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11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA

13
14 SAN LUIS & DELTA-MENDOTA WATER
15 AUTHORITY and WESTLANDS WATER
DISTRICT,

16 Plaintiffs,

17 v.

18 SALLY JEWELL, et al.,

19 Defendants,

20 and

21
22 HOOPA VALLEY TRIBE; PACIFIC COAST
23 FEDERATION OF FISHERMEN'S
ASSOCIATIONS; INSTITUTE FOR
24 FISHERIES RESOURCES; and YUOK
TRIBE,

25 Defendant-Intervenors.

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

**FEDERAL DEFENDANTS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
THEIR MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Judge: Honorable Lawrence J. O'Neill

Date: No Hearing Set

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Courtroom: No Hearing Set

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1 **INTRODUCTION**

2 In 2002, a massive die-off of fall-run Chinook salmon and other salmonids occurred on
3 the lower Klamath River. A large returning run of fish, low flow conditions, and poor water
4 quality led to the crowding of fish in pools, which in turn created conditions that allowed disease
5 to spread rapidly. Some 34,000 salmonids died according to conservative estimates. The lower
6 Klamath River faced similar conditions in 2012 and 2013: low flows, poor water quality, and an
7 extremely large estimated population of returning fall-run Chinook. In response, and to avoid or
8 reduce the impact of a fish die-off such as occurred in 2002, the Bureau of Reclamation
9 (“Reclamation”) decided to make releases from Trinity and Lewiston Reservoirs to increase
10 flows in the lower Klamath River between the middle of August and the end of September in
11 both 2012 and 2013. As we explain below, these releases to augment flow in the lower Klamath
12 River were within Reclamation’s authority to make and Reclamation complied with applicable
13 laws in making those releases.

14 Plaintiffs—Reclamation contractors on the west side of the San Joaquin Valley—seek to
15 enjoin Federal Defendants from making releases of water from the Trinity Reservoir in August
16 and September to prevent a large scale fish die-off in the lower Klamath River in years when
17 conditions similar to those that led to the fish-die off in 2002 present themselves. In order to
18 succeed, Plaintiffs must demonstrate that Reclamation’s decision was “arbitrary, capricious, an
19 abuse of discretion or otherwise not in accordance with law.” Plaintiffs allege that (1)
20 Reclamation does not have the authority to make the releases; (2) that Reclamation was required to
21 get approval from the State Water Resources Control Board (“State Water Board”) to change the place
22 of use in order to make these releases of Trinity River water to the Trinity River; (3) that Reclamation
23 was required to prepare an Environmental Impact Statement (“EIS”) regarding its decision to make the
24 releases; and (4) that Reclamation violated the Endangered Species Act (“ESA”) by failing to “initiate
25 consultation” with the National Marine Fisheries Service (“NMFS”) regarding the releases. For the
26 reasons discussed below, all of Plaintiffs’ arguments fail and Federal Defendants are entitled to
27 summary judgment.

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1 **LEGAL AND FACTUAL BACKGROUND**

2 **I. Factual Background**

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

13 The Klamath River and its tributaries provide spawning and rearing habitat to substantial
14 runs of anadromous fish, including Chinook salmon, Coho salmon, and steelhead. *Id.* Each of
15 these species requires varied water conditions, including depth, velocity, and temperature, at
16 different stages throughout their lives. *Id.* at 862. Depending on the species, a juvenile fish will
17 remain in the river for a few months to a few years before its size, water temperature, flow, and
18 the daylight period trigger its migration downriver to the ocean. AR 71 at 03761. After three to
19 six years in the ocean, depending on the species, the fish will return to the mouth of the Klamath,
20 and begin its migration back upriver to its spawning grounds, either on the mainstem of the
21 Klamath or in other tributaries including the Trinity River. AR 71 at 03763-64. The construction
22 of dams on the Trinity River to divert water from the River blocked access by salmon and
23 steelhead to 109 miles of upriver habitat and significantly altered river flow and gravel supply
24 conditions in ways that degraded habitat for anadromous fish. *Westlands*, 376 F.3d at 862.

25 Congress authorized construction of the TRD in 1955 with the Trinity River Division
26 Central Valley Project Act of 1955 (“1955 Act”), Pub. L. No. 84-386, 69 Stat. 719 (1955),
27

1 concluding that it was possible to divert water from the Trinity River Basin to the Central Valley
2 to supply irrigators and generate power “without harming the fishery of the Trinity and Klamath
3 Rivers.” *Westlands*, 376 F.3d at 861. In Section 2 of the 1955 Act, however, Congress limited
4 the extent of integration and coordination of the TRD with the CVP, providing that the Secretary
5 was “authorized and directed to adopt appropriate measures to insure the preservation and
6 propagation of fish and wildlife.” 1955 Act, 69 Stat. 719. Interior Solicitor Krulitz later
7 interpreted the provisions of the 1955 Act and its legislative history and concluded that Section 2
8 requires that the instream flow needs of the Trinity Basin be met prior to exporting water from
9 the Basin to the Central Valley. Memorandum from the Solicitor to Assistant Secretary – Land
10 and Water Resources, *Proposed Contract with Grasslands Water District* (December 7, 1979)
11 (“Krulitz Mem.”) (Dkt. 51-3). In the thirty years following its construction, however, the TRD
12 diverted an average of 68 percent of the Trinity River’s flows to the CVP, imposing “what was
13 essentially extreme drought conditions” on the Trinity River’s fish and wildlife populations.¹
14 *Westlands*, 376 F.3d at 862.

