

1 DANIEL J. O'HANLON, State Bar No. 122380  
ERIC N. ROBINSON, State Bar No. 191781  
2 REBECCA R. AKROYD, State Bar No. 267305  
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
3 A Professional Corporation  
400 Capitol Mall, 27th Floor  
4 Sacramento, CA 95814  
Telephone: (916) 321-4500  
5 Facsimile: (916) 321-4555  
Attorneys for Plaintiffs  
6 SAN LUIS & DELTA-MENDOTA WATER  
AUTHORITY and WESTLANDS WATER DISTRICT

7 STEVEN O. SIMS (*Pro Hac Vice* Pending)  
8 MICHELLE C. KALES (*Pro Hac Vice* Pending)  
GEOFFREY M. WILLIAMSON  
9 (*Pro Hac Vice* Pending)  
BROWNSTEIN HYATT FARBER SCHRECK LLP  
10 410 17<sup>th</sup> Street, Suite 2200  
Denver, CO 80202  
11 Telephone: (303) 223-1257  
Facsimile: (303) 223-1111  
12 Attorneys for Plaintiff  
WESTLANDS WATER DISTRICT

13 UNITED STATES DISTRICT COURT  
14 EASTERN DISTRICT OF CALIFORNIA  
15

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

18 Plaintiffs,

19 v.

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

26 Defendants.  
27

CASE NO. 1:13-CV-01232-LJO-GSA

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS SAN LUIS & DELTA-  
MENDOTA WATER AUTHORITY AND  
WESTLANDS WATER DISTRICT'S  
MOTION FOR PRELIMINARY  
INJUNCTION AND TEMPORARY  
RESTRAINING ORDER**

**DATE: TBD  
TIME: TBD  
COURTROOM: 4**

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I.

**INTRODUCTION**

1  
2  
3 The farms and cities that depend upon water supply from the Central Valley Project  
4 (“CVP”) are suffering a severe water shortage this year. In 2014, the shortage will likely be  
5 worse. Farm workers, farm-related businesses, and whole farm communities on the western side  
6 of the San Joaquin Valley face a growing water shortage catastrophe. The water shortage is now  
7 causing physical, social, and economic damage on a landscape scale, and even greater damage is  
8 threatened in 2014. Given this calamity, it is unthinkable that Defendants<sup>1</sup> would unlawfully  
9 release stored CVP water to the ocean, thereby depriving CVP water users of desperately needed  
10 supplies this year, and deepening the CVP water supply shortage coming in 2014. But  
11 Defendants intend to do exactly that.

12 On August 7, 2013, Defendants announced that, starting August 13, they will release to  
13 the Trinity River up to 109,000 acre-feet<sup>2</sup> (“AF”) of CVP water from the Trinity Reservoir’s  
14 already low storage (“Excess Releases”). According to Defendants’ final environmental  
15 document, the Excess Releases are for the benefit of fall-run Chinook salmon located below the  
16 confluence of the Trinity River and Klamath River (*i.e.*, the “lower Klamath River”). The Excess  
17 Releases of CVP water are above and beyond the 453,000 AF of CVP water already dedicated for  
18 2013 releases from Trinity Reservoir to restore and maintain Trinity River fall-run Chinook  
19 salmon. This water was dedicated for Trinity River fishery releases pursuant to a year 2000  
20 Record of Decision by which the Secretary of the Interior imposed final, permanent fishery flow  
21 release obligations on the CVP’s Trinity River Division (“TRD”). Although Defendants could  
22 have reserved part of the 453,000 AF for use this August and September, they elected not to.

23 The Excess Releases are unlawful. Moreover, the 109,000 AF of CVP water is

24 <sup>1</sup> Defendants include the United States Bureau of Reclamation; Michael L. Connor, as  
25 Commissioner of the United States Bureau of Reclamation, United States Department of the  
26 Interior; David Murillo, as Regional Director of the United States Bureau of Reclamation, Mid-  
27 Pacific Region, United States Department of the Interior; United States Department of the  
28 Interior; and Sally Jewell, as Secretary of the United States Department of the Interior,

<sup>2</sup> An acre-foot is a quantity of water sufficient to cover one acre of land one foot deep. *Colorado v. New Mexico*, 459 U.S. 176, 180 n.5 (1982).

1 desperately needed by farms and communities in the western San Joaquin Valley and will be  
2 irretrievably lost. This motion seeks to enjoin the unlawful Excess Releases.

3 The Excess Releases are unlawful because they would violate Defendants' mandatory  
4 statutory duties under sections 3406(b)(23) and 3411(a) of the Central Valley Project  
5 Improvement Act ("CVPIA"), Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700 (1992), and  
6 section 8 of the Reclamation Act, 43 U.S.C. section 383. The Excess Releases also are unlawful  
7 because Defendants have failed to comply with the National Environmental Policy Act  
8 ("NEPA"), 42 U.S.C. §§ 4321 et seq. Defendants' failure to prepare an environmental impact  
9 statement ("EIS") means the decision to make the Excess Releases occurred without first taking a  
10 hard look at their adverse impacts on the CVP service area, CVP hydropower production, and  
11 endangered and threatened species in the Trinity River system, the Sacramento River system and  
12 the Sacramento-San Joaquin River Delta ("Delta"). Among other things, the failure to complete  
13 an EIS means the Defendants have failed to seriously assess and disclose the environmental trade-  
14 offs between using 109,000 AF of CVP stored water for lower Klamath River Chinook salmon  
15 that are not protected under the federal Endangered Species Act ("ESA") versus other uses for the  
16 water, like water deliveries to Plaintiffs and maintaining cold water temperatures for Sacramento  
17 River spring- and winter-run Chinook salmon that are listed respectively as threatened and  
18 endangered under the ESA.

19 Defendants' Excess Releases threaten irreparable loss of water supplies that would  
20 otherwise be available to Plaintiffs and other south-of-Delta water users. The Excess Releases are  
21 scheduled to start August 13, 2013, and to conclude by September 30, 2013, which means the  
22 water will be irretrievably lost before Plaintiffs can reasonably obtain a final ruling on the merits  
23 of this action. Plaintiffs, therefore, seek temporary and preliminary injunctive relief to prevent  
24 the Excess Releases.

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**II.**

**BACKGROUND FACTS**

**A. Congress Previously Resolved The Issue Of Appropriate Releases From The Trinity River Division For The Fishery In The Trinity River**

In 1992, in the CVPIA, Congress sought to bring a final resolution to an ongoing decades-old dispute over the amount of CVP water to be released from the TRD’s Trinity Reservoir for purposes of restoring and maintaining the Trinity River’s fall-run Chinook salmon fishery. With CVPIA section 3406(b)(23), Congress directed the Secretary of the Interior to develop “permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery.” The Secretary did so, culminating in a December 19, 2000, Record of Decision (“ROD”) approving a program to restore and maintain fall-run Chinook salmon for the Hoopa Valley and Yurok Indian Tribes to harvest from the Trinity River system. Exh. 1 to Declaration of Rebecca R. Akroyd in Support of Plaintiffs’ Motion for Preliminary Injunction and Temporary Restraining Order (“Akroyd Dec.”), at p. 2. The ROD imposed permanent instream fishery flow release obligations on the TRD to discharge the Department of the Interior’s statutory obligations under the CVPIA “as well as the federal trust responsibility to the Hoopa Valley and Yurok Indian Tribes.” *Id.* at p. 2. The ROD was based on a Trinity River Flow Evaluation Study (“Final Flow Report”) completed in 1999 and on a Final Environmental Impact Statement/Environmental Impact Report completed in October 2000. Neither document proposed, analyzed, or approved elevated TRD storage releases in the months of August and September for the purpose of restoring or maintaining fall-run Chinook salmon in the lower Klamath River.

