
6 Klamath River faces similar conditions: low flows, poor water quality, and an estimated  
7 population of returning fall-run Chinook that is significantly larger than the returning run of  
8 2002. At the request of the Yurok and Hoopa Valley Tribes, who hold fishing rights on the  
9 Klamath and Trinity Rivers and who depend on fall-run Chinook for subsistence, commercial  
10 and ceremonial purposes, and after careful consideration under the National Environmental  
11 Policy Act, the Bureau of Reclamation (“Reclamation”) decided on August 6, 2013 to make  
12 supplemental releases of Trinity River water to increase flow in the lower Klamath River  
13 between the middle of August and the end of September for the purpose of avoiding, or reducing,  
14 the impact of a fish die-off such as occurred in 2002.  
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18 Plaintiffs, who are Reclamation contractors on the west side of the San Joaquin Valley,  
19 seek to enjoin the Federal Defendants from making these supplemental releases of water from  
20 Trinity and Lewiston Reservoirs to reduce the likelihood of a disease outbreak among fall-run  
21 Chinook salmon and thereby avoid another large scale fish die-off. They allege that (1)  
22 Reclamation does not have the authority to make the additional releases in August and September;  
23 (2) that Reclamation was required to get approval from the State Water Resources Control Board to  
24 change the place of use of water from the Trinity River; and (3) that Reclamation was required to  
25 prepare an EIS regarding its decision to make the additional releases. However, Plaintiffs have not  
26 established a likelihood that they will succeed on the merits of any of their claims, nor have they  
27  
28



1 demonstrated the existence of a serious legal issue regarding the Federal Defendants' compliance  
2 with the governing statutes.

3 For the reasons contained in this memorandum, the Environmental Assessment: 2013  
4 Lower Klamath River Late-Summer Flow Augmentation from Lewiston Dam, Bureau of  
5 Reclamation, EA-13-07-NCAO (August 2013) ("EA") (Doc. 25-3), the related Finding of No  
6 Significant Impact: 2013 Lower Klamath River Late-Summer Flow Augmentation from  
7 Lewiston Dam, Bureau of Reclamation, FONSI 13-07 NCAO (August 2013) ("FONSI") (Doc.  
8 25-7), and the declarations and exhibits filed contemporaneously with this memorandum, the  
9 Court should deny the relief requested by Plaintiffs so that the Reclamation may proceed with  
10 the planned releases. The EA and FONSI, prepared in compliance with the National  
11 Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, and other applicable law, approved  
12 an action designed to reduce the likelihood or severity of a disease outbreak among fall-run  
13 Chinook salmon that could lead to a large scale die-off. Reclamation has the authority to take  
14 this action, and as is evident from the EA, FONSI, declarations, and other evidence submitted  
15 with this memorandum, Reclamation took a hard look at the environmental consequences of the  
16 action and reasonably concluded that the action would not be likely to cause a significant impact  
17 on the human environment.

18  
19 Further, Plaintiffs have not proven that they are likely to suffer irreparable harm in the  
20 absence of an injunction. As shown below, granting an injunction would result in immediate and  
21 irreparable injury to the Federal Defendants' and the public's interests, including a significant  
22 risk of harm to fall-run Chinook salmon in the Klamath and Trinity Rivers and, of special  
23 concern, the frustration of the government's trust responsibility to the Hoopa Valley and Yurok  
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1 Tribes to restore their fisheries. Thus, the balance of equities and public interest here favor  
2 denying a temporary restraining order and preliminary injunction.

## 3 II. LEGAL AND FACTUAL BACKGROUND

### 4 A. Factual Background

5 The Trinity River Division (“TRD”), one component of the Central Valley Project  
6 (“CVP”), impounds and stores water from the Trinity River at Trinity and Lewiston dams and  
7 their associated reservoirs, and also includes Trinity and Lewiston powerplants, Clear Creek  
8 tunnel (through which the TRD diverts Trinity Basin water to the Sacramento Basin and the  
9 Central Valley), Judge Francis Carr powerhouse, Whiskeytown dam and lake, Spring Creek  
10 tunnel and powerplant, Spring Creek debris dam and reservoir, and related pumping and  
11 distribution facilities. *See Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 860-  
12 861 (9th Cir. 2004). The Trinity River is the largest tributary to the Klamath River; its  
13 confluence lies at Weitchpec near the eastern end of the Yurok Reservation, approximately forty-  
14 four miles upstream of the mouth of the Klamath River. *Id.*

15 The Klamath River and its tributaries provide spawning and rearing habitat to substantial  
16 runs of anadromous fish, including Chinook salmon, Coho salmon, and steelhead. *Id.* Each of  
17 these populations requires varied water conditions, including depth, velocity, and temperatures,  
18 at different stages throughout their lives. *Id.* at 862. Depending on the species, a juvenile fish  
19 will remain in the river for a few months to a few years before its size, water temperatures, flow,  
20 and the daylight period trigger its migration downriver to the ocean. U.S. Fish and Wildlife  
21 Service, *Trinity River Flow Evaluation – Final Report* 16 (1999), available at  
22 <http://odp.trrp.net/Data/Documents/Details.aspx?document=226>. After three to six years in the  
23 ocean, depending on the species, the fish will return to the mouth of the Klamath, and begin its  
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1 migration back upriver to its spawning grounds, either on the mainstem of the Klamath or in  
2 other tributaries including the Trinity River. *Id.* at 18. The construction of dams on the Trinity  
3 River blocked access by salmon and steelhead to 109 miles of upriver habitat and significantly  
4 altered river flow and gravel conditions in ways that degraded habitat for anadromous fish.  
5  
6 *Westlands*, 376 F.3d at 862.

7 Congress authorized construction of the TRD in 1955 with the Trinity River Division  
8 Central Valley Project Act of 1955 (“1955 Act”), Pub. L. No. 84-386, 69 Stat. 719 (1955),  
9 concluding that it was possible to divert water from the Trinity River Basin to the Central Valley  
10 to supply irrigators and generate power “without harming the fishery of the Trinity and Klamath  
11 Rivers.” *Westlands*, 376 F.3d at 861. In Section 2 of the 1995 Act, however, Congress limited  
12 the extent of integration and coordination of the TRD with the CVP, providing that the Secretary  
13 was “authorized and directed to adopt appropriate measures to insure the preservation and  
14 propagation of fish and wildlife.” 1955 Act, 69 Stat. 719. Interior Solicitor Krulitz later  
15 interpreted the provisions of the 1955 Act and its legislative history and concluded that Section 2  
16 requires that the instream flow needs of the Trinity Basin must be met first prior to exporting  
17 water to the Central Valley. Memorandum from the Solicitor to Assistant Secretary – Land and  
18 Water Resources, *Proposed Contract with Grasslands Water District* (December 7, 1979). In  
19 spite of the requirement that the Secretary “insure the preservation and propagation of fish and  
20 wildlife,” in the thirty years following its construction, the TRD diverted an average of 68  
21 percent of the Trinity River’s flows to the CVP, imposing “what was essentially extreme drought  
22 conditions” on the Trinity River’s fish and wildlife populations.<sup>1</sup> *Westlands*, 376 F.3d at 862.  
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28 <sup>1</sup> Over the first ten years the average diversion rate of flows to the Central Valley was 68 percent.  
*Westlands*, 376 F.3d at 861.

