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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY and WESTLANDS WATER DISTRICT, Plaintiffs, v. SALLY JEWELL, et al., Defendants.	Case No. 1:13-CV-01232-LJO-GSA **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Judge: Hon. Lawrence J. O'Neill Date: No Hearing Set Time: No Hearing Set Crtrm.: No Hearing Set
THE HOOPA VALLEY TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; and YUROK TRIBE, Defendant-Intervenors.	

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I. Introduction

In 2012 and 2013, Federal Defendants illegally released Central Valley Project ("CVP") water from storage in the Trinity River Division ("TRD") to the Trinity River, and into the ocean. Now, in 2014, California faces a calamitous drought. The illegal releases in 2012 and 2013 have deprived the CVP of tens of thousands of acre-feet of water that is desperately needed now for all CVP purposes, including providing water for irrigation, cities, wildlife refuges and endangered fish in the Central Valley.

Federal Defendants made these illegal releases for the benefit of the Trinity River fishery migrating up the lower Klamath River. They claim that Section 2 of the Central Valley Project Act of 1955, Pub. L. No, 84-386, 69 Stat. 719 (1955) ("1955 Act") authorized these fishery releases. It did not. Instead the releases were illegal, because they were in excess of annual volume limits on fishery releases set under more recent and specific direction by Congress, in section 3406(b)(23) of the Central Valley Project Improvement Act, Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700 (1992) ("CVPIA"). Pursuant to the mandate of section 3406(b)(23), the Secretary of the Interior, with the concurrence of the Hoopa Valley Tribe, set permanent annual volume limits on releases for fishery purposes in the Trinity River Record of Decision ("ROD"). The 2012 and 2013 releases (the "Excess Releases") exceeded these limits, in violation of the mandate in section 3406(b)(23) that the releases and operating criteria decided upon by the Secretary and concurred in by the tribe "shall be implemented accordingly."

Perhaps even more pernicious than Federal Defendants' disregard of section 3406(b)(23) and the specific terms of the ROD is their disregard of the resolution and balancing among competing needs that the ROD represents. The ROD explains that in "section 3406(b)(23) of the CVPIA, Congress sought the final resolution" of how much water should be released for the Trinity River fishery. AR 3019. The ROD chose volumes for release that "best meet the statutory and trust obligations of the Department to restore and maintain the Trinity River's anadromous fishery resources, based on the best available scientific information, while also continuing to provide water supplies for beneficial uses and power generation as a function of Reclamation's Central Valley Project (CVP)." AR 3004. The ROD rejected an alternative requiring higher volume releases that

may have benefited fish even more, because that "would exclude or excessively limit the Department's ability to address the other recognized purposes of the TRD, including water diversions to the CVP and power production in the Trinity Basin." AR 3027. Federal Defendants' view of Section 2 today, under which nothing has been finally resolved and they may release as much TRD water for fishery purposes each year as they wish, completely contradicts the balancing and express terms of the ROD, and the purpose of and mandate in section 3406(b)(23).

The Excess Releases are illegal for additional reasons. In taking these actions, Federal Defendants violated their duty under section 3411(a) of the CVPIA to first obtain an amendment of the TRD water rights permits, their duty under 43 U.S.C. section 383 to comply with state water law, their duty under the National Environmental Policy Act, 42 U.S.C. section 4321 *et seq*. ("NEPA") to prepare an environmental impact statement, and their duty to consult under section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. section 1536 *et seq*. regarding the impacts of the releases on threatened and endangered species. Had the Federal Defendants complied with these laws, great harm could have been avoided. Instead, in a severe drought, when every acre-foot of water is precious, water that could and should be in TRD storage and available for CVP uses in 2014 is gone. The communities, farms and environment of the Central Valley are now paying the painful price for the Federal Defendants' illegal actions.

That harm cannot now be undone. But the Court can, and should, grant this motion for summary judgment, and enter permanent injunctive and declaratory relief, to prevent this harm from happening yet again.

II. Statement Of Facts

A. The Trinity River Division

The TRD is a division of the CVP that stores and regulates water from the Trinity River. *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 861 (9th Cir. 2004). "The TRD transfers water from the Klamath River basin, which includes the Trinity River, in Trinity County, California, to the Sacramento River Basin." *Westlands Water Dist. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1157, 1168 (E.D. Cal. 2002). The Bureau of Reclamation ("Reclamation") operates the TRD pursuant to state water rights permits obtained from the State Water Resources Control Board

("State Water Board"). *See Westlands Water Dist. v. U.S.*, 153 F. Supp. 2d 1133, 1144 (E.D. Cal. 2001). The TRD primarily functions to store Trinity River water for diversion to the Central Valley for CVP purposes, including irrigation, municipal, and industrial uses, and environmental purposes. *Westlands*, 275 F. Supp. 2d at 1168. The TRD also produces electrical power as water is diverted into the Sacramento River watershed and conveyed to the Sacramento River, by passing through several hydroelectric plants. *Id*. Water that is diverted by the TRD and conveyed to the Central Valley is available for delivery to CVP contractors, including the San Luis & Delta- Mendota Water Authority's members. *See Westlands*, 376 F.3d at 860. In contrast, Trinity River water that is released to the Trinity River at Lewiston Dam is irretrievably lost to any further CVP uses. This released water flows through Trinity River to the Klamath River, and ultimately to the ocean.

B. Releases From TRD For The Fishery

In 1992, Congress enacted the CVPIA, Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700 (1992), in part to resolve an ongoing dispute over the amount of CVP water to release from the TRD's Trinity Reservoir to restore and maintain the Trinity River's fishery. With CVPIA section 3406(b)(23), Congress directed the Secretary of the Interior ("Secretary") 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." AR 4237-38. The Secretary did so, culminating in the December 19, 2000 ROD approving a program to, among other things, restore and maintain the Trinity River anadromous fishery. AR 3004.

The ROD set permanent instream fishery flow requirements for the TRD, thereby discharging the Department of the Interior's obligations under the CVPIA and other federal legislation "as well as the federal trust responsibility to the Hoopa Valley and Yurok Indian Tribes." AR 3004. CVPIA section 3406(b)(23) provides 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." AR 4237-38. The Hoopa Valley Tribe concurred in the flow requirements and related operating criteria set in the ROD, and indicated that concurrence by signing the ROD on December 19, 2000. AR 3028.

The ROD sets the annual volume of instream flow releases for the Trinity River. These

volumes range from 369,000 acre-feet ("AF") in a critically dry year to 815,000 AF in an extremely wet year. AR 3014. The ROD provides that "the schedule for releasing water on a daily basis, according to that year's hydrology, may be adjusted but the annual flow volumes established in Table 1 *may not be changed*." *Id*. (emphasis added).

In 2000, Plaintiffs and others filed an action in this Court to challenge the ROD and related environmental review. That litigation resulted in decisions by this Court (*Westlands Water Dist. v. U.S. Dept. of Interior*, 275 F. Supp. 2d 1157 (E.D. Cal. 2002); *Westlands Water Dist. v. U.S. Dept. of Interior*, 2001 WL 34094077 (E.D. Cal. 2001)), including a grant of preliminary injunctive relief, and by the Ninth Circuit Court of Appeals (*Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853 (9th Cir. 2004)). Since resolution of that litigation in 2004, Reclamation's annual release of CVP water from the TRD to the Trinity River for fishery purposes has been governed by the ROD.

C. History Of Excess Releases

In 2002, a fish die-off occurred in the lower Klamath River during which approximately 34,000 adult fall-run Chinook salmon and a smaller number of other fish species died. AR 2877. The fish die-off resulted from infection by two primary pathogens: *Ich* and *Columnaris*. *Id*. Although there have been a number of analyses of the potential factors contributing to the fish die-off, definitive cause-and-effect relationships have not been identified. Possible factors contributing to an increased risk of disease infection include high fish density, warm water temperature, reduced flushing flows, and potentially reduced upstream attraction flows. AR 2877.

Following the 2002 fish die-off, Reclamation released TRD flows in excess of the ROD limits in 2003 (34,000 AF) and in 2004 (36,200 AF), in an effort to avoid a repeat of 2002 conditions. AR 1367. In 2003 and 2004, before making fall releases of TRD stored water, Reclamation took action to ensure that the Authority's members and other CVP contractors would not suffer water supply losses as a result of the releases. In 2003, Reclamation completed a water exchange with the Metropolitan Water District of Southern California, and in 2004 Reclamation purchased water from Sacramento Valley settlement contractors, to offset the excess releases made for fishery purposes. AR 551.

Reclamation did not make TRD releases for fishery purposes in excess of the ROD flows again until 2012. 2012 was a "normal" water year type, which meant that under the ROD, Federal

Defendants were limited to a total volume of releases for fishery purposes of 647,000 AF. AR 3014. The first indication in the record that Reclamation was considering excess releases in 2012 came in April, when a subgroup of the Trinity River Restoration Program's ("TRRP") Flow Work Group developed recommendations to establish thresholds for actions aimed at preventing any fish die-off and for flow augmentation actions. AR 1179. Based on those flow recommendations, Reclamation issued a Draft Environmental Assessment and Finding of No Significant Impact for 2012 Lower Klamath River Late Summer Flow Augmentation in early July 2012. AR 1312, AR 1319. On July 27, 2012, then-Regional Director Don Glaser sent a letter to Plaintiffs in which Reclamation made three commitments regarding the proposed TRD releases. First, Reclamation promised that if Plaintiffs did not dispute the proposed action, Reclamation would not assert that Plaintiffs had waived any claims that the action was illegal. AR 1204. Second, Reclamation promised to mitigate any loss of water supply to its CVP contractors resulting from the releases. *Id*. Third, Reclamation further promised to develop a "long-term strategy for addressing fall fish needs on the Lower Klamath River." *Id*.

Reclamation issued a final Environmental Assessment and Finding Of No Significant Impact ("2012 EA/FONSI") on August 10, 2012. AR 1174, AR 1167. In August and September 2012, Federal Defendants made releases from the TRD of nearly 40,000 AF for the purpose of "reduc[ing] the likelihood, and potentially reduc[ing] the severity, of any fish die-off in 2012." AR 1179. The 2012 releases exceeded the 647,000 AF volume limit for "normal" water years set by the ROD by nearly 40,000 AF. Fed. Defs' Answer (Doc. 103) at ¶ 106.

There is no indication in the record that Reclamation followed through on its commitment in July 2012 to "develop[] a long-term strategy for addressing future fall fish needs on the Lower Klamath River." AR 1204. In early April 2013, Federal Defendants confirmed that the volume of releases of CVP water from the TRD's Trinity Reservoir for fishery purposes in 2013 would be 453,000 AF, based on 2013's classification as a "dry" year under the ROD. *See* AR 549. The 2013 release schedule adopted by Federal Defendants did not provide for supplemental releases in August and September. The first indication in the record that Reclamation was considering excess releases in 2013 came again in April, when the Pacific Fishery Management Council recommended actions

aimed at preventing any fish die-off and for flow augmentation actions. AR 564-567. In May 2013, after Reclamation indicated that it was considering supplemental fall releases in 2013, and hence would exceed the 453,000 AF volume set by the ROD, the Authority contacted Reclamation to express its concerns regarding the proposed releases. AR 546-557.