In CVPIA section 3406(b)(23), Congress directed that if the Hoopa Valley Tribe concurred in the release and operating criteria and procedures developed by the Secretary, then they “shall be implemented accordingly.” The Hoopa Valley Tribe concurred in the flow requirements and related operating criteria in the ROD, and indicated that concurrence by signing the ROD on December 19, 2000. As a result of that concurrence, the Secretary has a mandatory duty under CVPIA section 3406(b)(2) to follow the release requirements and criteria for fishery

1 flows as set forth in the ROD. The volume of instream flow releases for the Trinity River in the  
2 ROD ranges from 369,000 AF in a critically dry year to 815,000 AF in an extremely wet year. *Id.*  
3 at p. 12. The ROD provides that “the schedule for releasing water on a daily basis, according to  
4 that year’s hydrology, may be adjusted but the annual flow volumes established in Table 1 may  
5 not be changed.” *Id.* (emphasis added).

6 Plaintiffs and others filed an action in this Court to challenge the ROD and its  
7 requirements. That litigation resulted in decisions by this Court (*Westlands Water Dist. v. U.S.*  
8 *Dept. of Interior*, 275 F. Supp. 2d 1157 (E.D. Cal. 2002); *Westlands Water Dist. v. U.S. Dept. of*  
9 *Interior*, 2001 WL 34094077 (E.D. Cal. 2001)), including a grant of preliminary injunctive relief,  
10 and by the Ninth Circuit Court of Appeals (*Westlands Water Dist. v. U.S. Dept. of Interior*, 376  
11 F.3d 853 (9th Cir. 2004)). Since resolution of that litigation in 2004, Reclamation’s release of  
12 CVP water from the TRD to the Trinity River for fishery purposes has been governed by the  
13 ROD.

14 **B. The Excess Releases Exceed the CVP Water Releases The ROD Imposes To Restore**  
15 **And Maintain Fall-run Chinook Salmon**

16 In early April 2013, Defendants established a schedule for releases of 453,000 AF of CVP  
17 water from the TRD’s Trinity Reservoir for fall-run Chinook salmon restoration and maintenance  
18 purposes in 2013, based on 2013’s classification as a “dry” year under the ROD. Exh. 2 to  
19 Akroyd Dec.; *see* Declaration of James Snow in Support of Plaintiffs’ Motion for Preliminary  
20 Injunction and Temporary Restraining Order (“Snow Dec.”) at ¶ 11. Under the 2013 release  
21 schedule, Trinity Reservoir’s release of CVP water for fishery purposes started rising on April 21  
22 and peaked at a rate of 4,500 cubic feet per second (“cfs”) on May 2 and 3. Thereafter, releases  
23 declined until reaching a rate of 450 cfs on June 24. Under the 2013 release schedule, Trinity  
24 Reservoir’s fishery releases are to remain at 450 cfs until October 15, when releases will decrease  
25 to 300 cfs. The release schedule for 2013 uses the entire volume of 453,000 AF for fishery  
26 purposes specified for a “dry” year under the ROD. Neither the ROD nor the 2013 release  
27 schedule provide for supplemental releases in August and September that would go beyond the  
28 453,000 AF of CVP water dedicated for fall-run Chinook salmon restoration and maintenance

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1 purposes under the ROD.

2 Yet, Defendants intend to make the Excess Releases using water from Trinity Reservoir  
3 that goes beyond the 453,000 AF the ROD specifies for fall-run Chinook salmon restoration and  
4 maintenance. The Excess Releases include 62,000 AF of TRD storage, plus an additional 8,000  
5 AF if Defendants extend the release period to September 30, plus up to another 39,000 AF of  
6 TRD storage if the Yurok Indian Tribe detects an outbreak of disease. Exh. 3 to Akroyd Dec. at  
7 pp. 5-6. The Excess Releases approved by Defendants total up to 109,000 AF above and beyond  
8 the 453,000 AF specified in the ROD and accounted for in the 2013 dry-year release schedule.

9 Defendants contend the releases are needed to reduce the risk of a fall-run Chinook  
10 salmon fish die-off, but the factors Defendants cite as creating that risk were evident in early  
11 2013, when Defendants were scheduling release of the 453,000 AF of ROD flows for 2013. *Id.* at  
12 pp. 1-2; Declaration of Charles Hanson in Support of Plaintiffs' Motion for Preliminary Injunction  
13 and Temporary Restraining Order (“Hanson Dec.”) at ¶ 26. Defendants could have, but did not,  
14 schedule use of the 453,000 AF of ROD flows to address the risk they cite to justify the Excess  
15 Releases above and beyond the ROD flows.

16 **C. The Central Valley Is Currently Suffering A Critical Water Supply Shortage, And**  
17 **2014 Threatens To Be Even Worse**

18 The CVP is currently experiencing one of the driest periods on record. As of May 1, the  
19 Northern Sierra snowpack was only about 17% of normal. Exh. 4 to Akroyd Dec. at p. 1. CVP  
20 storage is also low. End-of-year storage in Shasta Reservoir is projected to be 1.9 million AF,  
21 which is far below the 2.9 million AF average end-of-year storage. Snow Dec. at ¶ 28. End-of-  
22 year storage in Trinity Reservoir, without the August and September supplemental releases, is  
23 projected to be about 1.3 million AF—300,000 AF lower than the 1.6 million AF average. *Id.*

24 The quantity of water in storage is a key determinant of CVP contract allocations. Snow  
25 Dec. at ¶ 19. The greater the storage that can be carried over from one year to the next, the  
26 greater the water supply protection against dry conditions the next year. *Id.* Conversely, the  
27 lower the carryover storage from one year to the next, the greater the risk of water shortages in  
28 the following year. *Id.* When making CVP water allocations to contractors, like Westlands and

1 other members of the Authority, Reclamation looks at storage levels in its CVP reservoirs,  
2 including Trinity Reservoir. On February 25, 2013, Reclamation announced that south-of-Delta  
3 CVP agricultural water service contractors (including Westlands and other Authority members)  
4 would receive 25% of their CVP contract supply. *Id.* at ¶ 15. That announcement was based on  
5 forecasted low reservoir storage and Reclamation’s then current forecast of CVP operations. *Id.*  
6 On March 22, 2013, Reclamation reduced the CVP water allocation to 20%. *Id.* Reclamation’s  
7 announcement of that CVP water delivery reduction stated “this decreased allocation for South-  
8 of-Delta contractors is based on the critical water year classification, the projection of reduced  
9 Delta inflows this spring, significant loss of reservoir storage to support pumping this summer  
10 and water quality permit requirements.” *Id.*; Exh. 3 to Snow Dec (emphasis added). For  
11 Westlands, a 20% allocation means taking delivery of just 230,000 AF of the 1,150,000 AF of  
12 CVP water to which it is entitled under its primary CVP water service contract with Reclamation.  
13 Freeman Dec. at ¶ 4.