1 In 1981, the Secretary of the Interior (“Secretary”) issued a decision initiating the Trinity  
2 River Flow Evaluation Study (“TRFES”), a scientific evaluation to determine appropriate flows  
3 and other measures to restore the Trinity River’s fishery. Secretarial Issue Document, Trinity  
4 River Fishery Mitigation (Jan. 14, 1981) (SID); *see also* ROD at 6. In making his decision, the  
5 Secretary stated:  
6

7 [T]he [Hoopa] and Yurok Indians have rights to fish from the Trinity and Klamath Rivers  
8 and to adequate water to make their fishing rights meaningful. These rights are tribal  
9 assets which the Secretary, as trustee, has an obligation to manage for the benefit of the  
10 tribes. The Secretary may not abrogate these rights even if the benefit to a portion of the  
11 public from such an abrogation would be greater than the loss to the Indians.

12 SID at 3. The decision concluded that the Secretary’s trust responsibility to the Hoopas and  
13 Yuroks, combined with applicable federal laws, required the “restoration of the river’s salmon  
14 and steelhead resources to pre-project levels.” *Id.* at 15.

15 Congress adopted this restoration goal in the 1984 Trinity River Basin Fish and Wildlife  
16 Management Act (“1984 Act”), Pub. L. No. 98-541, 98 Stat. 2721 (1984). The Act directed the  
17 Secretary to implement a basin-wide management program “designed to restore the fish and  
18 wildlife populations . . . to the levels approximating those which existed immediately before the  
19 start of construction [of the TRD] and to maintain such levels.” *Id.* at § 2. That management  
20 program was to include rehabilitation of fish habitats, the establishment of monitoring  
21 procedures, and “[s]uch other activities as the Secretary determin[ed] to be necessary to achieve  
22 the long-term goal of the program.” *Id.*

23  
24 Congress later amended the 1984 Act and extended appropriations for an additional three  
25 years. Trinity River Basin Fish and Wildlife Management Act of 1996, Pub. L. No. 104-143, 110  
26 Stat. 1338 (1996) (“1996 Act”). In the 1996 Act, Congress specified that the Secretary should  
27 direct activities at the Trinity River fish hatchery with the goal of “best service[ing] its purpose  
28

1 of mitigation of fish habitat loss above Lewiston Dam while not impairing efforts to restore and  
2 maintain naturally reproducing anadromous fish stocks within the basin.” *Id.* § 3(c).

3           In 1992, Congress confirmed its support for the development of a program to restore the  
4 fishery in the Central Valley Project Improvement Act, Pub. L. No. 102-575, §§3401-12, 106  
5 Stat. 4600, 4706-31 (1992) (“CVPIA”). *See Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986,  
6 988 (9th Cir. 2005). The CVPIA listed among its purposes the need “to protect, restore, and  
7 enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River Basins”  
8 and the need “to address impacts of the Central Valley Project on fish, wildlife, and associated  
9 habitats.” Sections 3402(a) and (b) of the CVPIA directed the Secretary to provide through the TRD a  
10 minimum of 340,000 acre feet (“af”) per year of releases to the Trinity River for the years 1992-1996.  
11 The Act further directed the Secretary, by September 1996, to complete a study (the TRFES)  
12 “regarding permanent instream fishery flow requirements and [TRD] operating criteria and procedures  
13 for the restoration and maintenance of the Trinity River fishery” after consultation with the Hoopa  
14 Valley Tribe, and if the Secretary and Tribe concur in these recommendations, to implement any  
15 increase in instream flow releases recommended in the TRFES. CVPIA, § 3406(b)(23).

16           Following the completion of the TRFES, the Department of the Interior (“Interior”)  
17 initiated the environmental review process to develop and assess alternatives aimed at restoring  
18 the Trinity River mainstem conditions to support fishery resources in the Trinity River. *See* 59  
19 Fed. Reg. 25141. As part of this process, Interior prepared a draft EIS which examined the  
20 affected environment and the environmental consequences for numerous alternatives. Following  
21 a public comment period, the EIS was finalized and the Secretary issued a Record of Decision in  
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1 December, 2000, with which the Hoopa Valley Tribe concurred.<sup>2</sup> Record of Decision: Trinity  
2 River Mainstem Fishery Restoration (Dec. 19, 2000) [hereafter “ROD”] (Doc. 25-1).

3         The ROD adopted the course of action that “best me[t] the statutory and trust obligations  
4 of the Department [of the Interior] to restore and maintain the Trinity River’s anadromous  
5 fishery resources, based on the best scientific information, while also continuing to provide water  
6 supplies for beneficial uses and power generation as a function of [the CVP].” ROD, at 2.

7  
8 Components of the action included “[v]ariable annual instream flows for the Trinity River from  
9 the TRD based on forecasted hydrology for the Trinity Basin as of April 1st of each year,” as  
10 well as actions to restore the watershed and physical channel conditions. To accomplish that  
11 goal, the ROD set flow levels for the mainstem of the Trinity River based on the forecasted  
12 hydrology of each year.<sup>3</sup> *Id.* The ROD allows for “adjustments to be made to certain elements  
13 of the fishery restoration plan,” including the daily schedule for water releases, “but the annual  
14 flow volumes... may not be changed.” *Id.* The ROD made clear that its focus was on the  
15 mainstem of the Trinity River, and that it did not preclude Interior from taking other actions to  
16 benefit the fisheries in the lower Klamath River. ROD at 15 (“[N]othing in this ROD is intended  
17 to preclude watershed restoration and monitoring, provided funding is available, below the  
18 confluence of the Trinity and Klamath Rivers. Because the TRFES and ROD focus on the  
19 Trinity River mainstem and Trinity Basin, watershed restoration and monitoring that benefit  
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25 <sup>2</sup> The ROD in its entirety went into effect in 2004 following the Ninth Circuit’s reversal of an injunction  
26 imposed by the district court. *See Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853 (9th Cir.  
2004).

27 <sup>3</sup> The recommendation for a “permanent increase of flows depending on the water-year class” was  
28 adopted from the Trinity River Flow Evaluation Study, which the FWS and Hoopa Valley Tribe  
collaborated in writing. *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 863 (9th Cir.  
2004).

1 Trinity River fisheries below the confluence of the Trinity and Klamath Rivers may be  
2 considered by the Trinity Management Council.”).

3 In the fall of 2002, an unprecedented fish die-off occurred in the lower Klamath River  
4 and within the Yurok Reservation. 2012 EA, at 1. Federal, tribal, and state biologists concluded  
5 that pathogens were the primary cause and that warm water and low flow conditions, combined  
6 with high fish density, contributed to the outbreak. *Id.* The United States Fish and Wildlife  
7 Service estimated that the outbreak killed over 34,000 fish, mainly fall run Chinook, but noted  
8 that its estimate was a conservative one. Cal. Dep’t of Fish & Game, *September 2002 Klamath*  
9 *River Fish-Kill: Final Analysis of Contributing Factors and Impacts 1* (2004), available at  
10 <http://odp.trrp.net/Data/Documents/Details.aspx?document=298>. “[A]ctual losses may have been  
11 more than double that number.” *Id.* at III. Not only did this die-off affect the long-term viability  
12 of fish populations because of the loss of a significant portion of 3 year-old and 4 year-old fish  
13 capable of spawning, the fish die-off also affected tribal and sport fishermen in the Klamath  
14 Basin who lost the opportunity to harvest 4,000 to 14,600 fall-run Chinook salmon. *Id.* at 154.