Reclamation developed a schedule for 2013 supplemental releases anyway, and issued a Draft EA/FONSI on July 16, 2013. AR 371-401; AR 361-370. Plaintiffs and others provided substantial comments on the draft environmental documents by July 31, 2013, including that an environmental impact statement was required. AR 57-352. The final 2013 EA/FONSI were issued one week later, on August 6, 2013. AR 1. The 2013 EA estimated that the 2013 Excess Releases would include the release of 62,000 AF of TRD stored water, plus an additional 8,000 AF if Defendants extended the release period to September 30. AR 20-21. In addition, the 2013 EA estimated the release of up to another 39,000 AF of TRD storage if the Yurok Indian Tribe detected an outbreak of disease, for a total of up to 109,000 AF in excess of the volume set by the ROD for a dry year. AR 20-21.

Due to higher than projected flows in the Klamath River and a temporary restraining order issued by this Court, the 2013 Excess Releases ultimately totaled approximately 17,000 AF. *See* Joint Scheduling Report (Doc. 107) at 2.

Although Reclamation took action to mitigate the water supply losses from the 2003 and 2004 Excess Releases, and made promises to do the same in 2012, it has not mitigated the CVP water losses caused by the 2012 and 2013 Excess Releases. The record indicates that Reclamation foresaw water supply impacts from the Excess Releases, and investigated mitigation such as purchasing water from other sources to these impacts, but to date Reclamation has not mitigated the water supply losses. *See, e.g.*, AR 440-48.

D. Procedural History

On August 7, 2013, Plaintiffs filed a complaint (Doc. 1), and on August 9, 2013, filed a motion for temporary restraining order and preliminary injunction (Doc. 14). The Hoopa Valley Tribe (Doc. 9), Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources (Doc. 13), and Yurok Tribe (Doc. 61) moved to intervene as defendants. In each case, the parties stipulated to intervention and the Court granted the motions. (Doc. 38, Doc. 70.)

The Court issued a temporary restraining order on August 13, 2013 restraining and enjoining Federal Defendants from making releases from Lewiston Dam to the Trinity River in excess of 450 cubic feet per second ("cfs") for fishery purposes through and including August 16, 2013. (Doc. 57.) Following a preliminary injunction hearing on August 21-22, 2013, the Court issued an Order Lifting Temporary Restraining Order and Denying Motion for Preliminary Injunction. (Doc. 91.) Federal Defendants filed their Administrative Record on December 20, 2013 (Doc. 109), and supplemented the record on January 29, 2014 (Doc. 110).

III. Jurisdiction

This action states claims against departments and officers of the United States arising under the 1902 Reclamation Act, 32 Stat. 388, and acts amendatory thereof and supplementary thereto including the CVPIA; a claim arising under NEPA; and a claim arising under the citizen suit provision of the ESA, 16 U.S.C. section 1540(g). In addition, the claims involve Plaintiffs' interests in CVP water established under contracts entered by the United States pursuant to reclamation law, and CVP operations. This Court has jurisdiction of this action pursuant to 28 U.S.C. section 1346(a)(2) and 28 U.S.C. section 1331. This Court is authorized to issue injunctive and declaratory relief pursuant to Rule 65 of the Federal Rules of Civil Procedure, 28 U.S.C. section 2201, and 5 U.S.C. sections 703 and 706.

The sovereign immunity of the United States, and that of its federal agencies and federal officers and employees, is waived for this action by the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. section 701 *et seq.*, including sections 702 and 704, and the citizen suit provision of the ESA, 16 U.S.C. section 1540(g).

A. Plaintiffs Have Standing To Challenge The Excess Releases

To satisfy Article III's standing requirements, a plaintiff must demonstrate that (1) "it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The San Luis & Delta-Mendota

Water Authority ("Authority") and Westlands Water District ("Westlands") (collectively, "Plaintiffs") have standing.

"Standing is determined by the facts that exist at the time the complaint is filed." *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). The evidence and pleadings submitted to the Court in connection with the proceedings for preliminary injunctive relief amply support Plaintiffs' standing.[1] The Authority's members, including Westlands, contract with Reclamation for water supply from the CVP for distribution and use. The Authority's members supply water for reasonable and beneficial uses such as municipal, industrial, agricultural, and environmental uses to cities, farms, municipal water retailers, and other residents and landowners within their service areas. Nelson Dec. (Doc. 24) at ¶ 4. When Plaintiffs filed this action on August 7, 2013, the proposed 2013 Excess Releases threatened releases up to 109,000 AF above and beyond the 453,000 AF specified in the ROD and accounted for in the 2013 dry-year release schedule. AR 4; *see Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 762 (9th Cir. 2004) (credible threat of future injury sufficient to prove standing). The 2013 Excess Releases thus threatened to create a "hole" in water storage at Trinity Reservoir of 109,000 AF. Federal Defendants confirmed that this hole was unlikely to fill in 2014, meaning that impacts to 2014 CVP contract allocations were likely. Milligan Dec. (Doc. 52) at ¶¶ 10-11. Likewise, the 2012 Excess Releases created a hole in storage of 39,000 AF that has not been filled. Snow Dec. (Doc. 26) at ¶¶ 58, 60-61. Reductions in water supply allocations have far-reaching effects, including effects on the physical environment in Plaintiffs' service area. Impacts include land fallowing, increased ground water pumping (with increased overdraft and potential for subsidence), increased soil salinity, increased energy use, permanent crop damage, unemployment, and reduced air quality. Freeman Dec. (Doc. 22) at ¶ 11. The injury-in-fact requirement is met here.

As to causation, the injury is fairly traceable to the challenged 2012 and 2013 Excess Releases, which created a hole in TRD storage that produces injury. Finally, when Plaintiffs filed this action, an injunction would provide redress, and the Court's temporary restraining order limited Plaintiffs'

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[1] *See, e.g.*, Aquistapace Dec. (Doc. 17); Hernandez Dec. (Doc. 18); Cardella Dec. (Doc. 19); Bourdeau Dec. (Doc. 20); Allen Dec. (Doc. 21); Freeman Dec. (Doc. 22); Anderson Dec. (Doc. 23); Nelson Dec. (Doc. 24); Snow Dec. (Doc. 26).

losses. Doc. 1, Prayer at ¶¶ 2, 5-6; *see San Luis & Delta-Mendota Water Authority v. U.S. Dept. of Interior*, 905 F. Supp. 2d 1158, 1173 (E.D. Cal. 2012) (finding "[d]eclaratory relief prohibiting future instances of the challenged conduct would redress the possibility of future injury in this case"). Plaintiffs satisfy all three requirements for standing.

B. The End Of The Excess Releases Does Not Moot This Action

In their answers to Plaintiffs' First Amended Complaint, Federal Defendants and Defendant-Intervenors suggest that the Court lacks jurisdiction because Plaintiffs' claims are moot. Fed. Defs' Answer (Doc. 103) at 26; PCFFA's Answer (Doc. 104) at 13; Yurok's Answer (Doc. 105) at 22; Hoopa's Answer (Doc. 106) at 22. This defense fails.

This case involves a controversy that is "capable of repetition, yet evading review." *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964-66 (9th Cir. 2007). "The [capable of repetition, yet evading review] doctrine is limited to extraordinary cases in which: '(1) the duration of the challenged action is too short to be litigated to a decision on the merits before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again.'" *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 939 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988) (quoting *Olagues v. Russoniello*, 797 F.2d 1511, 1517 (9th Cir. 1986) (en banc), *judgment vacated on other grounds in Russoniello v. Olagues*, 484 U.S. 806 (1987)). Both elements are satisfied here. The 2012 and 2013 Excess Releases each were less than six weeks in duration, too little time to decide the merits before the releases ended. *See, e.g., Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999) (finding two years inadequate time to allow for full litigation); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir. 1992) (finding regulation in effect for less than a year satisfied the durational component). The repetition element is met here as well. In *San Luis & Delta-Mendota Water Authority v. U.S. Dept. of Interior*, 870 F. Supp. 2d 943, 964 (E.D. Cal. 2012), this Court held that a pumping reduction that had occurred on at least one other occasion "suggest[ed] there is a reasonable expectation Plaintiffs could be subject to the same conduct again," therefore "permitting adjudication . . . despite the fact that the underlying dispute . . . [was] moot." Here, Federal Defendants have made TRD releases in excess of the quantities set in the ROD on four prior occasions. This Court may therefore decide the dispute, even though the Excess

Releases have ended.

There is a strong argument that this case is not moot at all. "The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Nw. Envt'l Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) ("*Gordon*"). Courts "have repeatedly held that where . . . both injunctive and declaratory relief are sought but the request for an injunction is rendered moot during litigation, if a declaratory judgment would nevertheless provide effective relief the action is not moot." *Forest Guardians*, 450 F.3d at 462 (citing *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002); *Gordon*, 849 F.2d at 1245)). In *Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006), the Ninth Circuit found that the U.S. Forest Service did not meet its burden to establish mootness, because the court could grant declaratory relief. The court explained the case "involve[d] a continuing practice" and "the Forest Service's practice of not complying with the monitoring is likely to persist despite the [purported mooting action]." 450 F.3d at 462. The case was not moot, because declaratory relief would "ensure that the Forest Service does not continue to fail to meet its monitoring responsibilities in the future and that it fulfills its duty under the ESA to consult with FWS when necessary." *Id*.

In this case, Federal Defendants have issued annual release schedules that dictate ROD releases for the Trinity River fishery, and they have made a "continuing practice" of declining to include water in these release schedules for late-summer or early-fall releases, thereby setting up an annual "emergency" when they take yet more TRD storage in excess of the ROD volumes. Federal Defendants maintain that they are not required to include late-summer or early-fall releases in their annual schedules. *See* Fed. Defs' Oppn. (Doc. 51). Although the 2012 and 2013 Excess Releases have ended, Plaintiffs request declaratory relief to prevent Federal Defendants from making releases in excess of the quantities set in the ROD in the future, in violation of CVPIA section 3406(b)(23). Declaratory judgment in favor of Plaintiffs would also ensure that Federal Defendants do not continue to make releases in violation of their legal obligations under CVPIA section 3411(a), 43 U.S.C. section 383, NEPA, and the ESA. Because the Court may grant effective relief, this case is not moot. Assuming it is moot, the capable of repetition yet evading review exception applies, and the Court may and should decide this case despite mootness.