15 In 1981, the Secretary of the Interior (“Secretary”) issued a decision initiating the Trinity
16 River Flow Evaluation Study (“TRFES”), a scientific evaluation to determine appropriate flows
17 and other measures to restore the Trinity River’s fishery. Secretarial Issue Document, Trinity
18 River Fishery Mitigation (Jan. 14, 1981) (“SID”) (Dkt. 51-4); *see also* AR 67 at 03005. In
19 making his decision, the Secretary stated:

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

24 SID at A-6. The decision concluded that the Secretary’s trust responsibility to the Hoopas and
25

26 ¹ Over the first ten years an average of 88 percent of the River’s flow was diverted to the Central Valley.
27 *Westlands*, 376 F.3d at 861.

1 Yuroks, combined with applicable federal laws, required the “restoration of the river’s salmon
2 and steelhead resources to pre-project levels.” *Id.* at A-17.

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

11 Congress later amended the 1984 Act and extended appropriations for an additional three
12 years. Trinity River Basin Fish and Wildlife Management Act of 1996, Pub. L. No. 104-143, 110
13 Stat. 1338 (1996) (“1996 Act”). In the 1996 Act, Congress specified that the Secretary should
14 direct activities at the Trinity River fish hatchery with the goal of “best service[ing] its purpose
15 of mitigation of fish habitat loss above Lewiston Dam while not impairing efforts to restore and
16 maintain naturally reproducing anadromous fish stocks within the basin.” *Id.* § 3(c).

17 In 1992, Congress confirmed its support for the development of a program to restore the
18 fishery in the Central Valley Project Improvement Act, Pub. L. No. 102-575, §§3401-12, 106
19 Stat. 4600, 4706-31 (1992) (“CVPIA”). *See Hoopa Valley Indian Tribe v. Ryan*, 415 F.3d 986,
20 988 (9th Cir. 2005). The CVPIA listed among its purposes the need “to protect, restore, and
21 enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River Basins”
22 and the need “to address impacts of the Central Valley Project on fish, wildlife, and associated
23 habitats.” CVPIA § 3402(a), (b). Section 3406(b)(23) of the CVPIA directed the Secretary to provide
24 through the TRD a minimum of 340,000 acre feet (“af”) per year of releases to the Trinity River for the
25 years 1992-1996. The Act further directed the Secretary, by September 1996, to complete a study (the
26 TRFES) “regarding permanent instream fishery flow requirements and [TRD] operating criteria and
27 procedures for the restoration and maintenance of the Trinity River fishery” after consultation with the

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1 Hoopa Valley Tribe, and if the Secretary and Tribe concur in these recommendations, to implement
2 any increase in instream flow releases recommended in the TRFES. CVPIA, § 3406(b)(23).

3 Following the completion of the TRFES, the Department of the Interior (“Interior”)
4 initiated the environmental review process to develop and assess alternatives aimed at restoring
5 the Trinity River mainstem conditions to support fishery resources in the Trinity River. *See* 59
6 Fed. Reg. 25141 (Jun. 17, 1985). As part of this process, Interior prepared a draft EIS which
7 examined the affected environment and the environmental consequences for numerous
8 alternatives. Following a public comment period, the EIS was finalized and the Secretary issued
9 a Record of Decision (“ROD”) in December, 2000, with which the Hoopa Valley Tribe
10 concurred.² AR 67.

11 The focus of the ROD was on the mainstem of the Trinity River and on the restoration of
12 the Trinity River fishery. The ROD adopted the course of action that “best me[t] the statutory
13 and trust obligations of the Department [of the Interior] to restore and maintain the Trinity
14 River’s anadromous fishery resources, based on the best scientific information, while also
15 continuing to provide water supplies for beneficial uses and power generation as a function of
16 [the CVP].” AR 67 at 03004. Components of the action included “[v]ariable annual instream
17 flows for the Trinity River from the TRD based on forecasted hydrology for the Trinity Basin as
18 of April 1st of each year,” as well as actions to restore the watershed and physical channel
19 conditions. To accomplish that goal, the ROD set flow levels for the mainstem of the Trinity
20 River based on annual forecast hydrology.³ AR 67 at 03004. The ROD allowed for “adjustments
21 [to] be made to certain elements of the fishery restoration plan,” including the daily schedule for
22 water releases, “but the annual flow volumes... may not be changed.” AR 67 at 03014.

24 ² The ROD in its entirety went into effect in 2004 following the Ninth Circuit’s reversal of an injunction
25 imposed by the district court. *See Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853 (9th Cir.
2004).