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18 In 2003, 2004, and 2012, low flow conditions and projected large returning runs of fall-  
19 run Chinook salmon again coincided, prompting concerns that another die-off could occur.<sup>4</sup> EA  
20 at 1. In the late summer of each of these years, Reclamation released supplemental water from  
21 Trinity Reservoir, to increase flow volume and velocity and reduce water temperature, in order to  
22 reduce the likelihood of another disease outbreak. *Id.* “While documentation of the effectiveness  
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28 <sup>4</sup> The 2012 EA described by way of background actions that occurred during the ongoing litigation over  
the execution of the ROD and implementation of the Trinity River Restoration Program. During appeal  
of the trial court’s ruling in favor of Westlands Water District, Reclamation was operating the Trinity  
River Division facilities pursuant to the court’s ongoing jurisdiction. In responding to the United States’  
motion for leave to release additional flows in 2003 to avert a die off, Judge Oliver Wanger directed  
Reclamation to determine what actions would be necessary to “assure against the risk of fish losses that  
occurred late in the 2002 season,” and issued a ruling allowing Reclamation to use an additional fifty  
thousand acre-feet at its reasonable discretion to prevent a recurrence. 2012 EA at 2.

1 of these events is limited, general observations were that implementation of the sustained higher  
2 releases from August to early September in each year coincided with no significant disease or  
3 adult mortalities.” *Id.* The 2012 Final EA and FONSI described the plan to release up to ninety-  
4 two thousand acre-feet of additional water from the reservoir. *See* Final Environmental  
5 Assessment: 2012 Lower Klamath River Late Summer Flow Augmentation, EA-NC-12-05 (Aug.  
6 2010) (“2012 EA”); Finding of No Significant Impact, 2012 Lower Klamath River Late Summer  
7 Flow Augmentation, FONSI-NC-12-05 (Aug. 2012). The total augmentation release for that  
8 year was 39,000 acre feet. EA at 1.  
9  
10

11 Recognizing that fall 2013 flow conditions and salmon-run size will be substantially  
12 similar to those in 2012, the Hoopa Valley and Yurok Tribes requested that Reclamation again  
13 augment late summer flows to the lower Klamath River. *See* Letter from Byron Nelson, Jr. Vice  
14 Chairman, Hoopa Valley Tribe, to Ken Salazar, Secretary of the Interior, U.S. Dep’t of the  
15 Interior (Feb. 21, 2013); Letter from Thomas O’Rourke Sr., Chairman, Yurok Tribe, to Sally  
16 Jewel, Secretary of the Interior, U.S. Dep’t of the Interior (Apr. 25, 2013); *see also* Person Decl.  
17 ¶ 7. The Trinity Management Council, a multi-agency federal, state, and tribal group that  
18 oversees ROD implementation, also recommended these releases. *See* Person Decl. ¶¶ 1, 2  
19 Reclamation agreed to consider this request, and prepared an EA and FONSI in compliance with  
20 NEPA assessing the potential impact of a flow augmentation of up to an additional 62,000 acre  
21 feet (af) of water from Trinity Reservoir.<sup>5</sup> Reclamation signed the EA and FONSI on August 6,  
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25 <sup>5</sup> This figure was based upon the amount of water that would be needed to meet the 2,800 cfs target at  
26 USGS Station KNK on the lower Klamath River (“KNK”) from August 15-September 21 (“the action  
27 period”). Plaintiffs state that the fall flow augmentation will use up to 109,000 af of water. Plaintiffs’  
28 figure includes water that would be used to extend the action period beyond the expected September 21  
end date (up to September 30) if daily water temperatures are projected to be above 23 C at KNK or the  
presence of observed fish behavior of concern, as well as up to 39,000 af of water that would be used only  
in case of an emergency due to observations of a disease outbreak. EA at 6.



1 2013 and intends to implement the proposed action contained within the EA in order to avoid or  
2 reduce the severity of any large-scale fish die off of fall-run Chinook salmon in the lower  
3 Klamath River. Releases will be made to maintain a minimum target flow in the lower Klamath  
4 River of 2,800 cfs, as measured at the gage USGS Station KNK. FONSI at 2.

5  
6 Plaintiffs incorrectly assert that Reclamation plans to release 109,000 af for this purpose.  
7 Based upon current flows in the lower Klamath, Reclamation now estimates that the amount of  
8 water that will be released for the supplemental flows is likely to be less than the 62,000 af of  
9 water identified in the EA. Reck Decl. ¶ 16. The flows in the lower Klamath are presently  
10 approximately 200 cubic feet per second (“cfs”) higher than the predictions in the EA, and thus  
11 less water needs to be released from the reservoirs to provide the targeted flows during the period  
12 of the fall-run Chinook upstream migration. *Id.* Additionally, based upon current water  
13 temperature records it is very unlikely that supplemental releases will need to continue past  
14 September 21. *Id.* It is also very unlikely that the additional emergency releases will be  
15 required. *Id.*

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18 **B. Legal Standards**

19 1. Standard of Judicial Review for a Preliminary Injunction or a Temporary Restraining  
20 Order

21 A preliminary injunction “is a matter of equitable discretion” and is “an extraordinary remedy  
22 that may only be awarded upon a clear showing that the [plaintiff] is entitled to such relief.” *Earth*  
23 *Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010), quoting *Winter v. Natural Res. Def. Council*,  
24 555 U.S. 7, 24, 32 (2008). As the Supreme Court has held, a plaintiff seeking a preliminary  
25 injunction “must establish” that: (1) it is likely to succeed on the merits of its claims; (2) it is  
26 likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its  
27 favor; and (4) an injunction is in the public interest. *Winter v. Nat’l Res. Def. Council*, 555 U.S.  
28

1 7, 19 (2008); *see also Am. Trucking Assocs. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.  
2 2009). If likelihood of success on the merits cannot be demonstrated, a preliminary injunction should  
3 be denied even though there may be evidence of irreparable harm. *Kandra v. United States*, 145 F.  
4 Supp. 2d 1192, 1200-01 (D. Or. 2001). Moreover, even where success on the merits is likely or  
5 “serious questions” are raised, an injunction “is not a remedy which issues as of course,” even in an  
6 environmental case. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citation omitted);  
7 *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545–46 (1987). An injunction should issue only  
8 where a plaintiff makes a “clear showing” and presents “substantial proof” that an injunction is  
9 warranted, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted), and  
10 does “more than merely allege imminent harm sufficient to establish standing,” *Associated Gen.*  
11 *Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991); *Ctr. for Food Safety*  
12 *v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) (“Of course, ... a plaintiff may establish  
13 standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to  
14 obtain it.”). Even in the extraordinary case where a court issues an injunction, the scope of relief  
15 should be limited, and relief should be granted only to the extent necessary. *Monsanto Co. v. Geertson*  
16 *Seed Farms*, 130 S. Ct. 2743, 2758–60 (2010). “The standard for granting a temporary restraining  
17 order is identical to that for a preliminary injunction.” *Arakaki v. Cayetano*, 198 F. Supp. 2d  
18 1165, 1173 (D. Haw. 2002).

## 23 2. Standard of Review of Agency Interpretations of Statutes

24 Pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.  
25 837, 843 (1984) and its progeny, a reviewing court must give deference to an agency’s  
26 interpretation of a statute which it administers. Under *Chevron*, a court must first determine  
27 whether “Congress has directly spoken to the precise question at issue.” *Id.* at 842-43. Where  
28

1 “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,  
2 must give effect to the unambiguously expressed intent of Congress.” *Id.* But if Congress did  
3 not specifically address the matter, the court “must respect the agency’s construction of the  
4 statute so long as it is permissible.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,  
5 132 (2000); accord *Wash. State Dept. of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987). Under this  
6 second step in the *Chevron* analysis, “[t]he sole question for the Court . . . is ‘whether the  
7 agency’s answer is based on a permissible construction of the statute.’” *Mayo Found. for Med.*  
8 *Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011) (citing *Chevron*, 467 U.S. at 843).  
9 Even where Congress has not expressly delegated authority to implement particular provisions of  
10 a statute, “it can still be apparent from the agency’s generally conferred authority and other  
11 statutory circumstances that Congress would expect the agency to be able to speak with the force  
12 of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one  
13 about which ‘Congress did not actually have an intent’ as to a particular result.” *United States v.*  
14 *Mead Corp.*, 533 U.S. 218, 229 (2001) (citation omitted).