14 The Governor of California, Reclamation and the State Water Resources Control Board  
15 (“SWRCB”) have all acknowledged the dire state of California’s 2013 water supply. On May 20,  
16 2013, Governor Brown issued Executive Order B-21-13, to streamline approvals for water  
17 transfers to California’s farms. Exh. 4 to Akroyd Dec. In the Order, the Governor states that  
18 “much of California experienced record dry conditions in January through March 2013,  
19 registering historic lows on the Northern Sierra and the San Joaquin precipitation indices.” Exh.  
20 4 to Akroyd Dec. at p. 2. The Governor describes significant adverse impacts of the water  
21 shortage, observing that “reductions in surface water deliveries will likely force San Joaquin  
22 Valley agricultural water users to extract additional groundwater from already overused basins,  
23 potentially resulting in additional land subsidence,” that “the supply reductions will jeopardize  
24 agricultural production in parts of the San Joaquin Valley” and that “the supply reductions will  
25 also impact millions of municipal and industrial water users across California.” *Id.*

26 Also in May, Reclamation and the California Department of Water Resources (“DWR”)  
27 jointly asked the SWRCB to relieve the CVP and State Water Project (“SWP”) from meeting  
28 certain Bay-Delta Water Quality Control Plan requirements that would require Reclamation to

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1 draw down storage in Shasta Reservoir so far that it would deplete the cold water pool needed to  
2 maintain temperatures for winter-run Chinook salmon in the Sacramento River in the late  
3 summer. Exh. 5 to Akroyd Dec. Reclamation and DWR acknowledged that “[t]he low reservoir  
4 inflow and increased storage withdrawal is depleting the cold water pool in the reservoirs that is  
5 important to provide adequate instream fishery habitat for anadromous fish in the rivers through  
6 the summer and fall.” Exh. 5 to Akroyd Dec. at p. 3. Reclamation sought to operate to Critical  
7 Dry rather than Dry year type objectives, “to achieve 100,000 to 200,000 af of cold water benefits  
8 in the upstream reservoirs” that “would improve the chances of meeting the temperature objective  
9 at Airport Road” and “help avoid temperature related fish losses in the Sacramento River.” *Id.* at  
10 p. 4.

11 In response to Reclamation’s request, the SWRCB, through the Delta Watermaster,  
12 indicated that it would not object or take any action if Reclamation and DWR operated to meet  
13 Critically Dry year rather than Dry year objectives, provided they submitted and operated to an  
14 approved temperature management plan to maximize benefits to fisheries resources. Snow Dec.  
15 at ¶ 26. In addition, on July 15, 2013, the SWRCB issued a “Notice of Surface Water Shortage  
16 for 2013.” *Id.* at ¶ 27. The notice warns water diverters that in light of dry conditions the past  
17 two years, some diverters’ rights will not support diversions this fall, and that their rights do not  
18 extend to stored water released by the CVP and State Water Project. *Id.* It further cautions that  
19 dry conditions may extend into next year as well. *Id.*

20 The dry conditions and water supply shortages in 2013 foreshadow further water  
21 shortages for CVP contractors in 2014. The CVP and other water projects depend upon water  
22 stored in wetter years to compensate for lower precipitation during dry years. Going in to 2014,  
23 CVP reservoirs will be depleted. Even with the relief provided by the SWRCB, the projected  
24 end-of-year storage in Shasta Reservoir and Trinity Reservoir is well below average. Given the  
25 projected storage, it is unlikely that there will be enough precipitation to refill Trinity Reservoir in  
26 2014. *Id.* at ¶ 28.

1 **D. The Excess Releases Will Cause Significant And Irreparable Harm**

2 **1. Harm To CVP Water Users**

3 On August 13, 2013, Reclamation will begin making the Excess Releases from Trinity  
4 Reservoir for the Trinity River fishery. The Excess Releases will result in up to 109,000 AF of  
5 water being irretrievably lost for export to the Sacramento watershed and other CVP uses,  
6 including water supply and generation of hydropower. Instead of releasing that water to the  
7 Trinity River, Defendants could export it to the Sacramento watershed, and use it to restore south-  
8 of-Delta CVP agricultural contractors' 2013 CVP water allocation to 25%. Snow Dec. at ¶¶ 4.a.,  
9 32. Reclamation has a contractual obligation to "make all reasonable efforts to optimize Project  
10 Water deliveries" to CVP water service contractors. Exh. 6 to Akroyd Dec., p. 31. Additional  
11 contract deliveries are desperately needed in 2013 by south-of-Delta farmers laboring under the  
12 reduced 20% allocation.

13 If Defendants make the Excess Releases to the Trinity River instead of restoring the  
14 south-of-Delta CVP agricultural water service allocation to 25%, Plaintiffs will be irreparably  
15 harmed in at least two ways. First, their constituents will suffer the immediate loss of the  
16 increased contract allocation and use of increased CVP water deliveries south of the Delta in  
17 2013. This loss is likely to cause environmental injury including long-term damage to orchard  
18 trees, other crops, and soil associated with increased use of low quality groundwater  
19 (Acquistapace Dec. at ¶ 5; Anderson Dec. at ¶ 4), subsidence (Freeman Dec. ¶¶ 17-19), and  
20 adverse impacts to air quality from fallowing (Freeman Dec. at ¶ 26). Water users will also  
21 suffer economic and social injury associated with lost CVP supply, including lost income due to  
22 fallowing, unemployment, increased expenses associated with the purchase of supplemental  
23 water, increased cost of obtaining operations financing, and declines in local school attendance  
24 and funding. (Acquistapace Dec. at ¶ 5; Cardella Dec. at ¶ 7; Acquistapace Dec. at ¶ 7;  
25 Hernandez at ¶ 8.)

26 Second, by further draining Trinity Reservoir in August and September this year,  
27 Defendants will impair the ability of the CVP to provide for Plaintiffs' water supply, and for  
28

1 environmental needs, in 2014. It is very unlikely that Trinity Reservoir will refill in 2014. Snow  
2 Dec. at ¶ 27. In light of the dry conditions in 2013, south-of-Delta agricultural water service  
3 contractors are facing a significant risk that they will receive a zero percent or other very low  
4 initial contract allocation in February 2014. Snow Dec. at ¶¶ 45, 47. Hence, the additional  
5 August and September releases will likely reduce initial, February 2014 CVP contract allocations  
6 to members of the Authority below what the allocations would have been without the releases.  
7 Snow Dec. at ¶¶ 44, 47. Lower initial allocations and delays in increases to allocations cause  
8 harm to farmers trying to plan their planting for the coming growing season and to secure  
9 financing. Allen Dec. at ¶ 10. With reduced CVP water allocations, they must scale back their  
10 operations by fallowing land, reducing the number of employees, and other measures. Allen Dec.  
11 at ¶ 11; *see* Bourdeau Dec. at ¶ 9.