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

1 Consistent with its focus on Trinity River restoration, the ROD made clear that it did not
2 preclude Interior from taking other actions to benefit the fisheries in the lower Klamath River.
3 AR 67 at 03017. (“[N]othing in this ROD is intended to preclude watershed restoration and
4 monitoring, provided funding is available, below the confluence of the Trinity and Klamath
5 Rivers. Because the TRFES and ROD focus on the Trinity River mainstem and Trinity Basin,
6 watershed restoration and monitoring that benefit Trinity River fisheries below the confluence of
7 the Trinity and Klamath Rivers may be considered by the Trinity Management Council.”).

8 In the fall of 2002, an unprecedented fish die-off occurred in the lower Klamath River
9 and within the Yurok Reservation. AR 2 at 00016, AR 34 at 01178. Federal, tribal, and state
10 biologists concluded that pathogens were the primary cause and that warm water and low flow
11 conditions, combined with high fish density, contributed to the outbreak. AR 2 at 00016, AR 34
12 at 01178. The United States Fish and Wildlife Service (“FWS”) estimated that over 34,000 fish,
13 mainly fall run Chinook, died from the disease outbreak but noted that its estimate was a
14 conservative one. AR 66 at 02895, 02896. Actual losses may have been more than double that
15 number. AR 63 at 02535. Not only did this die-off affect the long-term viability of fish
16 populations because of the loss of a significant portion of 3 year-old and 4 year-old fish capable
17 of spawning, the fish die-off also affected tribal and sport fishermen in the Klamath Basin who
18 lost the opportunity to harvest 4,000 to 14,600 fall-run Chinook salmon. AR 63 at 02533.

19 In 2003, 2004, 2012, and 2013, low flow conditions and projected large returning runs of
20 fall-run Chinook salmon again coincided, prompting concerns that another die-off could occur.⁴

21 _____
22 ⁴ The 2012 EA described by way of background actions that occurred during the ongoing litigation over
23 the execution of the ROD and implementation of the Trinity River Restoration Program. During appeal
24 of the trial court’s ruling in favor of Westlands Water District’s challenge to the ROD – a ruling that was
25 later reversed by the Ninth Circuit – Reclamation was operating the Trinity River Division facilities
26 pursuant to the court’s ongoing jurisdiction. In responding to the United States’ motion for leave to
27 release additional flows in 2003 to avert a die off, Judge Oliver Wanger directed Reclamation to
28 determine what actions would be necessary to “assure against the risk of fish losses that occurred late in
the 2002 season,” and issued a ruling allowing Reclamation to use an additional fifty thousand acre-feet at
its reasonable discretion to prevent a recurrence. AR 34 at 01179. Plaintiffs did not challenge the
subsequent release in 2004.

1 AR 2 at 00016. In the late summer of each of these years, Reclamation released water from
2 Trinity Reservoir to increase flow volume and velocity and reduce water temperatures in the
3 lower Klamath River, in order to reduce the likelihood of another disease outbreak. AR 2 at
4 00016. “While documentation of the effectiveness of these events is limited, general
5 observations were that implementation of the sustained higher releases from August to early
6 September in each year coincided with no significant disease or adult mortalities.” AR 2 at
7 00016.

8 Because “[p]rojected flow conditions and a forecasted record fall-run Chinook salmon
9 escapement to the lower Klamath River in 2012 present[ed] similar conditions to those
10 experienced during the die-off in 2002,” the Fall Flow Subgroup, a subgroup of the TRRP Flow
11 Work Group that includes the FWS and NMFS, convened several times and developed
12 preventative flow release criteria that included a recommendation for maintaining flows in the
13 lower Klamath River to provide suitable conditions to reduce the possibility of a disease
14 outbreak. AR 34 at 01179; *see also* AR 47. Based upon the recommendation of Fall Flow
15 Subgroup, Reclamation decided to consider making flow augmentation releases in the fall. AR
16 34 at 01179-80. In July 2012, Reclamation released a Draft Environmental Assessment (“EA”)
17 and a Draft Finding of No Significant Impact (“FONSI”) analyzing the potential impacts of its
18 plan to release up to 92 TAF of water from the Trinity reservoir to prevent a large scale fish die-
19 off like the one that occurred in 2002.⁵ AR 45; AR 46. After considering comments received
20 from the public, Reclamation issued a Final EA and FONSI in compliance with NEPA on
21 August 10, 2012. AR 33; AR 34. Reclamation implemented the 2012 action and the total
22 quantity of water used was 39 TAF. AR 2 at 00016. No significant disease outbreak or unusual
23 adult Chinook mortalities occurred. AR 2 at 00016.

24 In 2013, dry hydrologic conditions and a well above average expected escapement of fall-

25 _____
26 ⁵ As noted in the 2012 EA, no more than approximately 48 TAF was projected to be needed for preventative flows,
27 but the EA included an evaluation of an additional 44 TAF that would be necessary only if evaluations showed ich
28 in fishy and additional emergency actions were needed.