18 3. The National Environmental Policy Act

19 NEPA was enacted to foster better decision making and informed public participation for  
20 actions that affect both people and the natural environment. *See* 42 U.S.C. § 4321; 40 C.F.R. §  
21 1501.1; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To that  
22 end, the statute does not mandate particular results, but simply establishes procedural requirements for  
23 assessing the potential environmental impacts of an agency’s decisions. *Marsh v. Or. Natural Res.*  
24 *Council*, 490 U.S. 360, 371 (1989); *Methow Valley*, 490 U.S. at 349-50. “Other statutes may  
25 impose substantive environmental obligations on federal agencies, but NEPA merely prohibits  
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1 uninformed – rather than unwise – agency action.” *Methow Valley*, 490 U.S. at 351 (footnote  
2 omitted).

3 Thus, NEPA requires federal agencies to prepare an Environmental Impact Statement  
4 (“EIS”) for “major Federal actions significantly affecting the quality of the human environment .  
5 . . .” 42 U.S.C. § 4332(2)(C); *Save the Peaks Coal. v. U.S. Forest Service*, 669 F.3d 1025, 1035  
6 (9th Cir. 2012). In order to determine whether an action is one requiring an EIS, the agency may  
7 prepare an EA. 40 C.F.R. § 1501.4(b). An EA is a concise public document that briefly  
8 describes the proposal, examines alternatives, and considers environmental impacts to determine  
9 whether an EIS is required. 40 C.F.R. § 1508.9. If, through the EA, the agency determines that  
10 an EIS is not required, the agency shall issue a FONSI. 40 C.F.R. § 1501.4(e); *see also* 40  
11 C.F.R. § 1508.13. In challenging a FONSI, a plaintiff must raise “substantial questions whether  
12 a project may have a significant effect” on the environment. *Blue Mountains Biodiversity*  
13 *Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citation omitted).

14  
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16  
17 4. The Administrative Procedure Act

18 Because NEPA does not create a private right of action, review proceeds under the  
19 judicial review provisions of the APA, 5 U.S.C. § 701 *et seq.* *See Marsh*, 490 U.S. at 377 n.23;  
20 *Ecology Ctr., Inc. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009). The APA imposes a narrow  
21 and highly deferential standard of review limited to a determination of whether the agency acted  
22 in a manner that was “arbitrary, capricious, an abuse of discretion or otherwise not in accordance  
23 with law.” 5 U.S.C. § 706(2)(A); *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S.  
24 402, 416 (1971). The court’s review of the agency’s action is limited to the administrative  
25 record that was before the agency decision maker. *Fla. Power & Light Co. v. Lorion*, 470 U.S.  
26 729, 743-44 (1985). In addition, an agency’s action is entitled to the presumption of  
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28

1 administrative regularity. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council,*  
2 *Inc.*, 435 U.S. 519, 544 (1978). The party bringing an APA case bears the burden of  
3 demonstrating that the agency’s actions were arbitrary and capricious. *See Comm. to Pres.*  
4 *Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d 1543, 1555 (10th Cir. 1993).

6 The question for judicial review is not whether the Court itself would have made the  
7 same decision, because “the [C]ourt is not empowered to substitute its judgment for that of the  
8 agency.” *Overton Park*, 401 U.S. at 416; *Save the Peaks Coal.*, 669 F.3d at 1035-36. “The only  
9 role for a court is to insure that the agency has taken a ‘hard look’ at environmental  
10 consequences; it cannot ‘interject itself within the area of discretion of the executive as to the  
11 choice of the action to be taken.’” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)  
12 (quoting *Natural Res..Def. Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)). The Court  
13 must uphold the decision if the agency followed required procedures, evaluated relevant factors,  
14 and reached a reasoned decision, which did not constitute a clear error of judgment or exceed the  
15 bounds of its statutory authority. *Id.*; *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752,  
16 767 (2004).

19 When considering environmental impacts under NEPA, agencies are entitled to select  
20 their own methodology as long as that methodology is reasonable. *See e.g., Balt. Gas & Elec. v.*  
21 *Natural Res. Def. Council*, 462 U.S. 87, 100-01 (1983); *Save the Peaks Coal.*, 669 F.3d at 1036  
22 (noting that a court’s “hard look” determination “requires a pragmatic judgment whether the  
23 [environmental assessment]’s form, content and preparation foster both informed decision-  
24 making and informed public participation.”) (internal quotations and citation omitted).  
25 Accordingly, “[w]hen specialists express conflicting views, an agency must have discretion to  
26 rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court  
27  
28

1 might find contrary views more persuasive.” *Marsh*, 490 U.S. at 378; *see also Ecology Ctr.*, 574  
2 F.3d at 658-59 (noting that deference is particularly appropriate when questions of scientific  
3 methodology are involved). Thus, the Court’s role is not to weigh conflicting expert opinions or  
4 to consider whether the agency employed the best scientific methods, and the fact that plaintiff  
5 disputes the agency’s findings and conclusions is not a sufficient basis for the Court to conclude  
6 that the agency’s action was arbitrary and capricious.  
7

8           5.       Federal Government Trust Responsibility to Indian Tribes

9           Tribal fishing rights are property rights held in trust by the United States for the  
10 benefit of the federally-recognized Indian tribes. Numerous court decisions over the past thirty  
11 years have confirmed that, when the United States set aside lands along the Trinity and Klamath  
12 Rivers for the Hoopa Valley and Yurok Tribes, it also reserved for the Indians federally  
13 protected fishing rights to the fishery resource in the rivers running through the reservations.  
14 *See, e.g., Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981); *United States v. Eberhardt*, 789  
15 F.2d 1354, 1359 (9th Cir. 1986); *Parravano v. Babbitt*, 837 F. Supp. 1034 (N.D. Cal. 1993), 861  
16 F. Supp. 914 (N.D. Cal. 1994), *aff’d*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016  
17 (1996). A 1993 opinion from the Interior Solicitor emphasized that these rights include the right  
18 to harvest quantities of fish on their reservations sufficient to support a moderate standard of  
19 living and that the Tribes’ reserved fishing rights include the right to fish for ceremonial,  
20 subsistence, and commercial purposes. Memorandum from John D. Lesly, Solicitor, to  
21 Secretary of the Interior, Fishing Rights of the Yurok and Hoopa Valley Tribes, at 3, 15, 22, 32  
22 (Oct. 4, 1993) (attached). The Ninth Circuit cited to the Solicitor’s opinion with approval in its  
23 decision upholding regulations promulgated by the Department of Commerce under the  
24 Magnuson Fishery Conservation and Management Act restricting ocean harvest of the Klamath  
25  
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1 Basin fishery in light of the Hoopa Valley and Yurok Tribes' fishing rights. *Parravano*, 70 F.3d  
2 at 542, 547.