IV. Legal Standards

Reclamation's decisions to make the 2012 and 2013 Excess Releases are final agency actions for which there is no other adequate remedy in a court, within the meaning of section 704 of the APA. 5 U.S.C. § 704. Section 706 of the APA therefore provides the standard for review of the Excess Releases. Under section 706, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance or procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). An agency's decision is arbitrary and capricious if it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To determine whether an agency has violated this standard, courts examine whether the agency articulated a rational connection between the facts found and the choice made. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990).

A motion for summary judgment shall be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A court conducting APA judicial review may not resolve factual questions, but instead determines 'whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Pinnacle Armor, Inc. v. U.S.*, 2013 WL 5947340 at *7 (E.D. Cal. Nov. 4, 2013) (slip copy) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006)). "'[S]ummary judgment becomes the 'mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'" *Id.* (quoting *Sierra Club*, 459 F. Supp. at 90).

V. Argument

A. The Excess Releases Violate CVPIA Section 3406(b)(23) By Exceeding The Permanent Annual Volumes Of Water Established For Trinity River Fishery Purposes

1. Section 3406(b)(23) Directed The Secretary To Establish Permanent Instream Releases For Fishery Restoration and Maintenance

Reclamation's release of water from the TRD for fishery purposes in excess of the volumes of water established for such purposes under the ROD violates the statutory mandate of CVPIA section 3406(b)(23). In CVPIA section 3406(b)(23) Congress directed the Secretary to complete the Trinity River Flow Evaluation Study and develop recommendations for *permanent* fishery flows for the restoration and maintenance of the "Trinity River fishery."

Section 3406(b)(23) of the CVPIA provides, in relevant part:

> in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the Act of October 24, 1984, Public Law 98–541, provide through the Trinity River Division, for water years 1992 through 1996, an instream release of water to the Trinity River of not less than three hundred and forty thousand acre-feet per year for the purposes of fishery restoration, propagation, and maintenance and,
>
> (A) by September 30, 1996, the Secretary, after consultation with the Hoopa Valley Tribe, shall complete the Trinity River Flow Evaluation Study currently being conducted by the United States Fish and Wildlife Service under the mandate of the Secretarial Decision of January 14, 1981, in a manner which insures the development of recommendations, based on the best available scientific data, regarding *permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery*; and
>
> (B) . . . If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph and the operating criteria and procedures referred to in subparagraph (A) *shall be implemented accordingly*.

AR 4237-38 (emphasis added). The statutory directive of section 3406(b)(23) is clear—it directed the Secretary to develop recommendations for permanent instream releases for the Trinity River fishery, and if the Hoopa Valley Tribe concurred in the recommendations, directed the Secretary to implement the recommendations.

2. The ROD Sets The Criteria Reclamation Must Follow, Including The Annual Volume Of Releases For Fishery Purposes

Section 3406(b)(23) does not mention the ROD by name, but the ROD sets forth the Secretary's recommendations required by section 3406(b)(23). The ROD "represents the culmination of over two decades of efforts aimed at understanding the necessary instream flow and physical habitat restoration requirements in order to restore the Trinity River anadromous fishery." AR 3010. The ROD sets out different volumes of releases depending upon water year type. The volume of releases ranges from 369,000 AF in a critically dry year to 815,000 AF in an extremely wet year. AR 3014. The ROD directs that the schedule for releasing water from the TRD on a daily basis may be adjusted but these annual flow volumes "may not be changed." *Id*. Thus, the ROD provides flexibility in determining the schedule of releases for Trinity River fishery purposes, but prohibits variance from the annual volumes it set. The Hoopa Valley Tribe "concurred in and agreed with" the ROD. AR 3028. The Secretary directed Reclamation "to implement this decision as outlined in" the ROD. *Id.* Pursuant to section 3406(b)(23) of the CVPIA, the permanent fishery flows and TRD operating criteria and procedures established in the ROD must "be implemented accordingly." AR 4237-38.

Although Reclamation cannot change the annual volume of releases, the ROD allows for adjustments to the release schedule within those annual volumes to respond to changing conditions and evolving scientific understanding. The ROD established an Adaptive Environmental Assessment and Management Program, to "recommend possible adjustments to the annual flow schedule within the designated flow volumes provided for in [the] ROD or other measures in order to ensure that the restoration and maintenance of the Trinity River anadromous fishery continues based on the best available scientific information and analysis." AR 3005. Therefore, if Reclamation determines that late-summer and fall releases will benefit the restoration and maintenance of the Trinity River fishery, Reclamation can plan for making such releases within the annual volumes allowed under the ROD. The ROD allows the release schedule to be adjusted to best meet the needs of the Trinity River fishery, but neither the ROD nor CVPIA section 3406(b)(23) allow Reclamation to ignore and exceed the permanent annual volumes established in the ROD. AR 3014. This is precisely what makes the

ROD annual volumes "permanent" in nature, as mandated by CVPIA section 3406(b)(23). AR 4237-38.

3. The Excess Releases Are Subject To The ROD's Permanent Annual Volumes Because They Are Fishery Releases Intended To Benefit The Trinity River Fishery

Under the ROD, the total volume of water dedicated to Trinity River fishery purposes in a "dry" water year such as 2013 is 453,000 AF. AR 3014. Within this water budget, Reclamation has discretion to establish a schedule for instream releases for the restoration and maintenance of the Trinity River fishery. In 2013 Reclamation could have, but did not, budget sufficient water within the 453,000 AF dedication to make supplemental releases in August or September. Instead, Reclamation proposed exceeding the ROD's annual limit for 2013 by up to 109,000 AF (or 24%), by making late-summer supplemental releases. *See* AR 4. When Reclamation made the Excess Releases, it exceeded the ROD's 453,000 AF annual limit for Trinity River fishery purposes and violated section 3406(b)(23)'s mandate to implement the ROD's permanent instream releases. *See* Doc. 103 at ¶ 80 (admitting TRD releases for fishery purposes in 2013 were 453,000 AF, plus 17,500 AF in August and September). The Excess Releases in 2012 likewise exceeded the ROD volume limit, by nearly 40,000 acre-feet.

Federal Defendants admit the Excess Releases were for fishery purposes, and that approximately half of the Chinook salmon intended to benefit from the Excess Releases are part of the Trinity River fishery. *See* Doc. 103 at ¶¶ 50, 79, 107 (admitting releases are for fishery purposes), at ¶ 79 (admitting "approximately half of the Chinook salmon in the lower Klamath River are returning to the Trinity River for spawning"). Thus, it is undisputed that the Excess Releases are TRD fishery releases made for the purpose of restoring and maintaining the Trinity River fishery. As such, these releases are subject to the ROD's annual volumes for Trinity River fishery purposes and to the CVPIA's mandate to implement the ROD's requirements.

Despite the nature and the purpose of the Excess Releases, Federal Defendants assert that they are free to make these releases in excess of the ROD's permanent instream volumes. *See, e.g.*, Doc. 103 at ¶¶ 32-41 (denying the ROD is relevant to the challenged releases), at ¶ 29 (averring releases are not within the scope of the Flow Study or ROD), at ¶ 80 (admitting TRD releases for fishery purposes

in 2013 were 453,000 AF, plus 17,500 AF in August and September). Federal Defendants make two arguments in an effort to avoid the volume limits in ROD—a "place" argument and a "purpose" argument.

The "place" argument is that the ROD does not apply to the Excess Releases because they are "designed to increase flow volumes/velocities in the lower Klamath River (not the mainstem of the Trinity River)…" Doc. 51 at 19. But the statutory directive that the ROD responds to is not limited to a specific geographical area. The statutory directive in section 3406(b)(23) is to establish and implement permanent instream flows for the restoration and maintenance of the "Trinity River fishery." AR 4237-38. Therefore, if the releases are intended to benefit the Trinity River fishery, the releases are subject to the ROD annual volume limits, regardless of the geographic location downstream where the flows benefit the Trinity River fishery.

The "purpose" argument is that the annual volume limits on releases do not apply to the Excess Releases because the "flows approved in the ROD were developed for the purpose of restoring habitat and fish populations on the mainstem of the Trinity River, not avoiding a potentially lethal spread of pathogens on the lower 44 miles of the Klamath River." Doc. 51 at 19-20. This "purpose" argument likewise ignores what the Secretary was directed to do in section 3406(b)(23)—set releases for the restoration and maintenance of the "Trinity River fishery." The Excess Releases are undisputedly intended for the benefit of the Trinity River fishery, and are therefore within the scope of section 3406(b)(23), which the Secretary implemented through the ROD, and subject to the annual volume limits set by the ROD. Furthermore, among the express purposes of the flow volumes set aside by the ROD is to "provide physical fish habitat (i.e., appropriate depths and velocities, and suitable temperature regimes for anadromous salmonids)." AR 3014. That describes the purpose of the Excess Releases too, to increase flow velocities in the lower Klamath River.

Section 3406(b)(23) mandated recommendations for "permanent instream fishery flow requirements . . . for the restoration and maintenance of the Trinity River fishery." The ROD states that it meets this mandate, Federal Defendants cannot claim now that the ROD was instead a partial answer, limited to a portion of the river.

In sum, the Excess Releases are TRD releases intended to benefit the Trinity River fishery. As

such, they are subject to the permanent annual volumes of water established under the ROD for the restoration and maintenance of the Trinity River fishery. Releases made for the benefit of the Trinity River fishery that exceed the ROD's annual volumes violate section 3406(b)(23)'s statutory mandate to establish and implement permanent instream flows. Because Reclamation made Excess Releases in 2012 and 2013 that exceeded the ROD's permanent annual volume for fishery purposes, Reclamation violated CVPIA section 3406(b)(23).

B. Neither Section 2 Of The 1955 Act Nor The Tribal Trust Responsibility Authorize The Excess Releases

1. Section 2 Of The 1955 Act Does Not Authorize The Excess Releases

In the environmental assessments for both the 2012 and 2013 Excess Releases, Federal Defendants cite Section 2 of the 1955 Act[2] as the "principal authorization for implementing the Proposed Action." AR 1180, AR 17. No other legal authority is identified. Section 2 of the 1955 Act provides in relevant part that "the Secretary is authorized and directed to adopt appropriate measures to insure preservation and propagation of fish and wildlife," including a minimum summer flow below the diversion of 150 cubic feet per second.[3] AR 4249. The 1955 Act therefore directed the Secretary to adopt appropriate measures to insure the preservation of fish, including by maintaining minimum Trinity River flows at specified levels. The question becomes whether the 1955 Act provides

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[2] The 1955 Act is the authorizing legislation for the TRD. The first proviso of Section 2 provides that "the operation of the Trinity River shall be integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project." Pub. L. No. 84-386 (1955), § 2. In the August 22, 2013 hearing on injunctive relief, counsel for Federal Defendants confirmed that "Proviso 1 of section 2 of the 1955 Act is the authority relied upon by Reclamation in this case. This is the same authority that was relied upon last year." 8-22-13 Hrg. Tr. at 281:23-282:2.