1 run Chinook salmon again coincided, and also based upon recommendations of the Trinity
2 Management Council and the Pacific Fishery Management Council, AR 26 and 27, Reclamation
3 again decided to consider making flow augmentation releases to prevent a large scale fish die-
4 off. AR 2 at 00016. Again, Reclamation, working with biologists from the NMFS, AR 2 at
5 00012, prepared a Draft EA and FONSI analyzing the potential impact of its plan to release up to
6 62 TAF of water to prevent a large scale fish die-off,⁶ AR 7, 8, and considered public comments,
7 AR 4. In compliance with NEPA, Reclamation issued a final EA and FONSI on August 6, 2013.
8 AR 1, 2. In accordance with the ESA, Reclamation considered the effects of its plan on ESA-
9 listed species under the jurisdiction of NMFS, including the Southern Oregon/Northern
10 Sacramento California Coasts (“SONCC”) coho salmon in the Klamath River Basin, and
11 Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon,
12 Central Valley steelhead, and Southern Distinct Population Segment (“DPS”) of North American
13 Green Sturgeon. AR 3 at 00053. In addition, because operation of the TRD and its potential
14 affects to each of these species was described in Reclamation’s 2008 biological assessment for
15 the long-term operation of the CVP and State Water Project (“SWP”), and because Reclamation
16 is in ongoing ESA consultation with NMFS as it relates to the TRD and its potential affects to
17 each of these species, Reclamation considered whether implementation of the planned
18 augmentation release would violate ESA Section 7(d).⁷ AR 3 at 00052-54. Reclamation
19 concluded that it would not violate ESA Section 7(d) because the late-summer releases would
20 “continue the status quo as to listed species in that Reclamation still retains discretion to provide

21
22 ⁶ This figure was based upon the amount of water that would be needed to meet the 2,800 cfs target at
23 USGS Station KNK on the lower Klamath River (“KNK”) from August 15-September 21 (“the action
24 period”). Additional water would be required if the action period was extended beyond the expected
25 September 21 end date (up to September 30) if daily water temperatures are projected to be above 23 C at
26 KNK or the presence of observed fish behavior of concern, or if Reclamation needed to make emergency
27 releases (up to 39 TAF) due to observations of a disease outbreak. AR 2 at 00021. The use of this additional
28 water is very unlikely. AR 2 at 00021.

⁷ ESA Section 7(d) provides: “After initiation of consultation required under subsection (a)(2), the Federal agency and the
permit or license applicant 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
which would not violate subsection (a)(2).”

1 flow and temperature conditions that are consistent with currently-anticipated conditions with
2 respect to the listed fish.” AR 3 at 00054.

3 Reclamation implemented the flow augmentation action for the lower Klamath River in
4 2013. Although the EA estimated that up to 62 TAF of water would be needed to maintain the
5 minimum target flow from August 15-September 21, 2013, AR 2 at 00020, due to a delay in the
6 action by court order as well as actual hydrologic conditions being different from those
7 predicted, only approximately 17.5 TAF was used for this action in 2013. *See Fed. Defs.’*
8 *Answer* (Dkt. 103) at ¶ 51. No significant disease outbreak or unusual adult Chinook mortalities
9 occurred.

10 **II. Legal Standards**

11 **A. The Administrative Procedure Act**

12 Plaintiffs brought their claims challenging the late-summer flow augmentation release
13 under the Administrative Procedure Act (“APA”). The APA imposes a narrow and highly
14 deferential standard of review limited to a determination of whether the agency acted in a
15 manner that was “arbitrary, capricious, an abuse of discretion or otherwise not in accordance
16 with law.” 5 U.S.C. § 706(2)(A); *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S.
17 402, 416 (1971). The court’s review of the agency’s action is limited to the administrative
18 record that was before the agency decision maker. *Fla. Power & Light Co. v. Lorion*, 470 U.S.
19 729, 743-44 (1985). In addition, an agency’s action is entitled to the presumption of
20 administrative regularity. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council,*
21 *Inc.*, 435 U.S. 519, 544 (1978). The party bringing an APA case bears the burden of
22 demonstrating that the agency’s actions were arbitrary and capricious. *See Comm. to Pres.*
23 *Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d 1543, 1555 (10th Cir. 1993).

24 The question for judicial review is not whether the Court itself would have made the
25 same decision, because “the [C]ourt is not empowered to substitute its judgment for that of the
26 agency.” *Overton Park*, 401 U.S. at 416; *Save the Peaks Coal.*, 669 F.3d at 1035-36. “The only
27

1 role for a court is to insure that the agency has taken a ‘hard look’ at environmental
2 consequences; it cannot ‘interject itself within the area of discretion of the executive as to the
3 choice of the action to be taken.’” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)
4 (quoting *Natural Res..Def. Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)). The Court
5 must uphold the decision if the agency followed required procedures, evaluated relevant factors,
6 and reached a reasoned decision, which did not constitute a clear error of judgment or exceed the
7 bounds of its statutory authority. *Id.*; *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752,
8 767 (2004).