## 12 2. Harm To Fish And Aquatic Species

13 Although it is uncertain whether the release of up to 109,000 AF from Trinity Reservoir  
14 will benefit fall-run Chinook salmon in the lower Klamath River, it is certain to threaten  
15 significant adverse impacts on a number of fish and aquatic species in the Trinity and Sacramento  
16 rivers. On the Trinity River, the loss of stored water from Trinity Reservoir threatens adverse  
17 effects on the coho salmon, an ESA-listed species. The Excess Releases will cause an abrupt  
18 change in water temperatures as a result of reduced temperatures during the release followed by a  
19 rapid increase in temperatures following completion of the release. Hanson Dec. ¶ 29. Changes  
20 in fall flows and water temperatures threaten to degrade rearing habitat for juvenile coho salmon.  
21 Hanson Dec. at ¶ 28. The Excess Releases threaten to destroy spring-run Chinook salmon redds  
22 in the Trinity River when the unusually high flows recede in late September. Hanson Dec. at ¶  
23 34. Because the Excess Releases will artificially increase fall flows, they threaten to induce  
24 upstream migration of adult fall-run salmon during the release period, leading to a co-occurrence  
25 of spawning spring-run and fall-run adult salmon, which exacerbates the risk of hybridization  
26 between the two species. Hanson Dec. at ¶¶ 32-33.

27 In addition, the unnaturally high, cold flows from the Excess Releases will harm aquatic  
28

1 resources in the mainstem of the Trinity River, including western pond turtles, yellow-legged  
2 frog, and lamprey. The Excess Releases will increase water velocities within the river as well as  
3 seasonally reduced water temperatures, both of which would likely adversely impact the already  
4 compromised habitat conditions of western pond turtle (*Actinemys marmorata*) and yellow legged  
5 frog (*Rana boylei*). Hanson Dec. at ¶ 37. Reducing water temperatures would further reduce  
6 western pond turtle body temperatures, reduce growth and energy reserves, require longer periods  
7 of basking, thereby reducing foraging opportunities, and could potentially trigger premature  
8 hibernation. Hanson Dec. at ¶ 39. Altered flows and temperatures may also harm yellow legged  
9 frog metamorphosis and survival in the fall. Hanson Dec. at ¶ 39. Increasing instream flows on  
10 the Trinity River as part of the Excess Releases would increase water velocities in the river,  
11 which harms lamprey through a dislodging impact. Hanson Dec. at ¶ 36.

12 The Excess Releases will also harm the winter-run Chinook salmon and Central Valley  
13 spring-run Chinook salmon in the Sacramento River, which are listed as endangered and  
14 threatened under the ESA. The loss of stored water associated with the Excess Releases reduces  
15 the pool of cold water available to maintain cooler temperatures in the upper Trinity River and the  
16 upper Sacramento River, which harm impact winter-run and /or spring-run salmon egg incubation  
17 in 2013 and 2014 if the winter of 2014 does not result in sufficient flows to refill the reservoirs.  
18 Hanson Dec. at ¶ 48. Similarly, the Excess Releases will create a conflict between the U.S. Fish  
19 and Wildlife Service's management objectives for the delta smelt and the NMFS management  
20 objectives for listed salmonid species. Hanson Dec. at ¶ 56.

21 III.

22 ARGUMENT

23 A. The Court Should Issue A Temporary Restraining Order And Preliminary  
24 Injunction To Prevent Irreparable Harm From The Unlawful Release Of CVP  
25 Water From The Trinity River Division

26 This Court should issue the injunctions Plaintiffs request to prevent irreparable harm. “A  
27 plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits,  
28 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of  
equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural*

1 *Resources Defense Council*, 555 U.S. 7, 20 (2008). The legal standard for a temporary  
2 restraining order (“TRO”) parallels the four requirements for a preliminary injunction. *Bronco*  
3 *Wine Co. v. United States Dep’t of Treasury*, 997 F. Supp. 1309, 1313 (E.D. Cal. 1996) (citing  
4 *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal.  
5 1995)). Here, each of the four requirements is met.

6 **B. Plaintiffs Are Likely To Prevail On The Merits Of Their Claims**

7 Plaintiffs are likely to prevail on the merits of their claims because Defendants are acting  
8 unlawfully by making Excess Releases from Trinity Reservoir in August and September 2013.<sup>3</sup>  
9 Such violations are made redressable by the Administrative Procedure Act (“APA”), which  
10 provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and  
11 conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in  
12 accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short  
13 of statutory right; [or] (D) without observance of procedure required by law.” 5 U.S.C. § 706(2).

14 **1. The Excess Releases Will Violate CVPIA Section 3406(b)(23)**

15 The Excess Releases violate Defendants’ mandatory duty under CVPIA section  
16 3406(b)(23) to implement releases to the Trinity River for fishery purposes in accordance with  
17 the ROD. As explained above, in CVPIA section 3406(b)(23), Congress directed the Secretary of  
18 the Interior to develop “permanent instream fishery flow requirements and Trinity River Division  
19 operating criteria and procedures for the restoration and maintenance of the Trinity River  
20 fishery.” The Secretary did so, culminating in the Trinity ROD, which set forth the maximum  
21 fishery releases for each year, based on year type. Exh. 1 to Akroyd Dec., p. 12. The ROD states  
22 that “the annual flow volumes established in Table 1 may not be changed.” *Id.* at p. 12. The  
23 Excess Releases are for fishery purposes because they are intended to benefit fall-run Chinook  
24 salmon migrating up the lower Klamath River. Exh. 3 to Akroyd Dec., pp. 1-2. A significant  
25

26 <sup>3</sup> Plaintiffs base this motion for preliminary relief on their likelihood of success on the first three  
27 claims for relief alleged in their complaint. The remaining claim relates to late summer releases  
28 completed in 2012. Those releases can no longer be enjoined. Plaintiffs will seek other relief  
based on that claim when the Court decides the merits.

1 portion of the Chinook salmon in the lower Klamath River fish are returning to the Trinity River  
2 for spawning. Under the ROD, Defendants are limited to releases for fishery purposes totaling  
3 453,000 AF for 2013. If Defendants make the supplemental August and September releases, the  
4 total releases for fishery purposes in 2013 will exceed the 453,000 AF volume limit set by the  
5 ROD. Defendants' action is therefore in violation of Defendants' mandatory duty under CVPIA  
6 section 3406(b)(23).

7 In their environmental assessment, Defendants cite Section 2 of the Central Valley Project  
8 Act of 1955, Pub. L. 84-386 (1955), which provides that "the Secretary is authorized and directed  
9 to adopt appropriate measures to insure preservation and propagation of fish and wildlife..." But that  
10 general direction was later made specific in CVPIA section 3406(b)(23), and the ROD adopted to  
11 implement section 3406(b)(23) imposes a cap of 453,000 AF for TRD fishery releases. The EA  
12 argues that "Section 2 of the Act limits the integration of the Trinity River Division with the rest  
13 of the Central Valley Project and gives precedence to in-basin needs." Exh. 3 to Akroyd Dec., at  
14 p. 2. But Section 2 does not say that; Section 2 provides that "the operation of the Trinity River  
15 division shall be integrated and coordinated, from both a financial and an operational standpoint,  
16 with the operation of other features of the Central Valley project." Pub. L. 84-386 (1955), § 2  
17 (emphasis added). It is precisely that integrated coordination that translates the use of CVP  
18 storage for Excess Releases into reduced VP water supplies for Plaintiffs and other beneficial  
19 uses.