[3] Section 2 includes an additional proviso stating "[t]hat not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt county and downstream water users." AR 4250. This 50,000 AF release is for consumptive uses, not for instream fishery releases. It therefore does not provide independent authority for the Excess Releases. In any event, the record does not identify this proviso as legal authority for the Excess Releases. Agency action is reviewed on the basis of the record existing at the time of the action, not rationalizations developed for the purposes of litigation. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539 (1981); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1048-50 (9th Cir. 2010) ("[P]ost hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself.").

statutory authority for the Excess Releases, notwithstanding the terms of the ROD and the directive in section 3406(b)(23). The answer must be no.

After operation of the TRD resulted in adverse effects to the Trinity River fishery despite the direction in the 1955 Act to take "appropriate measures," Congress "passed a series of legislative initiatives directing the Department to determine and implement flows and other measures necessary to restore and maintain these populations to levels which existed prior to the TRD's inception." AR 3019. Congress enacted the Trinity River Basin Fish and Wildlife Management Act, Pub. L. No. 98-541, § 2, 98 Stat. 2721 (1984), the Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1955, Pub. L. No. 104-143, § 2(2), 110 Stat. 1338 (1996) (reauthorizing and expanding the 1984 Act), and the CVPIA section 3406(b)(23). *Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986, 988 (9th Cir. 2005). As this Court previously recognized, "[t]he culmination of Congressional activity to restore the Trinity was the CVPIA and its associated TRROD, which, after environmental review, set up a regime for restoring the Trinity River Fishery." Modified TRO (Doc. 62) at 5:3-5.

In both the 1999 Flow Report and the ROD, Defendants[4] acknowledged that the ROD criteria were intended to be the culmination of the legislative directives over the decades, and to finally resolve the issue of how much TRD water would be released for fish and fulfill legislative mandates, including the 1955 Act and federal trust responsibilities:

- "This [1999 flow] report provides recommendations to the Secretary of the Interior designed to fulfill fish and wildlife protection mandates of the 1955 Act, the 1981 Secretarial Decision, 1984 Trinity River Basin Fish and Wildlife Management Act, 1991 Secretarial Decision, the 1992 Central Valley Project Improvement Act, and the federal trust responsibility to restore and maintain the Trinity river fishery resources." AR 3747; *see also* AR 3734.

- "In section 3406(b)(23) of the CVPIA, Congress sought the final resolution of these issues in order to meet the federal trust responsibility and to meet the goals of prior legislation, calling for the completion of the scientific efforts initiated by Secretary Andrus and for the implementation of recommendations, based on the best available scientific information, regarding permanent instream fishery flow requirements and TRD operating criteria and procedures necessary for the restoration and maintenance of the Trinity River anadromous fishery." AR 3019; *see also* AR 3034.

[4] Representatives of the Hoopa Valley Tribe were co-primary authors of the 1999 Flow Report (AR 3710; AR 3728.

The ROD explains its criteria for releases "meets these statutory and trust obligations, providing the best means to achieve the restoration objectives while continuing to operate the TRD as an integrated component of the CVP." AR 3027.

Interpreting Section 2 of the 1955 Act to still provide Reclamation authority to make whatever additional fishery releases the Secretary decides are appropriate would mean that nothing was resolved by the process and decision required by CVPIA section 3406(b)(23). This result would be contrary to Congressional intent, and contrary to the interpretation of section 3406(b)(23) by Federal Defendants and the Hoopa Valley Tribe as included in the 1999 Flow Report and the ROD. *See, e.g.*, AR 3747; AR 3734; AR 3019; AR 3034. Congress intended, and Federal Defendants understood, that the process and decision under section 3406(b)(23) would define the obligation to make fishery releases, making specific the "appropriate measures" prescribed in the 1955 Act.

To the extent the 1955 Act conflicts with CVPIA section 3406(b)(23), the later, more specific direction in CVPIA section 3406(b)(23) controls over the earlier, more general direction in the 1955 Act. *U.S. v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *U.S. v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012). The Ninth Circuit is clear that "[w]here two statutes conflict, the later-enacted, more specific provision generally governs." *U.S. v. Juvenile Male*, 670 F.3d at 1008. The Ninth Circuit has consistently applied this principle of statutory construction when it finds conflicts between two statutes addressing the same point. *See, e.g., Severo v. C.I.R.*, 586 F.3d 1213, 1217 (9th Cir. 2009) (applying principle of statutory construction to give effect to later, specific statutory provision governing statute of limitations for taxpayer liability); *Westlands Water Dist. v. Natural Resources Defense Council*, 43 F.3d 457, 460 (9th Cir. 1994) (applying rule to give effect to specific directives in the CVPIA rather than more general directives in NEPA); *Johnson v. Payless Drug Stores Northwest, Inc.*, 950 F.2d 586, 587-88 (9th Cir. 1991) (applying more recently-enacted venue statute rather than older, more general venue statute).

The CVPIA directed the Secretary to establish recommendations for *permanent* releases for restoration and maintenance of the Trinity River fishery. The ROD contains those recommendations, including a total annual volume to be released for such purposes. The Hoopa Valley Tribe concurred in those recommendations, making implementation mandatory. Defendants now argue that the 1955

Act authorizes additional, unquantified, changeable annual releases for Trinity River fishery purposes. This conflict is easy to resolve. The CVPIA was enacted after the 1955 Act. CVPIA section 3406(b)(23) is more specific than Section 2 of the 1955 Act:

- 1955 Act, § 2: "…the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife…"

- CVPIA § 3406(b)(23): "…provide through the Trinity River Division . . . an instream release of water to the Trinity River of not less than three hundred and forty thousand acre-feet per year for the purposes of fishery restoration, propagation, and maintenance and, [following development of flow recommendations] . . . [i]f the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph . . . shall be implemented accordingly."

The more recent and specific directive in CVPIA section 3406(b)(23) controls over the earlier and more general directive in Section 2 of the 1955 Act. Section 2 of the 1955 Act does not authorize the Excess Releases, because they are contrary to the ROD.

2. Federal Defendants' Tribal Trust Responsibility Does Not Authorize The Excess Releases

In proceedings on Plaintiffs' motion for injunctive relief, Defendants suggested that the United States' tribal trust responsibility provides independent authorization for the Excess Releases. *See, e.g.*, Hoopa Oppn. (Doc. 50) at 18; 8-21-13 Hrg. Tr. at 12:23-13:3; 8-22-13 Hrg. Tr. at 327:22-24. As a matter of law, the tribal trust responsibility cannot be relied upon to uphold the Excess Releases.

First, as noted above, the environmental assessments for the Excess Releases identify only Section 2 of the 1955 Act as the legal authority for the Excess Releases. AR 1180, AR 17. In an action under the APA, agency action is reviewed on the basis of the record existing at the time of the action, not *post hoc* rationalizations developed for the purposes of litigation. *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 539 (1981); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962). Because the environmental assessments identify the 1955 Act as the sole legal authority for the Excess Releases, any assertion that the United States' tribal trust obligations provide independent legal authority for the Excess Releases must be rejected as unlawful *post hoc* rationalization. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007) ("[W]e may not accept appellate counsel's post hoc rationalizations for agency action.").

Second, assuming *arguendo* the tribes' fishing rights include an implied right to instream flows to protect their fishing rights, that "entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (holding the hunting and fishing rights of the Klamath Tribe carry with them an implied reservation of rights to instream flow in the Williamson River). At the time of the Excess Releases in 2012 and 2013, the TRD was not diverting water from the Trinity River at all. Instead, the TRD was releasing more water to the Trinity River than was flowing into the reservoir. The TRD was augmenting the natural flow by making releases of previously stored water. Doc. 103 at ¶ 8 (admitting 2012 Excess Releases were from Trinity Reservoir), ¶ 41 (admitting 2013 Excess Releases are of "stored water"). Hence, assuming the tribes here enjoy an implied right to instream flow to support their fishing rights, that right did not support the release of stored CVP water that was necessary to make the Excess Releases.

Third, the volume of releases from the TRD that fulfills the tribal trust responsibility has been quantified through implementation of CVPIA section 3406(b)(23). There, Congress directed the Secretary to provide instream releases of water to the Trinity River "[i]n order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe. . ." The Hoopa Valley Tribe concurred in the ROD. AR 3028. The ROD repeatedly explains that the permanent instream flow releases it set fulfill the federal trust responsibility to both the Hoopa Valley and Yurok Indian Tribes. *See, e.g.*, AR 3004; AR 3019; AR 3020; AR 3027. Reclamation therefore fulfills its trust responsibility by releasing the annual volume for fishery purposes set by the ROD. Congress was well within its power to define and limit the trust responsibility in this manner. *See, e.g., U.S. v. Jicarilla Apache Nation*, 564 U.S. ---, 131 S.Ct. 2313, 2325 (2011) (finding that because several statutes specifically defined the United States' trust responsibilities with respect to tribal funds, compliance with statutory requirements satisfied trust responsibility). The Excess Releases go beyond the trust responsibility.

In sum, Federal Defendants' tribal trust responsibility provides no independent legal authority or justification for making TRD releases for fishery purposes in excess of the annual volumes set in

the ROD.

C. Reclamation Failed To Comply With The Mandate In CVPIA Section 3411(a)

1. CVPIA Section 3411(a) Required Reclamation To Obtain A Modification In Its Water Right Permits Prior To Making The Excess Releases

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

> …the Secretary shall, prior to the reallocation of water from any . . . place of use specified within applicable Central Valley Project water rights permits and licenses to a . . . place of use not specified within said permits and licenses, obtain a modification in those permits and licenses, in a manner consistent with provisions of applicable State law, to allow such change in . . . place of use.

Pub. L. No. 102-575, Title 34, 106 Stat. 4706 (1992), § 3411(a). Section 3411(a) imposes a duty on the Secretary to obtain an amendment of the approved place of use prior to reallocating water to a new place of use.

It is undisputed that the lower Klamath River, which is the target area for use of the Excess Releases, is not an approved place of use in the water right permits applicable to the TRD. *See* Walter Dec. (Doc. 27) at ¶¶ 2-25; Doc. 103 at ¶¶ 85-86. To comply with CVPIA section 3411(a), Federal Defendants were required to seek and obtain changes to the water right permits for the TRD before reallocating water for use in the lower Klamath River. Chapter 10 of Division 2 of the California Water Code (commencing at Section 1700) provides a procedure and substantive requirements for an amendment to the approved place of use under a water rights permit. The process includes notice to interested persons and a right to protest. Cal. Wat. Code §§ 1703, 1703.1.