9 **B. The National Environmental Policy Act**

10 NEPA was enacted to foster better decision making and informed public participation for
11 actions that affect both people and the natural environment. *See* 42 U.S.C. § 4321; 40 C.F.R. §
12 1501.1; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To that
13 end, the statute does not mandate particular results, but simply establishes procedural requirements for
14 assessing the potential environmental impacts of an agency’s decisions. *Marsh v. Or. Natural Res.*
15 *Council*, 490 U.S. 360, 371 (1989); *Methow Valley*, 490 U.S. at 349-50. “Other statutes may
16 impose substantive environmental obligations on federal agencies, but NEPA merely prohibits
17 uninformed – rather than unwise – agency action.” *Methow Valley*, 490 U.S. at 351 (footnote
18 omitted).

19 Thus, NEPA requires federal agencies to prepare an Environmental Impact Statement
20 (“EIS”) for “major Federal actions significantly affecting the quality of the human environment .
21 . . .” 42 U.S.C. § 4332(2)(C); *Save the Peaks Coal. v. U.S. Forest Service*, 669 F.3d 1025, 1035
22 (9th Cir. 2012). In order to determine whether an action is one requiring an EIS, the agency may
23 prepare an EA. 40 C.F.R. § 1501.4(b). An EA is a concise public document that briefly
24 describes the proposal, examines alternatives, and considers environmental impacts to determine
25 whether an EIS is required. 40 C.F.R. § 1508.9. If, through the EA, the agency determines that
26 an EIS is not required, the agency shall issue a FONSI. 40 C.F.R. § 1501.4(e); *see also* 40
27

1 C.F.R. § 1508.13. In challenging a FONSI, a plaintiff must raise “substantial questions whether
2 a project may have a significant effect” on the environment. *Blue Mountains Biodiversity*
3 *Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citation omitted).

4 NEPA simply establishes procedural requirements for assessing the potential environmental
5 impacts of an agency’s decisions, but it does not mandate any particular result. *Marsh v. Or. Natural*
6 *Res. Council*, 490 U.S. 360, 371 (1989); *Methow Valley*, 490 U.S. at 349-50; *Inland Empire Pub.*
7 *Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996) (emphasis in original)
8 (“NEPA’s goal is satisfied once . . . information is properly disclosed; thus, NEPA exists to
9 ensure a *process*, not to ensure any result.”); *see also Churchill County v. Norton*, 276 F.3d 1060,
10 1072-73 (9th Cir. 2001). “Other statutes may impose substantive environmental obligations on
11 federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.”
12 *Methow Valley*, 490 U.S. at 351 (footnote omitted). As the Ninth Circuit has explained,
13 “[j]udicial review of agency decision-making under NEPA is limited to the question of whether
14 the agency took a ‘hard look’ at the proposed action as required by a strict reading of NEPA’s
15 procedural requirements. *Bering Strait Citizens for Resp. Res. Dev. v. U.S. Army Corps of*
16 *Eng’rs*, 524 F.3d 938, 947 (9th Cir. 2008).

17 When considering environmental impacts under NEPA, agencies are entitled to select
18 their own methodology as long as that methodology is reasonable. *See e.g., Balt. Gas & Elec. v.*
19 *Natural Res. Def. Council*, 462 U.S. 87, 100-01 (1983); *Save the Peaks Coal.*, 669 F.3d at 1036
20 (noting that a court’s “hard look” determination “requires a pragmatic judgment whether the
21 [environmental assessment]’s form, content and preparation foster both informed decision-
22 making and informed public participation.”) (internal quotations and citation omitted).
23 Accordingly, “[w]hen specialists express conflicting views, an agency must have discretion to
24 rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court
25 might find contrary views more persuasive.” *Marsh*, 490 U.S. at 378; *see also San Luis & Delta-*
26 *Mendota Water Auth. v. Jewell*, ___ F.3d __ (Delta Smelt Appeal), Case No. 11-15871, 2014 WL
27 975130, at *17, 23, 25 (9th Cir. Mar. 23, 2014) (noting that deference is particularly appropriate

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1 when agency choices regarding scientific methodology are involved); *Ecology Ctr. v.*
2 *Castaneda*, 574 F.3d 652, 658-59 (9th Cir. 2009) (same). Thus, the Court’s role is not to weigh
3 conflicting expert opinions or to consider whether the agency employed the best scientific
4 methods, and the fact that plaintiff disputes the agency’s findings and conclusions is not a
5 sufficient basis for the Court to conclude that the agency’s action was arbitrary and capricious.

6 C. Endangered Species Act

7 The ESA provides both substantive and procedural requirements designed to carry out its
8 goal of conserving endangered and threatened species and the ecosystems on which they depend.
9 16 U.S.C. § 1531(b). Anadromous species, including those at issue here, are under the
10 jurisdiction of NMFS.⁸

11 ESA Section 7(a)(2) requires federal agencies to ensure that any action they authorize,
12 fund, or carry out “is not likely to jeopardize the continued existence of any endangered species
13 or threatened species or result in the destruction or adverse modification” of designated critical
14 habitat. 16 U.S.C. § 1536(a)(2). “Should the [action] agency find that its proposed action *may*
15 affect a listed species or critical habitat, it must formally or informally consult with [the
16 consulting agency].” *Delta Smelt Appeal*, 2014 WL 975130, at *5.