20 **2. The Excess Releases Will Violate CVPIA Section 3411(a) And 43 U.S.C.**  
21 **Section 483**

22 The Excess Releases violate the CVPIA by using CVP water outside the geographic place  
23 of use approved by the state water right permits applicable to the TRD. Section 3411(a) of the  
24 CVPIA provides:

25 Notwithstanding any other provision of this title, the Secretary  
26 shall, prior to the reallocation of water from any purpose of use or  
27 place of use specified within applicable Central Valley Project  
28 water rights permits and licenses to a purpose of use or place of use  
not specified within said permits or licenses, obtain a modification  
in those permits and licenses, in a manner consistent with the



1 provisions of applicable State law, to allow such change in purpose  
2 of use or place of use.

3 Pub. L. No. 102-575 Title 34, 106 Stat. 4706 (1992), § 3411(a) (emphasis added). Section  
4 3411(a) imposes a duty on the Secretary to obtain an amendment of the approved place of use  
5 prior to reallocating water from any place of use specified in the CVP water right permits to a  
6 different place of use not authorized by those permits. Further, Section 8 of the Reclamation Act  
7 requires Defendants “to proceed in conformity with” State law “relating to the control,  
8 appropriation, use or distribution of water used in irrigation.” 43 U.S.C. § 483.

9 The existing state water rights permits applicable to the TRD do not approve use of the  
10 water diverted by the TRD in the lower Klamath River. Declaration of Hanspeter Walter in  
11 Support of Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order at ¶¶  
12 2-25. To comply with CVPIA section 3411(a), Defendants must seek and obtain changes to the  
13 water right permits for the TRD before reallocating water for use in the lower Klamath River.  
14 Chapter 10 of Division 2 of the California Water Code (commencing at Section 1700) provides a  
15 procedure and substantive requirements for an amendment to the approved place of use under a  
16 water rights permit. The process includes notice to interested persons and a right to protest. Cal.  
17 Wat. Code §§ 1703, 1703.1.

18 Defendants have not obtained a modification of TRD water rights permits to add the lower  
19 Klamath River as an approved place of use in the manner provided by California law.  
20 Accordingly, Defendants’ use of stored TRD water in the lower Klamath River in August and  
21 September 2013 as part of the Excess Releases is in violation of Defendants’ mandatory duties  
22 under CVPIA section 3411(a) and 43 U.S.C. section 483.

23 **3. The Excess Releases Will Violate Defendants’ NEPA Obligations**

24 Defendants’ decision to proceed with the Excess Releases without preparing an  
25 environmental impact statement (“EIS”) is arbitrary, capricious, and not in accordance with law.  
26 NEPA requires that “to the fullest extent possible,” all agencies of the federal government prepare  
27 an EIS prior to implementing “major Federal actions significantly affecting the quality of the  
28

1 human environment.” 42 U.S.C. § 4332(2)(C). The Ninth Circuit has explained that “to prevail  
2 on a claim that the federal agencies were required to prepare an EIS, the plaintiffs need not  
3 demonstrate that significant effects will occur. A showing that there are ‘*substantial questions*  
4 whether a project may have a significant effect on the environment’ is sufficient.” *Anderson v.*  
5 *Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (quoting *Blue Mountains Biodiversity Project v.*  
6 *Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)) (italics in original). Whether a government  
7 action may have a “significant” effect on the environment involves consideration of context and  
8 intensity. 40 C.F.R. § 1508.27; *Center for Biological Diversity v. Nat’l Highway Traffic Safety*  
9 *Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008). In reviewing Reclamation’s decision not to prepare  
10 an EIS, courts apply an arbitrary and capricious standard “to determine whether the agency has  
11 taken a ‘hard look’ at the consequences of its actions, ‘based [its decision] on a consideration of  
12 the relevant factors,’ and provided a ‘convincing statement of reasons to explain why a project’s  
13 impacts are insignificant.’” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th  
14 Cir.2001) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)), *abrogated on other*  
15 *grounds by Monsanto Co. v. Geertson Seed Farms*, --- U.S. ----, 130 S. Ct. 2743 (2010).

16 In the final environmental assessment for the Excess Releases, Defendants failed to take a  
17 hard look at the consequences of the releases, failed to provide a convincing statement of reasons  
18 to explain why the impact of the releases will be insignificant, and failed to base their decision on  
19 a consideration of all the relevant factors. Defendants’ Finding of No Significant Impact  
20 (“FONSI”), Exh. 7 to Akroyd Dec., is unsupported. At a minimum, there are substantial  
21 questions whether the Excess Releases may have a significant effect on the human environment.  
22 The unnaturally high, cold flows to be released from Trinity Reservoir in August and September  
23 will adversely affect biological resources in the mainstem of the Trinity River, including western  
24 pond turtles, yellow-legged frog and lamprey, and will result in the destruction of spring-run  
25 Chinook salmon redds in the Trinity River when the unusually high flows recede in late  
26 September. The loss of stored water threatens adverse effects on the ESA-listed coho salmon in  
27 the Trinity River, and on ESA-listed Sacramento River winter-run Chinook salmon and Central  
28 Valley spring-run Chinook salmon, by reducing the pool of cold water available to maintain

1 cooler temperatures in the upper Trinity River and the upper Sacramento River. The loss of CVP  
2 water supply and loss of hydropower generation from the releases will result in adverse effects to  
3 the environment throughout much of the CVP service area. It will cause physical impacts to the  
4 environment in the Central Valley, including fallowing and related dust emissions, groundwater  
5 overdraft and related subsidence, and use of alternative energy sources to compensate for lost  
6 hydropower. All of these impacts may be significant.

7 Under NEPA, Defendants are therefore required to prepare an EIS before proceeding with  
8 the Excess Releases. Moreover, to the extent there is controversy about the scientific justification  
9 for and size of the Excess Releases<sup>4</sup>, that further supports the need for an EIS. 40 C.F.R. §  
10 1508.27(b)(4); *see Anderson v. Evans*, 371 F.3d at 489 (explaining that “[a] proposal is highly  
11 controversial when there is a substantial dispute [about] the size, nature, or effect of the major  
12 Federal action”) (internal citations omitted). To proceed with the Excess Releases without  
13 preparing an EIS is arbitrary, capricious, and not in accordance with law.

14 In sum, the Excess Releases violate federal Reclamation law—CVPIA sections  
15 3406(b)(23) and 3411(a), 43 U.S.C. section 483—and violate NEPA, 42 U.S.C. § 4332(2)(C).  
16 Defendants’ action is therefore: (1) arbitrary, capricious, an abuse of discretion, and otherwise not  
17 in accordance with law; (2) in excess of statutory jurisdiction, authority, or limitation, or short of  
18 statutory right; and (3) without observance of procedure required by law, within the meaning of 5  
19 U.S.C. § 706(A), (C) and (D).