### 3 **III. ARGUMENT**

#### 4 **A. Plaintiffs Are Not Likely to Prevail on the Merits of Their Claims**

5 Plaintiffs are not entitled to an injunction because they have not and cannot show that they are  
6 likely to prevail on the merits of their claims. Plaintiffs ground their claims on three alleged violations  
7 of the law: (1) that Reclamation does not have the authority under the CVPIA to make the additional  
8 releases in August and September; (2) that Reclamation was required to, but did not, get approval from  
9 the State Water Resources Control Board to change the place of use of water rights; and (3) that  
10 Reclamation was required to prepare an EIS regarding its decision to augment the flows in the lower  
11 Klamath River in August and September 2013. Plaintiffs have not met their burden to demonstrate that  
12 they are likely to succeed on the merits regarding any of these allegations.  
13  
14

#### 15 1. Reclamation Has the Authority to Make Additional Releases to Augment Flow in 16 the Lower Klamath River

17 Plaintiffs argue that Reclamation has “a mandatory duty under CVPIA section 3406(b)(23) to  
18 implement releases on the Trinity River for fishery purposes in accordance with the ROD.” Compl. ¶  
19 68. In making this argument, Plaintiffs seem to assume that the only releases Reclamation may make  
20 to benefit the Trinity River fishery must be the flows set forth in the ROD. This is incorrect and it  
21 would lead to the illogical conclusion that when Congress enacted the CVPIA, despite expressing the  
22 intent to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe  
23 and the fishery restoration goals of the 1984 Act, it intended to prohibit the Secretary from providing  
24 the flows necessary to ensure the protection of fishery resources during the upstream migration through  
25 the Klamath River to the Trinity River.  
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1 The supplemental releases that will be made in August and September are authorized by other  
2 statutes. Reclamation is authorized and directed under the 1955 Act authorizing the Trinity River  
3 Division to “adopt appropriate measures to insure the *preservation and propagation* of fish and  
4 wildlife.” 1955 Act § 2 (emphasis added). Subsequent case law, statutes, and Solicitor Opinions  
5 demonstrate Reclamation’s proposal to augment late summer flows falls easily within the range  
6 of “appropriate measures” the agency may take to meet that statutory duty. *See, e.g., Trinity*  
7 *County v. Andrus*, 438 F.Supp. 1368, 1376 (1977) (discussing the Secretary’s discretion to  
8 determine appropriate measures to insure preservation and propagation of fish and wildlife). A  
9 1979 Solicitor’s Opinion explains that the Secretary may prioritize instream flow needs over  
10 water exports to the Central Valley as a necessary step to preserve fish and wildlife:  
11

12  
13 [I]n authorizing the Trinity River Division of the CVP in 1955, Congress  
14 specifically provided that in-basin flows... determined by the Secretary to be  
15 necessary to meet in-basin needs take precedence over needs to be served by out-  
16 of-basin diversion. *See* Pub. L. No. 84-386, § 2. In that case, Congress’ usual  
17 direction that the Trinity River Division be integrated into the overall CVP, set  
18 forth at the beginning of section 2, is expressly modified by and made subject to  
19 the *provisos* that follow giving specific direction to the Secretary regarding in-  
20 basin needs.

21 Memorandum from Interior Solicitor Leo Krulitz to Assistant Secretary - Land and Water  
22 Resources, *Proposed Contract with Grasslands Water District*, December 7, 1979 (attached).  
23 The Solicitor’s Opinion regarding the 1955 Act was discussed in both the Trinity River  
24 Restoration Program ROD and its implementation plan, and has not been refuted by either the  
25 courts or Congress. *See* ROD, at 6; Implementation Plan for the Preferred Alternative of the  
26 Trinity River EIS/EIR, at 1.

27 Subsequent legislative actions have further clarified the Secretary’s authority and  
28 obligation under the 1955 Act to insure the preservation of fish. The 1984 Trinity River Basin  
Fish and Wildlife Management Act, enacted by Congress in response to the further decline of the



1 fishery, ordered the Secretary to take steps to restore fish and wildlife populations to pre-dam  
2 levels. Pub. L. No. 98-541, § 2, 98 Stat. 2721 (1984) (“the Secretary shall formulate and  
3 implement a fish and wildlife management program for the Trinity River Basin designed to  
4 restore the fish and wildlife populations in such basin to the levels approximating those which  
5 existed immediately before the start of the construction” of the Trinity River Division). Although  
6 the 1984 Act expired in 1998, its restoration goals are preserved within the CVPIA, which  
7 directs the Secretary to meet the fishery restoration goals of the 1984 Act. *See* CVPIA §  
8 3406(b)(23).  
9  
10

11 In the 1992 CVPIA, Congress ordered that the Trinity River Flow Evaluation Study  
12 (“TRFES”), which was initiated over a decade earlier to evaluate the amount of flow necessary  
13 to rehabilitate and support a healthy habitat for natural fishery production in the Trinity River, be  
14 completed. *Id.* Congress further ordered that the recommendations of the TRFES be  
15 implemented if the Secretary and Hoopa Valley Tribe concurred in them. *Id.* The Department of  
16 the Interior prepared an EIS/EIR to analyze the impacts of the TRFES flows and alternatives to  
17 them. The ROD, which was signed by the Secretary of the Interior and concurred in by the  
18 Hoopa Valley Tribe, directs the implementation of the selected alternative, which includes flow  
19 levels for the mainstem of the Trinity River based on the forecasted hydrology of each year.  
20 Westlands sued Interior and other agencies challenging the EIS/EIR and the adoption of the  
21 ROD, as well as the Biological Opinion issued upholding the ROD. The Ninth Circuit ultimately  
22 confirmed the adequacy of the EIS/EIR and the ROD, finding that restoration actions on the  
23 Trinity River were “unlawfully long overdue” and that full implementation of the ROD should  
24 proceed. *Westlands Water Dist v. United States*, 376 F.3d 853, 866-867, 898 (9th Cir. 2004).  
25  
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1 Plaintiffs suggest that, rather than release additional water from storage to support  
2 Trinity River fish this year, Interior could have altered the ROD releases to “reserve” water for  
3 August and September releases. Pls.’ Memo. (Doc. 28) at 1, 20-21. This argument is flawed for  
4 two reasons. First, Plaintiffs ignore that the restoration efforts set forth in the ROD focus on  
5 restoring the mainstem of the Trinity River, especially the 40 miles immediately below the  
6 Lewiston Dam, to a “healthy” alluvial river, mimicking the natural hydrograph, albeit on a  
7 smaller scale. Flow releases were designed not only to provide water of sufficient quantity and  
8 quality (*e.g.* temperature) for appropriate salmonid habitat and transport while in the river, but  
9 also to flush sediments and provide other geomorphic benefits that – combined with mechanical  
10 river restoration and other recommendations – would restore the river without seeking to keep *all*  
11 Trinity River water supplies within the watershed (such as the Maximum Flow Alternative that  
12 Plaintiffs raise and that the Department already rejected). *See* ROD at 2-3. Reducing the ROD  
13 flows in order to create a “reserve,” as Plaintiffs propose, would defeat the specific purposes for  
14 which the ROD flows were developed, and which were based on over 20 years of detailed  
15 scientific study and integration of various disciplines (biology, hydrology, geomorphology) into  
16 the restoration of the mainstem of the Trinity River. Thus, it would not be consistent with the  
17 ROD for Reclamation to “reserve” an amount of water scheduled to be released under the ROD  
18 earlier in the year for a late summer flow augmentation release.

23 Second, the planned 2013 fall flow augmentations described in the EA are for a different  
24 purpose than the flows approved in the ROD. The flow augmentation releases approved in the  
25 August 6, 2013 FONSI are designed to increase flow volumes/velocities in the lower Klamath  
26 River (not the mainstem of the Trinity River) to keep salmon from holding closely together in  
27 limited thermal refugia and thereby spread disease such as occurred in 2002. The flows  
28

1 approved in the ROD were developed for the purpose of restoring habitat and fish populations on  
2 the mainstem of the Trinity River, not avoiding a potentially lethal spread of pathogens on the  
3 lower 44 miles of the Klamath River.