17 Informal consultation includes “all discussions, correspondence, etc., between the
18 [consulting agency] and the [action] agency ... designed to assist the [action] agency in
19 determining whether formal consultation ... is required.” 50 C.F.R. § 402.13(a). Informal
20 consultation suffices where the action agency determines that its proposed action “may affect,”
21 but “is not likely to adversely affect any listed species or critical habitat,” and the consulting
22 agency concurs in writing. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). “Adverse effect” is a term of
23 art meaning effects not “discountable, insignificant, or beneficial.” Endangered Species
24 Consultation Handbook, 3-12 (<http://fws.gov/endangered/esa-library/#consultations> (visited Feb.
25

26 ⁸ The “Secretary” referred to in the ESA may be either the Secretary of Interior or the Secretary of Commerce,
27 depending on the species at issue. 16 U.S.C. § 1532(15). The Secretary of Commerce has jurisdiction over
28 anadromous species, and has delegated his authority to NMFS.

1 27, 2014)). To determine if a proposed action is likely to adversely affect the species or critical
2 habitat, action agencies may prepare a biological assessment. 16 U.S.C. § 1536(c)(1); 50 C.F.R.
3 §§ 402.12(a), (b), 402.01(a), 402.02.

4 The ESA requires formal consultation only when an agency finds its proposed action is
5 “likely to adversely affect” a listed species or its critical habitat. *Id.* § 402.14(a); *Delta Smelt*
6 *Appeal*, 2014 WL 975130, at *5. Formal consultation concludes when the consulting agency
7 issues a biological opinion assessing the likelihood of any “jeopardy” to the species and any
8 “destruction or adverse modification” of critical habitat. 50 C.F.R. § 402.14(g). The ESA’s
9 implementing regulations also set forth circumstances where, after the Section 7 process is
10 completed, the action agency must “reinitiate” consultation, including situations where “new
11 information reveals effects of the action that may affect listed species or critical habitat in a
12 manner or to an extent not previously considered,” or “the amount or extent of taking specified
13 in the incidental take statement is exceeded.” *Id.* at § 402.16.

14 If an action agency and consulting agency have initiated or reinitiated consultation in
15 accordance with Section 7(a)(2) of the ESA, Section 7(d) provides additional guidance regarding
16 the activities the action agency may undertake while consultation is ongoing. Section 7(d) of the
17 ESA states:

18 After initiation of consultation required under subsection (a)(2) the Federal
19 agency ... shall not make any irreversible or irretrievable commitment o resources
20 with respect to the agency action which has the effect of foreclosing the
21 formulation or implementation of any reasonable and prudent alternative
22 measures which would not violate subsection (a)(2) of this section.

23 16 U.S.C. § 1536(d). This section was “enacted to ensure that the status quo would be
24 maintained during the consultation process, to prevent agencies from sinking resources into a
25 project in order to ensure its completion regardless of its impacts on endangered species.” *Wash.*
26 *Toxics Coal. v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005). Section 7(d) does not replace the
27 requirements found in section 7(a)(2); rather, it “clarifies” those requirements. *Pacific Rivers*
Council v. Thomas, 30 F.3d 1050, 1056 n.14 (9th Cir.1994) (citation omitted).

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1 **D. Federal Government Trust Responsibility to Indian Tribes**

2 Tribal fishing rights are property rights held in trust by the United States for the benefit of
3 the federally-recognized Indian tribes. Numerous court decisions over the past thirty years have
4 confirmed that, when the United States set aside lands along the Trinity and Klamath Rivers for
5 the Hoopa Valley and Yurok Tribes, it also reserved for the Indians federally protected fishing
6 rights to the fishery resource in the rivers running through the reservations. *See, e.g., Blake v.*
7 *Arnett*, 663 F.2d 906, 909 (9th Cir. 1981); *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th
8 Cir. 1986); *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016
9 (1996). A 1993 opinion from the Interior Solicitor emphasized that these rights include the right
10 to harvest quantities of fish on their reservations sufficient to support a moderate standard of
11 living and that the Tribes' reserved fishing rights include the right to fish for ceremonial,
12 subsistence, and commercial purposes. Mem. from John D. Leshy, Solicitor, to Sec'y of the
13 Interior, Fishing Rights of the Yurok and Hoopa Valley Tribes, at 3, 15, 22, 32 (Oct. 4, 1993)
14 (Dkt. 51-2). The Ninth Circuit cited to the Solicitor's opinion with approval in its decision
15 upholding regulations promulgated by the Department of Commerce under the Magnuson
16 Fishery Conservation and Management Act restricting ocean harvest of the Klamath Basin
17 fishery in light of the Hoopa Valley and Yurok Tribes' fishing rights. *Parravano*, 70 F.3d at
18 542, 547.