20 For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their claims.

21 **C. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief**

22 If the Excess Releases are implemented as scheduled, Plaintiffs are likely to suffer  
23 irreparable harm. First, if Defendants make the Excess Releases instead of restoring 2013 south-  
24 of-Delta CVP contract allocations to 25%, Plaintiffs will suffer immediate and aggravated  
25 environmental harms associated with loss of water, including negative impacts from groundwater

26 \_\_\_\_\_  
27 <sup>4</sup> The Hoopa Valley Tribe have argued that the size of the Excess Releases is inadequate, and that  
28 greater flows are needed; Plaintiffs dispute that there is any scientific justification for the Excess  
Releases at all.

1 use, damage to crops and orchards, degradation of air quality, and socioeconomic impacts.  
2 Second, if Defendants make the Excess Releases instead of restoring 2013 south-of-Delta CVP  
3 contract allocations to 25%, Plaintiffs are likely to suffer irreparable harm associated with the  
4 hole in storage caused by the Excess Releases. Plaintiffs would likely receive a lower initial  
5 allocation in 2014 than they would if the water were kept in storage, and are likely to continue  
6 receiving lower allocations throughout 2014 as a result of the hole in storage. In addition,  
7 Plaintiffs may suffer irreparable harm if the loss of cold water pool storage results in harm to  
8 ESA-listed species, through even tighter regulation of CVP water delivery operations.

9 **1. The Loss Of Restored CVP Water Deliveries South-Of-Delta In 2013 Will**  
10 **Irreparably Harm Plaintiffs**

11 Enjoining the Excess Releases would enable Reclamation to use the TRD water associated  
12 with the releases to restore south-of-Delta agricultural contractors' 2013 allocations to 25%. In  
13 March of this year, Reclamation decreased Plaintiffs' contract allocations, citing, in part, a  
14 "significant loss of reservoir storage to support pumping this summer." Snow Dec. at ¶ 15. Now,  
15 however, Reclamation has determined that 109,000 AF of water in Trinity Reservoir storage may  
16 be released from storage. See Snow Dec. at ¶¶ 29, 32. Reclamation has a contractual obligation  
17 to optimize deliveries to CVP water service contractors. Exh. 6 to Akroyd Dec., p. 31. There is  
18 no mandatory requirement for Reclamation to deliver 109,000 AF of CVP water for any other  
19 purpose. The quantity of water Reclamation is prepared to use for the Excess Releases, which  
20 should be enjoined as illegal, should instead be used to restore 2013 allocations for south-of-Delta  
21 agricultural water service contractors by up to 5%. Snow Dec. at ¶¶ 4.a, 32. Increased contract  
22 allocations have been made as late as September and October in past years. Snow Dec. ¶ 22.

23 Mr. Snow explains that the 109,000 AF of water "could instead be used to increase  
24 allocations to south of Delta contractors, and to restore all or a portion of the 5% allocation  
25 reduction imposed on March 22. Based on contract entitlement, an additional 5% allocation to  
26 south of the delta water service contractors equates to 90,000 acre-feet, less than the up to  
27 109,000 acre-feet earmarked for the Excess Releases." Snow Dec. at ¶ 33. He explains that "the  
28

1 CVP would be able to move the quantity of water necessary to increase the allocation to  
2 agricultural water service contractors south of the Delta by 5%.” *Id.* at ¶ 34. Water users could  
3 benefit almost immediately, because “[t]here is sufficient water in San Luis Reservoir, located  
4 south of the Delta, to make additional water available to water users who can use it right away if  
5 the CVP borrows from the SWP share in San Luis Reservoir. Reclamation could then repay any  
6 borrowing and restore storage in San Luis Reservoir, or make direct deliveries, over the fall  
7 months by releasing the water from Trinity Reservoir or other upstream CVP reservoirs and  
8 pumping it from the Delta.” *Id.*

9 If Reclamation makes the Excess Releases instead of increasing the contract allocation,  
10 Plaintiffs will suffer harms associated with lost CVP supply. In light of the current 20%  
11 allocation, groundwater has made up a significant portion of the 2013 water supply in Plaintiffs'  
12 service area. *See* Freeman Dec. at ¶ 8. In most areas of Westlands, groundwater has significantly  
13 higher salinity and boron concentration than CVP supplies. Freeman Dec. at ¶ 21. As compared  
14 to water from the CVP, groundwater in Westlands has concentrations that are several times higher  
15 for constituents of concerns for growers, including Boron, sodium, sulfate, and total dissolved  
16 solids. Freeman Dec. at ¶ 21. Because of the expected increased use of low quality groundwater  
17 for irrigation, damage to trees, crops, and soil is likely, i.e., in the form of severe leaf burn and  
18 shortened life and production. Freeman Dec. at ¶ 21; Acquistapace Dec. at ¶ 5; Anderson Dec. at  
19 ¶ 4. Some of the weaker trees in orchards will likely die as a result of the damage done by  
20 groundwater in 2013. Anderson Dec. at ¶ 4. Increased groundwater pumping leads to declining  
21 groundwater levels, which in turn cause subsidence. Freeman Dec. at ¶¶ 17-19. Increased  
22 groundwater pumping will also result in an increase in demand for energy, which is associated  
23 with adverse environmental impacts. Freeman Dec. at ¶ 22.

24 The loss of water will also cause farmers to fallow additional acres. *See* Cardella Dec. at  
25 ¶ 7, Anderson Dec. at ¶ 6; Nelson Dec. at ¶ 22. In Westlands, at least 160,000 acres will need to  
26 be fallowed in the 2013-2014 water year based on current water allocation percentages. Freeman  
27 Dec. at ¶ 10. Fallowing may also cause adverse impacts to air quality. Freeman Dec. at ¶¶ 11,  
28 26. These harms, by their nature, cannot be adequately remedied by money damages, and are

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1 permanent or at least of long duration. *See Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S.  
2 531, 545 (1987); *Earth Island Institute v. Carlton*, 626 F.3d 462, 481-82 (9th Cir. 2010) (noting  
3 court's repeated recognition "that the irreversible environmental effects of logging activity suffice  
4 to establish 'irreparable harm' for purposes of obtaining a preliminary injunction").

5 The west side of the San Joaquin Valley suffers socioeconomic injury from lost CVP  
6 supply. Mr. Snow describes how 109,000 AF is enough to irrigate about 43,600 acres of  
7 farmland in Westlands. Snow Dec. at ¶ 31. The fallowing of acreage or loss of crops due to  
8 impacts from increased groundwater use can lead to employees losing their jobs on farms and for  
9 processing companies. Acquistapace Dec. at ¶ 5. The difference in supply from the Excess  
10 Releases will likely cause at least one Westlands farmer, Mr. Cardella, to "idle a significant  
11 amount of acreage and cut [his] workforce by approximately 33%." Cardella Dec. at ¶ 7. The  
12 loss of water can also have significant economic costs, as many farmers will attempt to purchase  
13 supplemental water from non-CVP sources, at extremely high cost. Acquistapace at ¶ 6;  
14 Bourdeau at ¶ 5. Water shortages may also increase the cost of obtaining operations financing  
15 and the ability to obtain it at all. Acquistapace Dec. at ¶ 7.