4  
5 Additionally, although adaptive management may in the future allow for certain within-  
6 year alterations to the ROD's flow schedule based on Program results and objectives, Interior has  
7 concluded that such changes to the annual hydrographs should not occur prior to full  
8 implementation of the Program. The Restoration Program adopted by the ROD has yet to be  
9 fully implemented, due in part to delays caused by litigation challenges and reduced funding  
10 allocations in the early years. Thus, at this stage in the implementation of the ROD, it would not  
11 be prudent for the flow releases set forth in the ROD to be reduced at other times of year in order  
12 to provide for the "reserve" Plaintiffs suggest.

13  
14 Additionally, even if within-year alterations were an option, Reclamation could not have  
15 planned for the 2013 need for augmentation flows when the decision regarding the ROD releases  
16 was made and implemented. In the early spring, it was not clear how dry the year would be,  
17 particularly in light of the very wet conditions in December. The full extent of the forecasted  
18 lower Klamath River flows that created the need for these supplemental releases was not known  
19 until later in the year after the ROD releases. Milligan Decl. ¶ 7.

20  
21  
22 2. Reclamation Was Not Required to Obtain Authorization for a Change in the Place of  
23 Use Under its State Permits In Order to Proceed with the Action

24 Plaintiffs argue that Reclamation has violated the water right permits it holds for the TRD  
25 because it was allegedly required to obtain leave of the California State Water Resources Control  
26 Board ("State Water Board") but failed to do so. This argument lacks merit. The State has  
27 already spoken on this issue and has determined that a change in permits is not required.

28 Moreover, the flow augmentation action is consistent with CVPIA section 3411 and section 8 of

1 the Reclamation Act because there is no requirement under state law to change the TRD water  
2 rights in order to undertake these releases. Reclamation does not have to petition for a change in  
3 place of use in order to release water to improve instream conditions.

4  
5 Federal law requires Reclamation to follow state law as to the control, appropriation, use  
6 or distribution of water used in irrigation and to obtain state-issued water rights for its projects,  
7 to the extent it does not interfere with Congressional directives. 43 U.S.C. §483; *California v.*  
8 *United States*, 438 U.S. 645 (1978). The CVPIA reiterates this requirement, stating that the  
9 Secretary “shall, prior to the reallocation of water from any purpose of use or place of use  
10 specified within applicable CVP water rights permits and licenses, obtain a modification in those  
11 permits and licenses, in a manner consistent with the provisions of applicable State law, to allow  
12 such change in purpose of use or place of use.” CVPIA § 3411(a). Reclamation has consistently  
13 sought to operate the CVP, including the TRD, in compliance with these requirements, and its  
14 current operations to provide the augmentation flows are consistent with California law.

15  
16  
17 Under California law, the State Water Board is the entity charged with exercising  
18 adjudicatory and regulatory functions in the State with respect to water resources. California  
19 Water Code §174. California law requires any entity seeking the right to divert and use water in  
20 the State to obtain a permit from the State Water Board. The State Water Board grants water  
21 rights and determines the terms and requirements of these rights. Cal Water Code §1350.

22  
23 Consistent with these requirements of California law, Interior sought and was granted  
24 water rights on the Trinity River for the TRD portion of the CVP. These water rights include  
25 fish and wildlife enhancement and water quality control as a purpose of use. *In the Matter of*  
26 *Implementation of Water Quality Objectives for the San Francisco Bay/Sacramento-San Joaquin*  
27 *Delta Estuary; A Petition to Change Points of Diversion of the Central Valley Project and the*  
28

1 *State Water Project in the Southern Delta, and A Petition to Change Places of Use and Purposes*  
2 *of Use of the Central Valley Project*, Cal. State Water Res. Control Bd., D-1641 (revised), (Mar.  
3 15, 2000), available at [http://www.waterboards.ca.gov/waterrights/board\\_decisions/](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf)  
4 [adopted\\_orders/decisions/d1600\\_d1649/wrd1641\\_1999dec29.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf). These water rights also  
5 include minimum instream bypass flows, but, consistent with most water rights permits issued in  
6 California, the place where the instream bypass flows ultimately leave the facility and flow to the  
7 ocean is not included within the water right.

8  
9 Under the California Water Code, the State Water Board may not grant a water  
10 appropriation application to retain water instream to provide flows for fish. *Cal. Trout v. State*  
11 *Water Res. Control Bd.*, 90 Cal.App.3d 816 (1979). Instead, California law establishes that  
12 instream uses of water to preserve fish and wildlife are beneficial uses of water which must be  
13 considered when approving applications to appropriate water. Cal. Water Code § 1243 (“[I]n  
14 determining the amount of water available for appropriation for other beneficial uses, the board  
15 shall take into account, whenever it is in the public interest, the amounts of water required for  
16 recreation and the preservation and enhancement of fish and wildlife resources.”). In other  
17 words, instream needs are generally considered in the context of all other beneficial uses as part  
18 of the decision to grant the water right permit in the first instance, and they are protected through  
19 conditions of the water right permit. *See* Cal. Water Code § 1257. This is reflected in the TRD  
20 water rights.

21  
22 Reclamation sought to confirm this interpretation of California law when it began  
23 planning for the augmentation flows in 2012. In order to confirm that 2012 fall augmentation  
24 flows would be consistent with its permits, Reclamation submitted a temporary urgency petition  
25 to the State Water Board seeking to change the rights that it holds on the Trinity River with  
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1 respect to the place of use of water released for instream flow enhancement. *See* Holm Decl. at ¶  
2 2. The State Water Board responded to Reclamation's petition by confirming that a change to  
3 the permits is not required for Reclamation to bypass or release water in the late summer for  
4 protection of the fishery. *See id.* at ¶ 3; Letter from State Water Board, Exh. 2 to Holm Decl.  
5 The State Board explained that Reclamation could release water for nonconsumptive cultural  
6 resource needs and to improve instream conditions without adding downstream areas to the place  
7 of use specified in Reclamation's permits. *See* Holm Decl. at ¶ 3; Exh. 2 to Holm Decl.  
8 Reclamation thus is not required to seek and obtain changes to the water right permits it holds  
9 from California before releasing water to augment flows in the lower Klamath River, and thus,  
10 the proposed action in the EA is not inconsistent with CVIPA § 3411(a) and 43 U.S.C. § 483.  
11 Accordingly, Plaintiffs' their claim that the 2013 flow augmentation release violates state law is  
12 without merit  
13  
14

15 3. Plaintiffs Are Not Likely to Succeed on the Merits of Their NEPA Claim

16 Reclamation complied with NEPA by preparing an EA and executing a FONSI for both  
17 the 2012 and 2013 releases. In these documents, Reclamation evaluated the proposed actions  
18 and reasonably concluded that there was no potential for significant effects on the environment.  
19 Thus, Plaintiffs are not likely to prevail on their claim that Federal Defendants failed to comply  
20 with NEPA.  
21

22 In compliance with NEPA, Reclamation prepared a draft EA, which described the  
23 proposed action, examined an alternative, and considered the environmental impacts.  
24 Reclamation released the draft EA for public comment, and after fully considering all of the  
25 comments it received (including comments from Plaintiffs), it finalized the EA and signed a  
26 FONSI on August 6, 2013. The EA and FONSI demonstrate that Reclamation took a hard look  
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1 at the proposed action and reasonably concluded that while there exists the potential for adverse  
2 impacts, those impacts simply do not rise to a level of significance that necessitates an EIS.