Federal Defendants have not obtained a modification of TRD water rights permits to add the lower Klamath River as an approved place of use in the manner provided by California law. Accordingly, Federal Defendants' use of stored TRD water in the lower Klamath River in August and September of 2012 and 2013 was in violation of Federal Defendants' mandatory duties under CVPIA section 3411(a). Future releases for such use will likewise violate section 3411(a) unless and until the TRD permits are amended in accordance with California law.

2. The 2012 Staff Letter Does Not Excuse Reclamation From Complying With CVPIA Section 3411(a)

In briefing on Plaintiffs' motion for injunctive relief, Federal Defendants argued that the Excess Releases would not violate CVPIA section 3411(a). Doc. 51 at 20-23. They relied on an August 10, 2012 letter from State Water Board staff ("Staff Letter"). That reliance is misplaced. The Staff Letter does not say that the lower Klamath River is within the approved place of use in the TRD permits. The Staff Letter does not purport to amend the TRD permits. As a matter of law, the Staff Letter could not do so; amendment could only take place in compliance with the process and standards set in the California Water Code. Cal. Wat. Code §§ 1435; 1700 *et seq*. And, of course, a member of the State Water Board staff has no authority to excuse Reclamation from the duty imposed in section 3411(a).

Federal Defendants' reliance on the Staff Letter is further misplaced because it warns Reclamation of the consequences of continuing without amending its permits. AR 1166 ("absent a transfer or other change approved by the State Water Board, the Division cannot consider the bypass and/or release of water for such purposes as a beneficial use unless Reclamation's permitted place of use includes the streams where the water is bypassed and/or released"). The Staff Letter highlights why Congress would insist that Reclamation obtain a permit modification in accordance with California law before reallocating water to a new place or purpose of use. The 2012 releases (and the 2013 releases) are not considered a beneficial use of water under California law, because the lower Klamath River is not an approved place of use in the TRD permits. The consequence of failing to put water to beneficial use is loss of a right to the water: "a decision not to divert water or failure to put water to beneficial use for a period of five years may result in reversion of the water to the public and result in partial or total revocation of the water right. (Wat. Code, § 1241.)" *Id.* The State Water Board was warning Reclamation that if it chose to make releases without obtaining a permit amendment, Reclamation could lose its rights to divert that quantity of water in the future.

In section 3411(a), Congress prohibited Reclamation from putting CVP water rights at risk by failing to obtain permit modifications before reallocating water to a new place of use. Making the Excess Releases without first obtaining an amendment of the TRD permits violated section 3411(a).

As we explain next, the Excess Releases violated California law, and Reclamation therefore violated a separate and independent duty under 43 U.S.C. § 383.

D. Reclamation Violated The Mandate In 43 U.S.C. Section 383

"State and federal law impose upon Reclamation . . . a nondiscretionary duty to comply with state water rights law." *Consolidated Salmonid Cases*, 791 F. Supp. 2d 802, 918 (E.D. Cal. 2011) (citing 43 U.S.C. § 383; *California v. U.S.*, 438 U.S. 645, 675 (1978)). Specifically, Section 8 of the Reclamation Act requires Federal Defendants "to proceed in conformity with" State law "relating to the control, appropriation, use or distribution of water used in irrigation." 43 U.S.C. § 383. Federal Defendants are therefore required to comply with state water rights law, including the terms and conditions in the TRD water rights permits.

California law dictates that "[t]he issuance of a permit gives the right to take and use water only to the extent and for the purpose allowed in the permit." Cal. Wat. Code § 1381. It also dictates that the diversion or use of water other than as authorized is a trespass. Cal. Wat. Code § 1052(a). Accordingly, the State Water Board has recognized that "the use of water inconsistent with the terms and conditions of a permit or license constitutes a trespass against the State of California. . ." *See, e.g.*, State Water Resources Control Board Order WR 99-001, 1999 WL 166226 (Mar. 3, 1999) at *5 (citing Cal. Wat. Code, § 1052); State Water Resources Control Board Order No. WR 2008-0015, 2008 WL 904658 (Mar. 18, 2008) at *7. Reclamation made the Excess Releases for the purpose of benefitting fish in the lower Klamath River. Reclamation's permits do not allow use of TRD water for instream flow purposes in the lower Klamath River, so the Excess Releases were not in accordance with the terms and conditions of Reclamation's permits. Consequently, the Excess Releases violate California Water Code sections 1381 and 1052(a). Because the Excess Releases violate California water law, they also violate 43 U.S.C. section 383.

By failing to follow California law, Reclamation evaded provisions that would have protected CVP water users. To amend the place of use in the TRD permits, Reclamation would have been required to establish "that the change will not operate to the injury of any legal user of the water involved." Cal. Wat. Code § 1702. Both Reclamation and the State Water Board recognized that the Excess Releases raised the potential for injury to CVP contractors such as Plaintiffs. AR 1261-62; AR

1165. To obtain an amendment, Reclamation would have been required to mitigate and avoid supply losses to Plaintiffs and other CVP contractors from the Excess Releases. *Id.* The record demonstrates Reclamation's awareness of this obligation. In 2013, Reclamation investigated "options for how and where to purchase water." AR 440-48. In 2012, Reclamation drafted a mitigation condition and expressly promised to "identify and implement mitigation measures to ensure that this action does not have a water supply impact to Central Valley Project water contractors in the 2013-14 contract year." AR 1203-04. The record does not explain Reclamation's failure to follow through with the mitigation promised in 2012, and because Reclamation did not follow the California permit amendment process, it never had to explain to the State Water Board how the changed use of its water rights "will not operate to the injury of any legal user of water."

In July 2012, Reclamation understood that a change place of use in the TRD permits was necessary to make the Excess Releases, as evidenced by the petition for temporary urgency change it submitted to the State Water Board on July 18, 2012. AR 1252-1311. The Staff Letter in response indicated that processing the petition in time to meet Reclamation's schedule for the Excess Releases was problematic, because more information on injury to CVP water contractors was needed. AR 1165. Federal Defendants have argued that the Staff Letter says no amendment to the place of use was necessary to bring the Excess Releases into compliance with California law. Doc. 51 at 20-23. But the letter does not say that.[5] It does say that no change to the approved purposes of use is required, because the purposes of use in the TRD permits include "to improve instream conditions for aquatic life." AR 1166. It goes on to say that "[h]owever, absent a transfer or other change approved by the State Water Board, the Division cannot consider the bypass and/or release of water for such purposes as a beneficial use unless Reclamation's permitted place of use includes the streams where

[5] Even if the Staff Letter had said the Excess Releases were lawful, that would not be determinative here. The Staff Letter was advisory only and has no legal effect because it was not issued by the State Water Board. *See* SWRCB Order WR 96-1, 1996 WL 82542 at *8, n. 11 (1996); SWRCB Order WQ 2001-05-CWP, 2001 WL 293726 at *7 (Mar. 7, 2001) ("The Board has designated as precedent only those orders and decisions that were adopted by the Board itself, not those actions taken by staff pursuant to delegated authority."). Further, the Staff Letter is not persuasive regarding the legality of the Excess Releases. *See Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 14-15 (1998).

the water is bypassed and/or released." *Id*. Federal Defendants have seized upon the statement that no change to the approved purposes was required, and ignored the statement that a change to the approved place of use was required.

In essence, the Staff Letter noted that as operator of the dam Reclamation could decide upon either of two courses: (1) continue pursuing the change petitions without assurance the no injury requirement could be met, or that Reclamation's schedule for making the Excess Releases could be met; or (2) make the Excess Releases without State Water Board approval, with the consequence that the Excess Releases would not be considered a beneficial use of water. The letter does *not* say, as Federal Defendants construe it, that choosing the second option was lawful. It could not, because that position is untenable under the law cited above. Reclamation, not the State Water Board, decided to pursue the second option, and to risk the water rights consequences.

The Excess Releases are a trespass under California law, and in violation of California Water Code sections 1381 and 1052. In making the Excess Releases, therefore, Federal Defendants failed to comply with the mandate in 43 U.S.C. section 383.

E. Reclamation's Decision To Make The Excess Releases Without Preparing An EIS Violates NEPA

Federal Defendants' decision to go forward with the Excess Releases in 2012 and 2013 without preparing environmental impact statements ("EIS") is arbitrary, capricious, and not in accordance with law. NEPA requires that "to the fullest extent possible," all federal agencies prepare an EIS before implementing "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Here, despite Reclamation's longstanding awareness that the Excess Releases could cause such significant environmental effects—including negative environmental impacts related to water supply, power generation, and biological resources—the agency nonetheless proceeded to implement the Excess Releases each year without preparing an EIS.

In the 2012 and 2013 environmental documents, Reclamation attempts to avoid its NEPA obligations by repeatedly dismissing potentially significant impacts of the Excess Releases as "minor," or by claiming that such effects cannot be "meaningfully evaluated." *See, e.g.*, AR 1188 ("[I]t is not possible to meaningfully evaluate how a potential slightly lower Trinity Reservoir storage

in 2013 may exacerbate system-wide supply conditions in the future. However, any such effects would be minor."); AR 7 ("[I]t is not possible to meaningfully evaluate how a potential slightly lower Trinity Reservoir storage in 2014 may exacerbate system-wide supply conditions in the future. However, any such effects would be very minor."). Reclamation should not be permitted to evade NEPA's EIS requirement simply by providing dismissive conclusions that are contradicted by the record and Reclamation's own admissions. Reclamation should have prepared EISs to address substantial questions regarding the effect of the Excess Releases on the human environment, and Reclamation's failure to take a hard look at the potential environmental impacts of the Excess Releases violates NEPA.

1. An Agency Must Prepare An EIS Where There Are "Substantial Questions" Whether A Project May Have A Significant Effect On The Environment

An agency's decision not to prepare an EIS should be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004) (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)); *Tillamook Cnty. v. U.S. Army of Eng'rs*, 288 F.3d 1140, 1143 (9th Cir. 2002). The agency is required to take a "'hard look' at the [environmental] consequences of its proposed action" and to base its decision on a "consideration of the relevant factors." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743 (2010). An "EA can never substitute for preparation of an EIS, if the proposed action could significantly affect the environment." *Anderson v. Evans*, 371 F.3d at 494 (internal citation omitted).

"An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a *convincing statement of reasons* why potential effects are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (citing *Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) and *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)) (emphasis added). The agency's "statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a Project'"

and general or cursory statements about potential impacts are not sufficient unless the agency justifies why it could not provide more definitive information. *Id.* at 1212-13.

To prevail on a claim that a federal agency was required to prepare an EIS, a NEPA plaintiff "need not demonstrate that significant effects *will* occur." *Anderson v. Evans*, 371 F.3d at 488 (emphasis added). Instead, a plaintiff must demonstrate only that "*substantial questions*" exist as to "whether a project may have a significant effect on the environment." *Id.* (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d at 1212) (italics in original).