16 In contrast, if Reclamation restores Plaintiffs' 2013 contract allocations to 25%, that water  
17 could be used on farms to reduce dependence on groundwater and mitigate the negative impacts  
18 associated with increased groundwater pumping, e.g. by helping to dilute the sodium levels in the  
19 water. Acquistapace Dec. at ¶ 8; Anderson Dec. at ¶ 10; Allen at ¶ 8. An additional 5%  
20 allocation could allow farmers to irrigate crops such as winter wheat, or to pre-irrigate cotton  
21 beds for next year's planting. Allen Dec. at ¶ 8. It would help reduce the cost of purchasing  
22 supplemental water in 2013 and 2014. Bourdeau Dec. at ¶ 9. An increase would also allow  
23 farms to retain employees they would otherwise lose. Acquistapace Dec. at ¶ 10; Anderson Dec.  
24 at ¶ 10. Moreover, whatever water from an additional allocation that farmers do not use this year,  
25 they could carry over as a supply to use next year. Allen Dec. at ¶ 8; Anderson Dec. at ¶ 11.

1           **2. The Reduction In Initial Allocations And Delay To Any Increases In**  
2           **Allocation In 2014 Will Irreparably Harm Plaintiffs**

3           Mr. Snow explains that because Trinity Reservoir is very unlikely to refill in 2014, the  
4 water storage in the reservoir will likely be lower by the full amount of the Excess Releases.  
5 Snow Dec. at ¶ 37. “The hole in storage created by the Excess Releases will likely impact CVP  
6 water supply allocations in 2014, by causing the initial allocation for south of Delta agricultural  
7 water service contractors to be lower than it would be if the volume of water released were still in  
8 storage in Trinity Reservoir.” Snow Dec. at ¶ 44. Mr. Snow also explains that, because low  
9 storage coming into 2014 will not likely be filled up, the impact of the Excess Releases on storage  
10 will likely continue to be felt in the allocations after the initial allocation in February 2014. *Id.* at  
11 ¶ 48.

12           If the initial 2014 water allocation is made lower by the Excess Releases, it is likely that  
13 fallowing and further work force reductions will take place. In addition, the size of the initial  
14 allocation in February 2014 is important, because February is a critical time for determining what  
15 crops and how much farmland can be planted. Allen Dec. at ¶ 10. When initial allocations are  
16 low, farmers plant fewer acres and choose crops that use less water, such as safflower or sudan  
17 grass, but also produce less revenue and profit. Allen Dec. at ¶ 11. Crops such as safflower and  
18 sudan grass require less labor and other inputs, meaning fewer hours for farm workers and lower  
19 sales for farm vendors. Allen Dec. at ¶ 11. Low initial allocations also result in farms initially  
20 planting too few acres, preventing them from maximizing their crop yield. Nelson Dec. at ¶ 14.  
21 Lower than necessary initial allocations can also result in farms unnecessarily arranging to  
22 purchase more expensive supplemental water supplies that may not be needed, or not receiving a  
23 line of credit or bank loan, or one for less value or at a higher interest rate than they could have  
24 otherwise obtained had the initial CVP allocations been higher. Nelson Dec. at ¶ 14. In contrast,  
25 as is the case for 2013, even a small increase in contract allocations would help offset the use of  
26 groundwater and help dilute poor quality groundwater. Bourdeau Dec. at ¶ 9. It would also give  
27 farmers the opportunity to maintain their workforces and reduce the cost of purchasing  
28 supplemental water. Bourdeau Dec. at ¶ 9.

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1 The hole in Trinity Reservoir storage created by the Excess Releases will also make it  
2 more difficult for Reclamation to manage the cold water pool in Shasta Reservoir for the benefit  
3 of listed salmon species, which will likely impact future actions taken for the benefit of those  
4 species. Water from Trinity Reservoir is used in conjunction with Shasta Reservoir to maintain  
5 cool water temperatures in the Sacramento River for two species of salmon listed under the ESA,  
6 the winter-run Chinook salmon and the Central Valley spring-run Chinook salmon. Snow Dec. at  
7 ¶ 7. The greater the level of reservoir storage, the greater the volume of cold water that can be  
8 used to meet the water temperature requirements for salmonids, which are sensitive to exposure to  
9 seasonally elevated water temperatures. Hanson Dec. at ¶ 42. Because a reduction in cold water  
10 storage may adversely impact listed salmonids, additional measures may be necessary to avoid  
11 unauthorized take under the ESA. History shows that such measures often result in additional  
12 restrictions on CVP exports, with impacts disproportionately felt by Plaintiffs.

13 **D. The Balance Of Hardships Favors Injunctive Relief**

14 Plaintiffs will suffer significant hardship as a result of the Excess Releases. Plaintiffs'  
15 constituents will suffer the immediate loss of an increased contract allocation and use of increased  
16 CVP water deliveries south of the Delta in 2013. In addition, the Excess Releases will impair the  
17 ability of the CVP to provide for Plaintiffs' water supply, and for environmental needs, in 2014.  
18 The farms and cities that depend on CVP water supply are already facing a water shortage  
19 catastrophe. The Excess Releases will exacerbate these impacts by further reducing CVP water  
20 supply. If Defendants proceed in making the releases, they will be adding insult to injury.  
21 Moreover, Defendants will be flouting their contractual obligation to optimize deliveries to CVP  
22 contractors.

23 In contrast, Defendants are not required to implement the Excess Releases. Defendants  
24 are actually precluded from making the Excess Releases. See CVPIA §§ 3406(b)(23), 3411(a);  
25 43 U.S.C. § 483. The Trinity River fishery is already provided for in the ROD, in accordance  
26 with Congressional intent. Defendants had adequate notice of the expected size of the fall-run  
27 Chinook salmon escapement in 2013, and could have set aside a portion of the ROD flows for  
28



1 releases in August and September. Hanson Dec. at ¶ 26. Defendants chose not to, apparently  
2 determining that the potential threat of a fish die-off to fall-run salmon did not require those flows  
3 to be accounted for using ROD scheduled releases.

4 Now, Defendants assert that the 1955 Act provides authority for the supplemental  
5 releases, which are designed to reduce the risk of a fish die-off of the fall-run Chinook salmon.  
6 Exh. 3 to Akroyd Dec., p. 2. But the 1955 Act does not require the Excess Releases. Nor does  
7 any other federal statute. The fall-run Chinook salmon is not listed under the ESA, and if  
8 Defendants do not implement the supplemental releases, they will not be violating the ESA.