3 Plaintiffs challenge Reclamation's FONSI and assert that Reclamation should have  
4 prepared an EIS. As the Ninth Circuit has explained, "[j]udicial review of agency decision-  
5 making under NEPA is limited to the question of whether the agency took a 'hard look' at the  
6 proposed action as required by a strict reading of NEPA's procedural requirements. *Bering*  
7 *Strait Citizens for Resp. Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 947 (9th Cir.  
8 2008). In challenging a FONSI, a plaintiff must raise "substantial questions whether a project  
9 may have a significant effect" on the environment. *Blue Mountains Biodiversity Project v.*  
10 *Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citation omitted). Plaintiffs have failed to meet  
11 their burden here.

12  
13  
14 Contrary to Plaintiffs' contentions, there are not substantial questions about whether the  
15 supplemental releases will have a significant effect on the human environment. Although  
16 Reclamation's NEPA analysis revealed that there could be some adverse effects, "it does not  
17 follow that the presence of some negative effects necessarily rises to the level of demonstrating a  
18 significant effect on the environment." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d  
19 1233, 1240 (9th Cir. 2005) (emphasis added). As long as the EA took a reasonable approach in  
20 addressing the relevant NEPA intensity factors<sup>6</sup> it must be upheld, *Bering Strait*, 524 F.3d at  
21  
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23

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24  
25 <sup>6</sup> In determining whether an impact is significant, NEPA implementing regulations require consideration  
26 of both "context" and "intensity." 40 C.F.R. § 1508.27. "Context" refers to the area of "the affected  
27 region, the affected interests and the locality," *id.* § 1508.27(a), while "intensity" "refers to the severity of  
28 the impact." *Id.* at § 1508.27(b). The NEPA regulations direct the Corps to evaluate, *inter alia*, the  
"degree to which the possible effects on the human environment are highly uncertain or involve unique or  
unknown risks," and "the degree to which the action may adversely affect an endangered or threatened  
species or its habitat." *Id.* at § 1508.27(b)(5),(9).

1 956–57, and none of the issues that Plaintiffs have identified casts any doubt on the validity of  
2 the EA.

3 Reclamation considered areas in which there could be some adverse effects and  
4 reasonably concluded that the effects would be insignificant. *See* FONSI. The FONSI discusses  
5 the possibility of the proposed action increasing water temperatures in the Sacramento River  
6 Basin and even quantifies the potential temperature increases, which are minor. After  
7 considering this information, Reclamation reasonably concluded that the proposed action would  
8 not have a significant impact on the quality of the water (i.e. water temperature). FONSI at 6.  
9 Reclamation also considered the possible impact of the proposed action to the global climate.  
10 Reclamation recognized that some of the water that will be released for fall flow augmentation  
11 under the proposed action may have been exported from the Trinity River and through power  
12 plans, which would have generated hydroelectric power. *Id.* at 7. Without this power  
13 generation, Reclamation recognized that CVP power customers may have to purchase  
14 hydrocarbon generated power, resulting in an estimated 53,149 metric tons of CO<sub>2</sub> being emitted.  
15 *Id.* Considering this information, Reclamation reasonably concluded that the proposed action  
16 would not cause a significant impact to the global climate.  
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20 As noted in the EA, providing the augmentation flows would not affect any listed or  
21 endangered species. There is no likelihood of adverse impacts to Western pond turtle, yellow-  
22 legged frog, Pacific lamprey, spring-run Chinook salmon, or coho salmon in the Trinity River.  
23 *See* Reck Decl. at 9-14. Further, there is no likelihood of adverse impacts on winter-run Chinook  
24 salmon, spring-run Chinook salmon, and steelhead in the Sacramento River. *See id.* at 15-16.  
25 Accordingly, and contrary to Plaintiffs’ unsupported assertions, Reclamation considered all of  
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28



1 the relevant factors and reasonably concluded that the planned fall flow augmentation releases  
2 will not have a significant impact on the environment.

3 **B. Plaintiffs Fail to Demonstrate Immediate and Irreparable Injury Will Be Caused by**  
4 **Flow Augmentation**

5 Not only have Plaintiffs failed to establish a likelihood of success on the merits, they  
6 have failed to establish that they are likely to suffer irreparable harm absent preliminary relief as  
7 they must to show that injunctive relief is warranted. *See Winter v. Nat'l Res. Def. Council*, 555  
8 U.S. 7, 129 S. Ct. 365, 374 (2008); *see also Am. Trucking Assocs v. City of Los Angeles*, 559 F.3d  
9 1046, 1052 (9th Cir. 2009). Plaintiffs claim there are three ways in which the supplemental fall  
10 releases will allegedly harm them: (1) Plaintiffs assert that the action will affect the water  
11 allocation in 2013; (2) Plaintiffs assert that the action will limit water available for the 2014, thus  
12 water allocations may be impacted; and (3) Plaintiffs allege that less cold water storage will be  
13 available, which may impact ESA-listed species in the Sacramento River. Plaintiffs have not  
14 demonstrated that any of these harms are likely to occur.

15 The flow augmentation releases this year will not impact 2013 allocations to CVP  
16 contractors in general, or the irrigation contractors south of the Delta in particular. As explained  
17 in the EA, “[w]ater allocations for irrigation and [municipal and industrial] deliveries have  
18 already been determined for 2013, and the supplemental water would not affect the projected  
19 volume of water to be exported to the Sacramento River Basin in 2013.” 2013 EA, at 13. While  
20 Reclamation has been undertaking other actions to alleviate the impacts of the dry conditions in  
21 2013, Reclamation does not plan to change water allocations for the year. Thus, even if there  
22 were no plan to make the supplemental releases this fall, Plaintiffs’ 2013 allocations would not  
23 be increased.

24 Additionally, allocation decisions for 2013 were made earlier in the year and did not take  
25 into account the planned flow augmentation releases. The current allocations were announced in  
26 May, and at that time, it was not predicted that there would be a need for the additional releases  
27 from Trinity Reservoir. Milligan Decl. at ¶7. In making the additional supplemental releases,  
28

1 Reclamation is not reducing the 2013 allocations. Rather, those allocations will remain the same  
2 and deliveries will continue as scheduled for the rest of the irrigation season.

3 Moreover, even if Reclamation sought to release additional water from storage in Trinity  
4 Reservoir to the CVP, there are a number of factors that limit its ability to do so for re-diversion  
5 in the Delta and delivery to south of Delta contractors. *Id.* at ¶ 8. First, the ability to release  
6 water to the CVP this month is limited by the capacity of Carr Tunnel and Power Plant. *Id.*  
7 Further, an additional release of 62,000 acre feet would have to be coordinated with the  
8 operation of Shasta Reservoir and operations that are occurring to control Sacramento River  
9 temperatures. *Id.* It would also be necessary to coordinate with DWR to ensure available Delta  
10 pumping capacity. *Id.* In summary, there are obstacles to using the 62,000 af of supplemental  
11 flow water to increase the contract allocations to south-of-Delta contractors this year.

12 The potential for this action to have an impact on Plaintiffs' water supplies in 2014 is  
13 dependent on the hydrology next year. There may in fact be no lingering effects if the hydrology  
14 next winter is very wet. *Id.* at ¶¶ 9, 10. However, it is possible that hydrologic conditions will  
15 be such that the storage deficit from the 2012 and 2013 flow augmentation release will remain in  
16 the spring of 2014 and that this could impact 2014 CVP allocations. *Id.* But, even with a storage  
17 deficit, the precise impact to CVP contractors is dependent on actual operating conditions. *Id.* at  
18 ¶ 10. Finally, the planned fall flow augmentation releases will not cause harm to any ESA-listed  
19 species or other species in the Trinity River or Sacramento River. *See Reck Decl.* at 9-16.