19 **E. Standard of Review of Agency Interpretations of Statutes**

20 Pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.
21 837, 843 (1984) and its progeny, a reviewing court must give deference to an agency's
22 interpretation of a statute which it administers. Under *Chevron*, a court must first determine
23 whether "Congress has directly spoken to the precise question at issue." *Id.* at 842-43. Where
24 "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,
25 must give effect to the unambiguously expressed intent of Congress." *Id.* But if Congress did
26 not specifically address the matter, the court "must respect the agency's construction of the
27

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

12 ARGUMENT

13 Plaintiffs allege four violations of law, namely, that Reclamation: (1) has no authority to
14 implement the action; (2) was required to, but did not, get approval from the State Water
15 Resources Control Board to change the place of use of water rights; (3) was required to prepare
16 an EIS regarding its decisions to augment the flows in the lower Klamath River in 2012 and
17 2013; and (4) was required, but failed, to consult with NMFS regarding the action in violation of
18 the ESA. Plaintiffs have not met their burden to demonstrate that Reclamation’s decision to
19 make the August and September flow augmentation releases was arbitrary and capricious or
20 otherwise in violation of the law, and therefore, summary judgment should be granted in Federal
21 Defendants’ favor.

22 **I. As an Initial Matter Plaintiffs Have Not Established Standing to Challenge** 23 **Reclamation’s Decisions.**

24 “[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the
25 threshold requirement imposed by Article III of the Constitution by alleging an actual case or
26 controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). “[T]o satisfy Article III’s
27 standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a)

1 concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the
2 injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed
3 to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the*
4 *Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000); *Maya v. Centex Corp.*, 658 F.3d
5 1060, 1067 (9th Cir. 2011). When the alleged injury is a procedural one, as is the case for
6 Plaintiffs’ NEPA claim and ESA consultation claim here, “to show a cognizable injury in fact, [a
7 plaintiff] must allege ... that (1) the [agency] violated certain procedural rules; (2) these rules
8 protect [a plaintiff’s] concrete interests; and (3) it is reasonably probable that the challenged
9 action will threaten their concrete interests.” *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1197
10 (9th Cir.2004). “[A] plaintiff must demonstrate standing separately for each form of relief
11 sought.” *Friends of the Earth*, 528 U.S. at 185. They may not “engage in an ‘ingenious academic
12 exercise in the conceivable’ to explain how defendants’ actions caused his injury.” *Maya*, 658
13 F.3d at 1068. “[W]hen the plaintiff is not himself the object of the government action or inaction
14 he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to
15 establish.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citations omitted).
16 Plaintiffs also bear the burden of proving that it is “likely, as opposed to merely speculative, that
17 the injury will be redressed by a favorable decision.” *Friends of the Earth*, 528 U.S. at 181.

18 To demonstrate standing, Plaintiffs purport to rely on nine declarations submitted in
19 connection with their preliminary injunctive relief proceedings. Pls.’ Mem. in Supp. Of Mot. for
20 Summ. J. (“Pls.’ Mem.”) (Dkt. 113) at 8. Of these, six are from individual farmers and an
21 elementary school principal. Dkts. 17-21, 23. These third-party declarations cannot form the
22 basis of Plaintiffs’ standing. *Friends of the Earth*, 528 U.S. at 180-81 (relevant showing is “injury
23 to the plaintiff”); *Lujan*, 504 U.S. at 563 (“[T]he ‘injury in fact’ test requires more than an injury
24 to a cognizable interest. It requires *that the party seeking review be himself among the injured.*”);
25 *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (“remedy must of course be limited to the inadequacy
26 that produced the injury in fact that the plaintiff has established”); *Larson v. Valente*, 456 U.S.
27 228, 243, n.15 (1982) (Article III requires a litigant to show that a favorable decision “will

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1 relieve a *discrete injury to himself*”).

2 Plaintiffs allege in their Amended Complaint that Plaintiff Westlands Water District can
3 maintain legal actions on behalf of its landowners. Dkt. 95 ¶ 16. But this allegation is insufficient
4 to demonstrate Westlands may use the individual farmer declarations as the basis for an injury to
5 itself. Plaintiffs bear the burden of demonstrating standing “with the manner and degree of
6 evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561 (citations
7 omitted). While “[a]t the pleading stage, general factual allegations of injury resulting from the
8 defendant's conduct may suffice,” in responding to a summary judgment motion, “the plaintiff
9 can no longer rest on such mere allegations, but must set forth by affidavit or other evidence
10 specific facts, which for purposes of the summary judgment motion will be taken to be true.” *Id.*
11 (citation and quotes omitted); *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir.
12 2013). Because Plaintiffs rest on “mere allegations” and offer no declaration to support these
13 allegations, they have failed to establish that Westlands can maintain legal actions on behalf of
14 landowners. In any event, as discussed below, even if Plaintiffs could rely on the individual
15 declarations, they still fail to establish standing.

16 Mr. Nelson, Executive Director of Plaintiff San Luis & Delta-Mendota Water Authority,
17 states that the Authority has an interest in “contract[ing]... for”—that is selling or
18 “supply[ing]”—water to various third parties. Dkt. 24 ¶¶ 4, 7 (Plaintiff “contracts for the
19 delivery of approximately 3.3 million acre-feet of water”). Mr. Nelson suggests that the water
20 used for augmentation releases could change certain water allocation percentages. *Id.* ¶27.
21 Plaintiffs’ consultant then opines that without the augmentation release, allocations of CVP
22 water for south-of-Delta agricultural water service contractors may have increased by up to 5%
23 and that the release has the potential to reduce 2014 allocations and storage. Dkt. 26, ¶ 4.