Determining whether an agency action may have a "significant" effect on the environment requires consideration of context and intensity. 40 C.F.R. § 1508.27; *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008). With respect to context, "[t]his means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and locality." 40 C.F.R. § 1508.27(a). Intensity refers to the "severity of the impact" and, in evaluating intensity, an agency must consider a host of factors, including:

- unique characteristics of the geographic area "such as proximity to…ecologically critical areas;
- the degree to which the effects on the quality of the human environment are likely to be highly controversial;
- the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;
- the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;
- whether the action is related to other actions with individually insignificant but cumulatively significant impacts;
- the degree to which the action may adversely affect an endangered or threatened species or its critical habitat under the ESA; and
- whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Id. § 1508.27(b)(3), (4), (5), (6), (7), (9), and (10). The presence of one or more of these factors should result in the agency's preparation of an EIS. *See, e.g., Anderson v. Evans*, 371 F.3d at 494 (finding that an EIS was required where there was substantial uncertainty and controversy surrounding the environmental impacts of a tribal whaling plan).

2. Reclamation Was Required To Prepare An EIS In 2012 And 2013 Because There Were Substantial Questions Whether The Excess Releases May Have Significant Environmental Effects

In 2012 and 2013 Reclamation faced a host of "substantial questions" whether the Excess Releases may have a significant effect on the environment. Those substantial questions included concerns raised by Federal Defendants' own staff, Plaintiffs, and other parties regarding the impacts of the Excess Releases on water supply, power generation, biological resources, and other components of the human environment both in the Trinity and Klamath basins as well as the Sacramento-San Joaquin Delta. Rather than prepare an EIS, Federal Defendants either minimized or ignored those concerns in each EA without engaging in the context and intensity analysis required by NEPA. Preparing an EA rather than an EIS fit the tight time schedule that Federal Defendants had for making the Excess Releases in 2012 and 2013, whereas preparing an EIS would not. *See* AR 371 (Draft 2013 EA issued July 16, 2013); AR 57-352 (compiled comments received July 31, 2013); AR 1 (Final 2013 FONSI signed August 6, 2013); *see also* AR 1319 (Draft 2012 EA issued July 1, 2012); AR 1206-1230, 1233-1251 (compiled comments received no later than July 27, 2012); AR 1168 (Final 2012 FONSI signed August 10, 2012). But that expediency does not excuse Federal Defendants' failure to prepare an EIS as required by law. Federal Defendants failed to provide any convincing statement of reasons that the impacts of the Excess Releases would be insignificant, and as a result did not take the necessary "hard look" at those impacts as required by law.

(a) The 2013 EA Failed To Analyze Releases Up To 109,000 AF

As a threshold matter, Reclamation's 2013 EA and FONSI are inadequate because Reclamation did not even attempt to evaluate the full amount of water that would be used for the Excess Releases in the event that "emergency" flows would be needed, up to 109,000 AF. Although Reclamation briefly mentions the emergency response amount of up to 39,000 AF in the EA (AR 21) and the record shows modeling of 100,000 AF of releases (AR 353), the EA limited its analysis to the impacts of releasing up to 62,000 AF of Trinity Reservoir water (AR 20). Reclamation failed to comply with NEPA because it did not even attempt to evaluate the potential environmental impacts of the full proposed release up to 109,000 AF.

Reclamation staff recognized this deficiency during their review of the Draft EA. In proposed

edits to an early draft of the EA, one staff member proposed to supplement the description of the proposed action to state that "[a]n additional 39,000 AF of Trinity water may also be needed as an emergency response under this Proposed Action." AR 414. Similarly, multiple reviewer comments questioned the proposed action under review: "Why do we not address the additional 39 TAF that could be needed for an emergency release?…What about the additional 39 taf? How can we implement if we do not analyze?" AR 420. This failure to consider the full amount of emergency releases clouds Reclamation's analysis throughout the 2013 EA, rendering the agency's conclusions regarding environmental impacts from the Excess Releases meaningless. *See, e.g.*, AR 426 (reviewer comment noting that Reclamation's findings regarding temperature changes only address release volumes up to 62,000 AF, and not any temperature impacts from the emergency release volume).

(b) Impacts To CVP Water Supply And Associated Impacts

In both the 2012 and 2013 EAs, Federal Defendants failed to address substantial questions regarding the impacts of the Excess Releases could have on the water supply available to CVP contractors, and the environmental impacts arising from loss of water supply. As this Court has previously found, "[t]he EA gives little attention to the potential environmental impacts of reduced water supplies to water users in the Sacramento San Joaquin Basin, declaring instead that it is 'not possible to meaningfully evaluate how a potential slightly lower Trinity River storage in 2014 may exacerbate system-wide supply conditions in the future.'" Order Lifting Temporary Restraining Order and Denying Motion for Preliminary Injunction (Doc. 91) at 12.

The record contains Reclamation's acknowledgement of the potential for water supply impacts due to the Excess Releases in 2012 and 2013. In July 2012, as Reclamation considered that year's flow release action, Reclamation internally acknowledged the potential for injury to CVP water service contractors. AR 1261 ("The only potential for injury to any legal user of water due to the proposed action [in 2012] would be to CVP water service contractors."). In a subsequent 2012 letter to Plaintiffs, Reclamation stated that it "will assess the effects of the proposed action on water supply and power generation, and will identify and implement mitigation measures to ensure that this action does not have a water supply impact to Central Valley Project water contractors in the 2013-14 contract year…." AR 1204. Reclamation continued to communicate its intent to mitigate against

impacts to CVP contractors caused by a supplemental release, and drafted a mitigation condition to that end. AR 1203 ("Reclamation intends to assess any effects of the [2012] Proposed Action in future years in terms of water supply and power generation, and seek to identify and implement mitigation opportunities…."). However, the final 2012 EA and FONSI did not fully analyze water supply impacts, and did not supply a convincing statement of reasons why the potential effects were insignificant. This is inexcusable given modeling in the record that shows a potential reduction in storage in Trinity by about 92,000 AF (AR 1232), an amount that could have resulted in a meaningful increase in CVP water deliveries.

The potential for water supply impacts from Excess Releases in 2013 was even greater, because storage was lower. *See* Doc. 103 at ¶ 113. Reclamation's acknowledgment of the potential water supply impacts to CVP contractors continued in 2013, and in preparing the 2013 EA, Reclamation sought to address options for quantifying and reducing those water supply impacts by, in part, purchasing water. AR 440-48. Despite Reclamation's knowledge and admission that supplemental releases could negatively impact the water available to CVP contractors, in the 2013 EA Reclamation concluded that the Excess Releases "would not affect water supply allocations managed as part of the CVP in 2013 or water operations within the Central Valley." AR 28. But as Plaintiffs extensively discussed in their comment letter on the 2013 Draft EA, the water that would be released from storage for the Excess Releases could be used to restore CVP contractors' 2013 allocation, which was reduced earlier in the year from 25% to 20%. AR 71. The volume of water that Reclamation set aside for the Excess Releases could have supported a 5% increase in the allocation to south-of-Delta CVP contractors, and such a late-summer or early-fall increase would have been consistent with the historical practice of restoring contract allocations in dry years where possible. *Id.*

The 2012 and 2013 EAs failed to meaningfully analyze the potential impacts of the Excess Releases on future CVP water supplies, stating instead that any such impacts would depend on future water year hydrology. AR 1187-88; AR 28. Reclamation could and should have done much more to describe and quantify the potential impacts of water supply losses. The Excess Releases would create a hole in Trinity storage that correlated exactly with the quantity of the Excess Releases, given that Trinity Reservoir was unlikely to refill in 2013 or 2014. AR 1232; AR 72; *see* AR 353 (Reclamation

manager stating "the approximately 100 taf hole is still in storage 50 % of the time…"). Reclamation failed to address the fact that reduced Trinity storage in 2012 and 2013 would likely result in lower initial 2013 and 2014 CVP allocations. Reclamation's conclusory finding that "[w]ater allocations are not likely to be affected by implementation of the proposed action" is unsupported by the agency's own knowledge as well as the information presented to the agency during the comment period on the Draft EA. AR 28; *see* AR 1171. Reclamation also failed to analyze or describe the potential impacts to groundwater resources caused by the Excess Releases in 2012 and 2013. As Plaintiffs pointed out in comments to Reclamation, a reduction in CVP deliveries to Plaintiffs' members will result in increased groundwater usage, subsidence, and damage to water conveyance facilities on the west side of the San Joaquin Valley. AR 76.

There were substantial questions regarding the significance of the Excess Releases' impact on CVP water supplies and the cascading environmental impacts from reduced water supplies. Those questions compelled the preparation of an EIS in 2012 and 2013. Reclamation failed to prepare required EISs, and failed to provide convincing statements of reasons why potential impacts were insignificant. These failures are inexcusable violations of NEPA.

(c) Impacts To Hydropower Generation

The record also demonstrates that Reclamation was faced with substantial questions as to whether the proposed releases in 2012 and 2013 would significantly impact hydropower generation. In 2012, Reclamation ignored those questions entirely. See AR 1186-88 (no discussion of any potential impacts to power generation). In 2013, Reclamation found that the Excess Releases "will not adversely affect power generation in 2013, with the exception of a small loss of potential power generation at Trinity Dam," and that any decreased power generation in 2014 caused by the Excess Releases "would be complex to determine and quantify" and "subject to many restrictions and uncertainties unrelated to the Proposed Action." AR 27. Reclamation conceded that the Excess Releases could result in decreased power generation (in the amount of about 75,330 megawatt-hours with 62,000 AF of releases), but made no attempt to otherwise quantify or analyze that impact to the full extent of water that could be released or determine whether that impact is "significant" under NEPA. *Id*. Reclamation did not supply a convincing statement of reasons why potential impacts were

insignificant in either 2012 or 2013.

In 2012, Redding Electric Utility ("REU") provided comments to Reclamation on the 2012 Draft EA that "the impact of taking 92 TAF from potential CVP power deliveries, or a maximum of 110,400 megawatt hours, is approximately $3 to $6 million in lost CVP generation." AR 1237. Accordingly, REU noted, "the impact of the proposed 2012 fall preventative and emergency flows could be significant on Trinity Reservoir storage, Shasta Reservoir storage, the fisheries in the Sacramento River system, as well as CVP water and power deliveries in 2013 and beyond if Trinity Reservoir does not refill." The Final 2012 EA and FONSI did not even acknowledge these potential significant impacts, let alone explain why they did not require preparation of an EIS.