20 **C. The Balance of Equities and Public Interest Favor Denial of the Requested**  
21 **Injunction**

22 Finally, the Court should not enter an injunction because the balance of equities does not  
23 tip in Plaintiffs favor and an injunction would not be in the public interest. *See Winter v. Nat'l*  
24 *Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008); *see also Am. Trucking Assocs v. City of*  
25 *Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). A preliminary injunction should not be issued if the  
26 injunction will "substantially injure other interested parties." *Mova Pharm. Corp. v. Shalala*, 140 F.3d  
27 1060, 1066 (D.C. Cir. 1998). As discussed above, if the flow augmentation action is taken Plaintiffs  
28

1 will not suffer any harm in 2013, and any harm they may suffer in 2014 is speculative and likely to be  
2 minor. In contrast, if the flow augmentation action is not taken, conditions are such that the fall-run  
3 Chinook salmon are likely to experience a large scale die-off similar to the die-off that occurred in  
4 2002, and such a die-off will impact the species, as well as cause significant harm to the interests of the  
5 Hoopa Valley and Yurok Tribes, the United States' trust duties to the Hoopa Valley and Yurok Tribes,  
6 and commercial and recreational fishing.  
7

8 The Ninth Circuit has recognized that the Hoopa Valley and Yurok Tribes have federally  
9 protected fishing rights in the Trinity and Klamath Rivers and that those salmon fisheries were "not  
10 much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v.*  
11 *Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381  
12 (1905)). The Ninth Circuit further elaborated upon the Tribes' fishing right, concluding that the  
13 right includes "fishing for ceremonial, subsistence, and commercial purposes." *United States v.*  
14 *Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986). Tribal fishing rights are property rights held in  
15 trust by the United States for the benefit of Indian tribes. *Blake*, 663 F.2d at 909; *Eberhardt*, 789  
16 F.2d at 1359; *Parravano v. Babbitt*, 837 F. Supp. 1034 (N.D.Cal.1993), *aff'd*, 70 F.3d 539 (9th  
17 Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).  
18  
19

20 Even before the CVPIA, Interior recognized the importance of and responsibility to the  
21 Hoopa Valley and Yurok Tribes' fishing rights in the Trinity and Klamath Rivers. In 1981,  
22 Secretary Andrus, mentioned above, issued a decision that led to the CVPIA's Trinity River  
23 provision, directing increased instream flows from the TRD and initiating the scientific  
24 evaluation to determine appropriate flows and other measures to restore the Trinity River's  
25 fishery. Secretarial Issue Document, Trinity River Fishery Mitigation (Jan. 14, 1981) (SID)  
26 (attached); *see also* ROD at 6. In making his decision, the Secretary discussed the fact that the  
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1 Hoopa Valley and Yurok Tribes have right to fish from the Trinity and Klamath Rivers and the  
2 Secretary has an obligation to manage this trust asset for the benefit of the Tribe. SID at 3. The  
3 decision concluded that the Secretary’s trust responsibility to the Tribes, combined with  
4 applicable federal laws, required the “restoration of the river’s salmon and steelhead resources to  
5 pre-project levels,” in order to make the Tribes’ fishing rights meaningful. *Id.* at 15. Congress  
6 adopted this restoration goal in the 1984 Trinity River Basin Fish and Wildlife Management Act  
7 and later expanded the restoration goal when it reauthorized the 1984 Act in 1996. *See* ROD at  
8 6-7.  
9  
10

11 In 1993, Solicitor Leshy issued a published Opinion which addressed the Tribes’ rights to  
12 an allocation or quantified share of the Klamath Basin anadromous fishery resources. M-36979,  
13 Fishing Rights of the Yurok and Hoopa Valley Tribes (Oct. 3, 1993). After addressing the  
14 Tribes’ historic dependence on the fishery and the fishery’s current depressed conditions, the  
15 Opinion stated:  
16

17 The Secretary . . . has acted in the past to increase flows in the Trinity River, in part to  
18 improve the fishery for the benefit of Indians. This was a recognition that protection of  
19 the fishery itself is necessary to make the fishing right meaningful. In order for both the  
20 purposes of the reservations and the objectives of the Magnuson Act to be fulfilled, the  
21 fishery resource here must be rebuilt to sustain a viable fishery for all user groups,  
22 consistent with sound conservation practices. . . . As a general matter, all parties that  
23 manage the fishery, or whose actions affect the fishery, have a responsibility to act in  
24 accordance with the fishing rights of the Tribes. This may go beyond safeguarding their  
25 right to an appropriate share of the harvest on their reservation . . . to include a viable and  
26 adequate fishery from which to fulfill the Tribes’ rights . . . .

27 *Id.* at 29-30 (footnotes and citations omitted). The M-Opinion concluded that the Tribes have a  
28 right to meaningful fishery, one “sufficient to support a moderate standard of living” and as  
much as 50 percent of the available harvest in any given year. *Id.* at 3; *see also id.* at 32. The  
M-opinion establishes the basis on which the Department of Commerce regulates ocean fishing  
harvest under the Magnuson Fishery Conservation and Management Act in order to protect the

1 Tribes' in-river trust fishery, which courts have affirmed. *Parravano*, 837 F. Supp. At 1034 and  
2 861 F. Supp. At 914.

3 In addition to completion and implementation of the ROD, Interior has taken other  
4 actions in the Trinity and Klamath Basins to protect the Tribes' fishing and related water rights.  
5 See, e.g., *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990 (D. Or. 1998), *aff'd*, 204  
6 F.3d 1206, *reh'g denied*, 203 F.3d 1175 (9th Cir. 2000), *cert. denied sub nom. Klamath*  
7 *Drainage Dist. v. Patterson*, 531 U.S. 812 (2000) (upholding Department's decision to operate  
8 Klamath Project to meet ESA requirements and senior Indian water rights prior to delivering  
9 water to Project irrigators). The action challenged here follows Interior's obligation to protect  
10 the Tribes' fishing rights consistent with their rights and decisions such as *Parravano* and  
11 *Patterson*, by seeking to avoid the recurrence of a fish die-off that would impair the Tribes'  
12 exercise of their acknowledged fishing rights.  
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15 As detailed in the EA, Reclamation has determined that, due to the large size of the fall  
16 salmon run and low flow conditions, instream flow needs must be prioritized over out-of-basin  
17 exports as directed in the 1955 Act. While the flow augmentations will have a minor impact on  
18 CVP water deliveries, another large scale fish-die off "could substantially impact present efforts  
19 to restore the native Trinity River anadromous fish community and the fishery... and may  
20 impede recovery goals as identified in the [1955 Act] and the [CVPIA]." 2012 EA, at 2. In a  
21 study following the 2002 die-off, the California Department and Fish and Game in fact  
22 concluded that "[f]low is the *only* controllable factor and tool available in the Klamath Basin...  
23 to manage risks against a major adult fish-kill." California Dep't of Fish and Game, *supra*, at 131  
24 (emphasis added). By increasing flows, Reclamation will diminish the risk the crowded holding  
25 conditions, warm water temperatures, and disease pathogens that contributed to the 2002 die-off.  
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1 Washington, D.C. 20044-0663  
2 anna.stimmel@usdoj.gov  
3 (202) 305-3895

4 Attorney for Federal Defendants

5  
6 Of Counsel:

7 John Bezdek  
8 Assistant Solicitor for Water and Power  
9 Office of the Solicitor  
10 U.S. Department of the Interior  
11 1849 C Street, NW  
12 Washington, D.C. 20240-0001  
13 (202) 208-4379

14 Stephen R. Palmer  
15 Assistant Regional Solicitor  
16 Office of the Regional Solicitor  
17 Department of the Interior  
18 2800 Cottage Way, Room E-1712  
19 Sacramento, CA 95825-1890  
20  
21  
22  
23  
24  
25  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of August, 2013, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

/s/ Anna K. Stimmel  
ANNA K. STIMMEL