9 There is no convincing evidence that the additional flows are necessary to prevent, or will  
10 prevent, a repeat of the 2002 die-off. Although it has been hypothesized that increasing late  
11 summer and early fall releases of water from the Trinity River would reduce the risk of a die-off,  
12 no definitive cause and effect relationship has been identified. Hanson Dec. ¶¶ 21-24. In the last  
13 thirty-five years there has been only one disease outbreak that resulted in substantial adult salmon  
14 mortality, and therefore there is high uncertainty in the contribution of various environmental and  
15 biological factors resulting in a disease outbreak and the potential frequency of re-occurrence.  
16 Hanson Dec. ¶¶ 21-22. Although increased flows have been provided during the fall months in  
17 recent years there is no proof that these flows precluded a disease outbreak just as there have been  
18 no outbreaks or mortality in past years when these supplemental flows were not made. Hanson  
19 Dec. ¶¶ 21-24. In addition, the magnitude of beneficial flow remains unknown, assuming that  
20 increased flows provide any contribution to the health of adult salmon in the lower Klamath  
21 River. Hanson Dec. ¶¶ 23-24. In 2003, 2004, and 2012, supplemental releases of 30-40,000 AF  
22 were made from the Trinity River during the fall with no observed salmon mortality. Hanson  
23 Dec. ¶ 24. Results of these earlier years provide no scientific basis to suggest that higher releases  
24 would be necessary in 2013 to avoid disease outbreak. Hanson Dec. ¶¶ 21-24. Further, there is  
25 no assurance that if the Excess Releases are implemented in the late summer of 2013 there will be  
26 no disease outbreak.

27 It is more certain that other fish and aquatic species would be negatively impacted by the  
28 Excess Releases. The artificial increase in late summer flows may result in greater attraction and

1 suitable upstream migration conditions for adult fall-run salmon during the August-September  
2 supplemental release period, leading to a co-occurrence of spring-run and fall-run adult salmon  
3 spawning in the Trinity River and an increased risk of hybridization between the two species.  
4 Hanson Dec. ¶¶ 32-33. Increased instream flows on the Trinity River that will result from the  
5 Excess Releases may have a significant dislodging effect on lamprey. Hanson Dec. ¶ 36.  
6 Conditions that would occur under the releases would also compound and further aggravate the  
7 already compromised habitat conditions of the western pond turtle and yellow legged frog.  
8 Hanson Dec. ¶¶ 37-41. Reducing water temperatures as a result of the supplemental releases  
9 would further reduce the western pond turtle body temperature, reduce growth and energy  
10 reserves, require longer periods of basking thereby reducing foraging opportunities and could  
11 potentially trigger pre-mature hibernation. Hanson Dec. ¶ 39. Additionally, for species in the  
12 Sacramento River, a reduction in reservoir storage as a result of the releases would directly result  
13 in a reduction in reservoir and cold water storage that may adversely impact listed Sacramento  
14 River winter-run Chinook and/or Central Valley spring-run Chinook salmon egg incubation in  
15 2013 and 2014 assuming that Trinity Reservoir does not refill. Hanson Dec. ¶¶ 42-50.

16 In sum, Plaintiffs will suffer significant hardship if the Excess Releases are implemented.  
17 There is no proof that the releases will make the fall-run Chinook salmon less susceptible to  
18 disease outbreak, but there is evidence that the releases will harm other aquatic and fish species.  
19 The balance of hardships therefore favors injunctive relief.

20 **E. It Is In The Public Interest To Grant Injunctive Relief**

21 Finally, requiring Defendants to comply with federal law is strongly in the public interest.  
22 *See American Signature, Inc. v. U.S.*, 598 F.3d 816, 830 (Fed. Cir. 2010) (“The public interest is  
23 served by ensuring that governmental bodies comply with the law”). The Excess Releases violate  
24 CVPIA sections 3406(b)(23) and 3411(a), as well as 43 U.S.C. section 483. As this Court has  
25 previously recognized, “[t]he public certainly has an interest in seeing that the CVPIA . . . [is]  
26 implemented and that Plaintiffs’ interests under their water service contracts[] are protected.”  
27 *San Luis & Delta-Mendota Water Authority et al. v. U.S. Dept. of Interior*, 2011 WL 3915770

1 (E.D. Cal. 2011).

2 Defendants' decision to make the releases without doing an EIS violates NEPA. In *Flint*  
3 *Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787, the Supreme  
4 Court stated:

5 NEPA's instruction that all federal agencies comply with the impact  
6 statement requirement and with all the other requirements of section  
7 102 'to the fullest extent possible,'[] is neither accidental nor  
8 hyperbolic. Rather, the phrase is a deliberate command that the  
duty NEPA imposes upon the agencies to consider environmental  
factors not be shunted aside in the bureaucratic shuffle.

9 It is in the public interest to restrain Defendants from forging ahead with releases of CVP water  
10 that may that may have significant adverse impacts before all the impacts have been considered  
11 by Defendants, as required by NEPA. The public interest here requires that Defendants be  
12 restrained from causing these impacts before NEPA has been satisfied. The public interest  
13 requires that the federal decisionmakers here understand the impacts of their actions before those  
14 actions occur.

15 Requiring Defendants to operate the CVP in accordance with federal law, including  
16 provisions of the CVPIA, will make additional CVP water supply available for use south of the  
17 Delta. These communities have suffered tremendous water losses from ongoing ESA and other  
18 restrictions on operations that have already impacted public health and safety through loss of jobs,  
19 hunger, displacement of housing, undermining of local communities and services, and lending.  
20 *Consolidated Salmonid Cases*, 713 F. Supp. 2d 1116, 1155 (E.D. Cal. 2010), *appeal docketed*,  
21 No. 12-15289 (9th Cir. Feb. 10, 2012); *see Alliance for the Wild Rockies v. Cottrell*, 632 F.3d  
22 1127, 1138 (9th Cir. 2011) (finding "[t]he effect on the health of the local economy" to be "a  
23 proper consideration in the public interest analysis"). Thus, requiring Defendants to operate the  
24 CVP in accordance with federal law, in a manner that makes more water available for CVP uses,  
25 is strongly in the public interest.

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IV.

**CONCLUSION**

Plaintiffs have established that the Excess Releases violate CVPIA sections 3406(b)(23) and 3411(a), 43 U.S.C. section 383, and NEPA. The Excess Releases will result in irreparable harm in a variety of ways. In the Trinity River, the Excess Releases will likely cause irreparable environmental harm through dewatering of salmon redds, adverse effects on juvenile coho salmon habitat, flushing of lamprey, and cumulative effects on western pond turtle, and yellow-legged frogs. In the west side of the San Joaquin Valley, the lost opportunity to increase contract allocations will likely cause irreparable environmental harm through damage to orchards and soil from use of poor quality groundwater, subsidence from greater groundwater overdraft, fallowing of land and related dust emissions, and regional socioeconomic impacts from a depressed farm economy. Defendants have failed to take a hard look at many more potentially significant impacts from the Excess Releases, and hence the total actual impacts will likely be even greater. The likely irreparable harm known today, however, amply supports injunctive relief. The need for and benefit of the Excess Releases to reduce the risk of disease is highly uncertain, and hence the balance weighs in favor of enjoining the Excess Releases, in the public interest. Thus, this Court should enjoin implementation of the Excess Releases.

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KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Law Corporation

By: /s/ Daniel J. O'Hanlon

Daniel J. O'Hanlon  
Attorneys for Plaintiffs  
SAN LUIS & DELTA-MENDOTA WATER  
AUTHORITY and WESTLANDS WATER  
DISTRICT