In 2013, Plaintiffs and REU provided comments to Reclamation on the 2013 Draft EA that emphasized the lack of analysis or "convincing statement of reasons" explaining why impacts to hydropower generation would not be significant. AR 57-58, AR 72-73. REU noted that Reclamation failed to consider the cumulative impact from the 2012 supplemental flows as well as the 2013 Excess Releases. AR 57. REU stated that because the Trinity Reservoir did not refill in 2013, the 2012 supplemental releases resulted in $3-6 million of foregone hydropower generation. *Id.*

Further, REU noted that Reclamation's claim that water and power impacts are not significant *if* the Trinity Reservoir refills in 2014 is questionable "given Reclamation's own awareness of the dry conditions predicted in 2014 in both the Trinity and Sacramento systems." AR 58. REU, like Plaintiffs, also questioned Reclamation's assessment of hydropower impacts where Reclamation neglected to assess any impacts that would be caused by up to 39,000 AF of emergency releases. *Id.* "REU does not see how the proposed action will result in anything less than a $3.5 million impact to CVP power users and up to $6 million if Reclamation releases an additional 39 TAF for emergency flows. The significance of this impact is even greater to REU given the carbon-free nature of the lost hydroelectric power." AR 59.

Reclamation did not offer any further analysis of hydropower impacts in response to these comments. Instead, Reclamation disregarded these concerns entirely. Such a dismissive approach is not adequate under NEPA. Reclamation failed to consider the Excess Releases' impacts to hydropower generation and the additional impacts of using alternative carbon-based energy sources

that might be used to replace the lost carbon-free hydropower. *See* 40 C.F.R. § 1508.27(a) (must analyze action in several contexts such as society as a whole). Reclamation also failed to adequately consider the intensity of hydropower impacts in light of the uncertainty surrounding the extent of the financial impact to hydropower providers as well as the fact this year's action will contribute to cumulatively-significant adverse impacts to hydropower. *See id.* § 1508.27(b)(5), (7).

(d) Impacts To Cold Water Pool Management

Reclamation further disregarded substantial questions about the potential effects of the Excess Releases on the cold water pool used to maintain water temperatures for species protection. In the 2012 and 2013 EAs, Reclamation stated that the proposed Excess Releases "would not result in significant affects [sic] to the cold water resource needs for the immediate year." AR 1187; AR 26-27. For the subsequent years, 2013 and 2014, Reclamation found that "the reduction in storage . . . due to implementation . . . may influence the coldwater resource but is dependent upon whether the reservoir would fill. … [T]here could be a relatively minor reduction in available cold water resources that may be accountable to this action." AR 1187; AR 27.

As Plaintiffs noted in their comment letter to Reclamation, these cursory findings regarding a lack of significant impact to cold water resources are contradicted by Reclamation's request in May 2013 to be relieved from certain Bay-Delta Water Quality Control Plan Requirements in order to protect the Shasta Reservoir cold water pool, which is needed to maintain temperatures for winter-run Chinook salmon in the Sacramento River in late summer. AR 73. Reclamation sought to operate to "Critical Dry," rather than "Dry" year requirements in order to save 100,000 to 200,000 AF of combined CVP and SWP storage to help protect the cold water pool. AR 74. Therefore, only a few months before issuing the 2013 EA, Reclamation took the position that 100,000 to 200,000 AF of storage was a significant amount of water for the purposes of maintaining the cold water pool and avoiding temperature-related fish losses in the Sacramento River.

Further, Federal Defendants recognized a potential impact to cold water storage as a result of the Excess Releases, even though that impact was not addressed in the final EA. In staff comments contained in a draft version of the EA, Federal Defendants noted that the Excess Releases would impact water quality:

> There will be a degradation in water quality due to the loss of cold water pool volume. This could coincide to a period when we historically have had difficulty meeting the Basin Plan objectives in mid September. The difference in temperature at Lewiston could be a few tenths of a degree.

AR 420. Another comment provided that "[t]he loss of cold water in Shasta has a potential impact to 2014 temperature operations that NMFS asks Reclamation use discretion to improve," and that "[t]he half degree increase is based on a supplemental release volume up to 62 TAF" and "doesn't address an additional 39 TAF emergency release volume." AR 426.

These record documents indicate that Reclamation faced substantial questions regarding the significance of any effect the Excess Releases would have on temperature management, but failed to supply a statement of convincing statement of reasons why potential impacts were not significant. In light of these questions, Reclamation should have elected to prepare an EIS , rather than simply ignoring or minimizing the issue in the EA. Reclamation failed to adequately address the Excess Releases' impacts in the context of cold water management objectives across the Trinity and Sacramento systems, as well as the intensity of the action in light of the unique temperature requirements for ESA-listed species in these watersheds.

(e) Impacts To Biological Resources

In both the 2012 and 2013 EAs, Reclamation failed to address substantial questions regarding the significant impacts that the Excess Releases could have on biological resources in the Trinity and Klamath basins, as well as in the Delta. Reclamation was aware that the Excess Releases may have a significant impact on a host of species other than the Trinity River fall-run Chinook salmon that Reclamation sought to protect with the releases. Several of these impacts were summarized in a May 2012 memorandum from the Trinity River Restoration Program Fall Flow Subgroup, which noted that late-summer and early-fall releases could result in increased hybridization of spring-run and fall-run Chinook, redd dewatering, premature migration of juvenile lamprey, and negative effects to amphibians and reptiles. AR 1347. Yet, in considering the Excess Releases, Reclamation did not find any of these impacts significant, despite scientific literature and related information provided by Plaintiffs indicating that many of those impacts could in fact be significant. AR 77-83; *see* SAR 5187-5205 (discussing dislodging effect of 2003 flow release on lamprey ammocetes); AR 1631-1688

(expressing concerns that changes in river conditions have adversely impacted population dynamics of amphibians inhabiting the river); AR 1806-1836 (raising concerns regarding effects of altered flow and temperatures on yellow legged frog metamorphosis and survival in the fall); AR 1837-2025, SAR 5206-5215 (additional articles discussing yellow-legged frog); SAR 4886-5157 (showing impact to habitat conditions for western pond turtles downstream of dam that would be aggravated by Excess Releases); SAR 4252-4281, 5158-5163, 5164-5174, 5175-5186 (additional articles supporting conclusion that reduction in water temperatures from Excess Releases would further reduce western pond turtle body temperature, reduce growth and energy reserves, require longer periods of basking thereby reducing foraging opportunities, and potentially triggering pre-mature hibernation).

Biological resources in the Trinity and Klamath River basins such as western pond turtles, yellow-legged frogs, and lamprey could be adversely affected by the unnaturally high, cold flows associated with the Excess Releases. AR 79-80; *see* AR 1631-1688, 1806-1836, 1837-2025; SAR 4252-4281, 4886-5157, 5187-5205, 5206-5215, 5158-5163, 5164-5174, 5175-5186 (literature relating to the life history and population dynamics of aquatic species and impacts of temperature changes). Similarly, the Excess Releases would cause an increase in flows that could trigger the early spawning of spring-run Chinook salmon in the Trinity River. *See* AR 1347. Once the Excess Releases cease and flows return to normal, there is a risk that redds constructed and eggs laid under the high flows would be dewatered. *Id*. Reclamation failed to address these types of impacts in both 2012 and 2013. Neither the 2012 EA or 2013 EA acknowledge any possible impact to western pond turtles, yellow-legged frogs, or lamprey. *See* AR 1189; AR 33.

The record also reveals substantial questions relating to the Excess Releases' impacts on Central Valley salmonids, including three ESA-listed species: the Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and the Central Valley steelhead. AR 80-82. Despite acknowledging the persistent drought conditions in the region, Reclamation failed to address the impacts of the releases on water quantity and quality as those factors relate to these Central Valley species. Instead, in the 2012 EA, Reclamation does not address Central Valley Species at all. AR 1189. In the 2012 FONSI, however, Reclamation concludes without analysis that "[t]he 2012 flow augmentation will not affect listed fish species in the Sacramento River Basin, although

depending on water supply conditions associated with Trinity and Shasta Reservoirs in 2013, cold water resources used for temperature management may be affected to a small degree." AR 1172. In the 2013 EA, Reclamation summarily states that "there would be no substantial effects to the biota of the Sacramento River Basin in 2013" and that "[c]hanges to the ability to achieve temperature objectives [in 2014] would be expected to be minor, as would the associated effects to ESA-listed salmon and steelhead." AR 34. These statements ignore the possible effects that a reduced cold water pool may have on the ability to maintain cooler temperatures for these listed species. Both winter-run Chinook and spring-run Chinook spawning and egg incubation are sensitive to temperatures, and a reduction in cold pool storage in 2014 could adversely impact both populations. AR 81. Further, the environmental assessments fail to address the potential impacts to wildlife refuges in the Central Valley that are supplied with CVP water. *See* AR 1189; AR 33-34.

The information before the agency raised substantial questions regarding the proposed action's impact on biological resources, and by choosing not to prepare an EIS the agency violated NEPA. Reclamation's minimal analysis largely skirts the regulatory context of this region, where agencies must make water management decisions in compliance with ESA obligations, CVP operational requirements and delivery obligations, and California water law. *See* 40 C.F.R. § 1508.27(a). Reclamation fails to provide a convincing statement of reasons why the impacts to biological resources from the loss of up to 92,000 AF in 2012 and 109,000 AF in 2013 would not be significant. And Reclamation fails to acknowledge the substantial dispute about the effects to biological resources (including ESA-listed species) from the Excess Releases, which make the impacts "controversial" as that term is defined in NEPA case law. *See* 40 C.F.R. § 1508.27(b)(4), (9); *Anderson v. Evans*, 371 F.3d at 489-90. In light of this context and intensity, Reclamation cannot credibly argue that the impacts to biological resources from the Excess Releases would not be significant.

3. Reclamation's Failure To Prepare An EIS In 2012 And 2013 Was Arbitrary And Capricious

For all of the reasons identified above, the record demonstrates that Reclamation has failed to take a "hard look" at the consequences of the Excess Releases. With every issue—water supply, hydropower, cold water storage, biological resources, and others—Reclamation minimized or

dismissed the potential impacts of its proposed action, without any "convincing statement of reasons" explaining why potential impacts are insignificant. *See Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d at 730. The information before the agency at the time of its decisions demonstrated a pressing need for more analysis on a number of these issues–the very approach contemplated by NEPA's EIS requirement. By improperly attempting to avoid NEPA's EIS requirement for actions that may have a significant impact on the human environment, Reclamation acted arbitrarily, capriciously, and not in accordance with law.

F. Reclamation Failed To Consult Regarding The Excess Releases As Required By Section 7 Of The Endangered Species Act

1. An Agency Must Consult If A Proposed Action "May Affect" A Listed Species Or Its Critical Habitat

"For federal agencies, the heart of the Endangered Species Act is section 7(a)(2)." *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999, 1018 (9th Cir. 2009). Section 7(a)(2) requires that each federal agency ensure that any action which it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of any listed species' critical habitat. 16 U.S.C. § 1536(a)(2). To carry out section 7's "substantive mandate, agencies must engage in a consultation process with the appropriate expert wildlife agency on the effects of any federal action on listed species." *Lockyer*, 575 F.3d at 1018. "Section 7 imposes on all agencies a duty to consult with either the Fish and Wildlife Service or the NOAA Fisheries Service before engaging in any discretionary action that may affect a listed species or critical habitat." *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998); *see* 50 C.F.R. §§ 402.13 (describing informal consultation process), 402.14 (describing formal consultation process).

Reclamation has a duty to "review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a); *Conservation Congress v. U.S. Forest Serv.*, 720 F.3d 1048, 1051 (9th Cir. 2013). The Ninth Circuit has explained that "'may affect' is a 'relatively low' threshold for triggering consultation." *Karuk Tribe*, 681 F.3d at 1027 (quoting *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009)). Any

possible effect triggers the consultation requirement. *Id*. The threshold for consultation is set low so that federal agencies may satisfy their duty to insure that their actions do not jeopardize listed species or adversely modify critical habitat. *Id*.; *see also Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements"). If an agency determines that an action "may affect" ESA-listed species or critical habitats, formal consultation is generally mandatory. *Conservation Congress*, 720 F.3d 1048, 1051 (9th Cir. 2013); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998); 50 C.F.R. § 402.14(a).

"Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, and (2) the relevant Service (FWS or NMFS) concurs with that determination." *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (citing 50 C.F.R. § 402.14(b)); *Conservation Congress v. U.S. Forest Serv.*, 720 F.3d 1048, 1051. Thus, Reclamation is excused from initiating *formal* consultation only if it obtains, after preparing a biological assessment through *informal* consultation, the written concurrence from NMFS or FWS that the proposed action is not likely to adversely affect a listed species or critical habitat. 50 C.F.R. § 402.14(b)(1). But actions that have "any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA." *Karuk Tribe*, 681 F.3d at 1027.

2. Reclamation Was Required To Consult Because The Excess Releases "May Affect" Listed Species Or Their Critical Habitat

For listed species under NMFS' jurisdiction, Reclamation recognized that the Excess Releases "may affect" these species by creating a "deficit" in the Trinity and Shasta Reservoirs and using water that could otherwise be available for fish protection purposes, such as temperature control.[6] AR 41. And the record reveals that in the past, Reclamation has initiated informal consultation with NMFS regarding the potential effects of such late-summer releases after concluding the releases may affect

[6] In contrast, Reclamation determined that the Excess Releases would not affect any listed species under the U.S. Fish and Wildlife Service's jurisdiction. AR 40.

listed species. *See* AR 2358-2360 (2004 concurrence letter from NMFS in response to Reclamation's request to initiate informal consultation regarding the proposed 2004 late-summer releases). Thus, the record demonstrates that Reclamation determined the Excess Releases "may affect" listed species and consequently, Reclamation was required to consult with NMFS. *See* AR 52 (Reclamation memo concluding "listed fish in the Klamath Basin and the Central Valley may be affected" by the proposed 2013 flow augmentation); *see also Pacific Coast Fed. of Fishermen's Associations v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1243 (N.D. Cal. 2001) (concluding formal consultation was required because evidence established Reclamation "knew full well" that its operation of Klamath Project pursuant to an annual operations plan "might affect" listed coho salmon). Comment letters submitted to Reclamation confirmed and explained how the Excess Releases may affect listed salmon species and their critical habitat. *See, e.g.*, AR 78; AR 80-83; AR 90-91; AR 554-556.

Reclamation does not dispute that it was required to conduct section 7 consultation regarding the Excess Releases' potential effects on listed species under the jurisdiction of NMFS. *See* AR 40-41; AR 52-56. A Reclamation memo regarding "Endangered Species Act Section 7 Compliance for the Lower Klamath River Late Summer Flow Augmentation from Lewiston Reservoir in 2013" states: "water used for flow augmentation may not be available for other purposes (e.g., water temperature control) in future years. Accordingly, it is appropriate to consider the effects to listed species and designated critical habitats in the context of ESA section 7(a)(2) consultation." AR 53. Thus, the question at issue here is not whether the consultation requirement was triggered, but rather, whether Reclamation satisfied its consultation requirement after determining that the proposed action "may affect" listed species. *See Karuk Tribe*, 681 F.3d at 1030 (holding Forest Service had a duty to consult under Section 7 before approving mining activities, where the Forest Service did not dispute that the mining activities "may affect" critical habitat of coho salmon).

3. Reclamation Failed To Consult Regarding The Excess Releases

Reclamation never initiated consultation with NMFS regarding the 2013 Excess Releases. The record is devoid of any document evidencing either informal or formal consultation with NMFS regarding the 2013 Excess Releases. *See* 50 C.F.R. §§ 402.13 (describing informal consultation process), 402.14(c) (describing initiation of formal consultation process). Federal Defendants'

response to the allegation that they failed to consult is the following: "Federal Defendants admit that Reclamation did not initiate formal consultation with NMFS but deny that such initiation was required because as to coho salmon, the action was determined to have a minimal beneficial effect, and as to the Sacramento River species, Reclamation is currently in consultation with NMFS." Doc. 103 at ¶ 65. This allegation reveals two legal errors.

First, it is a legal error to conclude that consultation was not required if Reclamation decided the proposed action would have a beneficial effect on a listed species. "*Any* possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement…." 51 Fed. Reg. 19,949 (June 3, 1986) (emphasis added); *see also California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018-19 (9th Cir. 2009). Therefore, if Reclamation determined that the proposed action would have a "minimal beneficial effect" on coho salmon, Reclamation was required to consult with NMFS regarding those potential effects. Doc. 103 at ¶ 65.

Second, it is a legal error to conclude that Reclamation can rely on a consultation with NMFS for a different proposed action to satisfy its obligation to consult regarding the Excess Releases. Reclamation's failure to consult regarding the 2013 Excess Releases is a result of its mistaken reliance on the remanded NMFS 2009 Biological Opinion addressing CVP/SWP operations ("OCAP Opinion"). *See* AR 40-41; AR 53-54. Reclamation's position appears to be that the remand process for the OCAP Opinion satisfies its consultation obligation with respect to the Excess Releases. *Id.*; Doc. 103 at ¶ 65.

Reclamation relies on the remand of the NMFS OCAP Opinion and a new biological opinion that is currently scheduled to be issued in 2017 but may be issued several years after that. AR 40. The EA states:

> Reclamation has determined that implementing the proposed flow augmentation action in 2013 prior to receiving the above mentioned new Opinion on CVP/SWP operations will not violate section 7(d) of the ESA, i.e., the action would not constitute an irreversible or irretrievable commitment of resources which would have the effect of foreclosing the formulation or implementation of any RPA measures which would not violate section 7(a)(2) of the ESA.

AR 40-41. The legal error in this position is that neither the 2009 OCAP Opinion nor the current remand process satisfy Reclamation's section 7 consultation obligation with respect to the Excess

Releases, because Reclamation has *never* initiated consultation regarding the Excess Releases in any process.

Nothing in the record indicates that the Excess Releases were part of the CVP operations upon which the OCAP Opinion was based. To the contrary, the 2008 Biological Assessment ("BA") upon which the OCAP Opinion issued in 2009 was based described the proposed TRD operations as implementation of the ROD flows, with annual flows ranging from 368,600 to 815,000 AF. Exh. 1 to Akroyd Dec. in Support of Plaintiffs' Req. for Judicial Notice at 2-28 ("Based on the Trinity River Main-stem Fishery Restoration ROD, dated December 19, 2000, 368,600 to 815,000 af is allocated annually for Trinity River flows"), at 2-2, Table 2-1 (identifying ROD flows); *see* AR 03014 (ROD identifying annual flows ranging from 369,000 to 815,000 AF). Because the Excess Releases exceed the ROD flows and differ in timing and magnitude, they were not part of the TRD operations described in the 2008 BA or evaluated in the OCAP Opinion. *See* Doc. 26 at 7:13-15 ("The additional releases above 450 cfs for August and September are in excess of the 453,000 acre-feet volume set by the ROD").

Nor can Reclamation claim that formal consultation on the Excess Releases is ongoing. Nothing in the record indicates that Reclamation has yet initiated formal consultation in the OCAP remand process. The EA for the 2013 Excess Releases states that "Reclamation *plans* to submit a consultation package that includes a supplemental/updated BA describing a proposed operation of the CVP/SWP to NMFS, to facilitate the remand of the [OCAP] Opinion, consistent with section 7(a)(2) of the ESA." AR 40 (emphasis added). In fact, Reclamation recently confirmed that it does not anticipate issuing an updated BA in the OCAP consultation until August 2014; formal consultation will not be initiated until after that time. Exh. 2 to Akroyd Dec. in Support of Plaintiffs' Req. for Judicial Notice at 37. In sum, the record is devoid of any evidence showing that Reclamation has initiated consultation with NMFS regarding the Excess Releases as part of the OCAP consultation.

Finally, Reclamation's conclusion that it could proceed with the Excess Releases because the releases would not constitute an irreversible or irretrievable commitment of resources in violation of ESA section 7(d) does not comport with the ESA regulatory process. Section 7(d) of the ESA provides: "*After initiation of consultation* required under [section 7(a)(2)], the Federal agency…shall

not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. § 1536(d) (italics added). Section 7(d) does, in some instances, allow the Federal agency to move forward with a proposed action during the consultation process, but Section 7(d) only applies *after* a Federal agency has initiated consultation. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) ("§ 7(d) applies only after an agency has initiated consultation under § 7(a)(2)"). The Ninth Circuit has "made it clear that § 7(d) does not serve as a basis for *any* governmental action unless and until consultation has been initiated." *Id*. Here, Reclamation has not initiated consultation with NMFS regarding the Excess Releases. Therefore, section 7(d) does not provide a basis for Reclamation to proceed with the Excess Releases or to avoid its section 7(a)(2) consultation obligations.

Plaintiffs provided notice of Reclamation's violation of the ESA in a letter dated July 11, 2013, as required by 16 U.S.C. § 1540(g). AR 437-439. Reclamation made the 2013 Excess Releases anyway, without complying with ESA section 7.

In conclusion, despite the weight the Ninth Circuit has repeatedly placed upon complying with the ESA section 7 consultation requirements, Reclamation failed to comply with those requirements before implementing the 2013 Excess Releases. The 2013 Excess Releases have never been the subject of *any* section 7 consultation process, and NMFS has not evaluated the effects of those releases. Because Reclamation did not initiate or complete consultation with NMFS regarding the 2013 Excess Releases, Reclamation violated the ESA and failed to satisfy its section 7 consultation obligations when it implemented the Excess Releases.

VI. Conclusion

For the foregoing reasons, the Court should find that the Excess Releases violated CVPIA sections 3406(b)(23) and 3411(a), 43 U.S.C. section 383, NEPA, and the ESA, and grant Plaintiffs' motion for summary judgment.

Dated: February 4, 2014.

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