24 Plaintiffs’ declarations fail to shoulder their burden. First, they fail to satisfy the “injury
25 in fact” element of Article III standing. The record shows that even with the release,
26 Reclamation retained sufficient operational flexibility to satisfy all temperature and flow
27 requirements for the Central Valley species. AR 3 at 00053-54. In other words, while the actual

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1 water released down the Trinity River may be “lost to CVP use,” Dkt. 26, ¶ 4, the overall amount
2 of CVP water in the system would not change at all from the “status quo,” AR 3 at 00053-54,
3 given Reclamation’s ability to use other water to supply the same amount of water to meet flow
4 and temperature requirements. Moreover, the declarations speak only in terms of a past violation
5 and harm, *see e.g.*, Dkt. 24 ¶¶ 25-28; Doc. No. 26 (opining on effects of 2013 release), over
6 which this Court lacks jurisdiction. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S.
7 49, 57 (1987) (federal courts lack jurisdiction over “wholly past violations”). These backward-
8 looking declarations thus also fail to show an expectation of imminent injury or a reasonable
9 expectation of repetition of that past injury.

10 Plaintiffs’ declarations also fail to satisfy the second and third Article III standing
11 requirements, because any alleged injury suffered by Plaintiffs is neither “fairly traceable” to
12 Reclamation’s decision, nor “redressable” by a favorable judicial ruling. At bottom, plaintiffs’
13 harm amounts to a vague allusion to the possibility of more water for allocations without the
14 augmentation release. Plaintiffs’ attenuated claims of injury stand in sharp contrast to those
15 raised in *Bennett v. Spear*, 520 U.S. 154, 167-168 (1997), where ranchers and irrigation districts
16 demonstrated standing by alleging that the FWS’s improper biological opinion requiring use of
17 reservoir water to protect endangered species of fish would necessarily result in less water
18 available for their irrigation needs.

19 Unlike *Bennett*, Plaintiffs here fail to show that the alleged failure of Reclamation to
20 prepare an EIS or engage in more ESA consultation actually resulted in its being able to supply a
21 lesser amount of water. Nor do they suggest, let alone demonstrate, that more NEPA analysis or
22 more ESA consultation would have resulted in a lesser amount of water for the releases or the
23 realization that the releases were not needed. Plaintiffs cannot make any such showings. The
24 record shows that after considering its authority to make releases and the potential environmental
25 impacts, and after coordination with NMFS to develop the action and fully considering its effects
26 on listed coho salmon and Central Valley salmonids and green sturgeon, Reclamation
27 determined that this volume of water was needed to prevent a massive die-off of fall-run

1 Chinook and other salmonids in the lower Klamath River. Reclamation's substantive conclusions
2 about the need for this amount of water and the environmental impacts of that release and
3 impacts to listed fish were reasonable and undisputed. *Supra*, Moreover, as noted above, given
4 Reclamation's ability to use other water to supply the same amount of water to meet flow and
5 temperature requirements in the Central Valley, the release maintained the "status quo," and did
6 not diminish the amount of CVP water in the system available for export. In short, unlike
7 *Bennett*, Plaintiffs here have not and cannot show that the alleged failure of Reclamation to
8 engage in more consultation resulted in Plaintiffs being able to supply a lesser amount of water.

9 Relatedly, Plaintiffs' requested relief is also not "likely" to redress their alleged harm.
10 *See* Am. Compl., Prayer for Relief. Even if the Court found Plaintiffs' declaratory and injunctive
11 remedy appropriate, it could not order Reclamation to propose a different action or require it to
12 come to a different conclusion following further NEPA analysis. *See Marsh*, 490 U.S. at 371
13 (NEPA establishes procedural requirements, it does not mandate any substantive result); *Methow*
14 *Valley*, 490 U.S. at 349-50 (same); *Inland Empire Pub. Lands Council*, 88 F.3d at 758 (same).
15 Nor does more process mean that Reclamation would have come to any different substantive
16 conclusion, or that it would be required to alter its action following ESA consultation. In fact,
17 both the ESA and Supreme Court recognize that even after formal consultation, an action agency
18 may exercise its discretion to carry out its operations as it sees fit, so long as it "articulate[s] its
19 reasons" for those actions. *Bennett*, 520 U.S. at 168-69; 50 C.F.R. § 402.15(a). "Relief that does
20 not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very
21 essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83,
22 107 (1998). In short, Plaintiffs lack standing, and this Court must dismiss this case. *Maya*, 658
23 F.3d at 1067 (lack of standing "requires dismissal for lack of subject matter jurisdiction").

24 **II. Reclamation Has the Authority to Make Releases to Augment Flow in the Lower**
25 **Klamath River.**

26 Reclamation's authority to make the fall augmentation releases flows from the 1955 Act.
27 In that Act, Congress authorized and directed the Secretary to "construct, operate, and maintain .

1 . . .the Trinity River division . . . *Provided*, That the Secretary . . . adopts appropriate measures to
2 insure the preservation and propagation of fish and wildlife.” 1955 Act. This mandate has never
3 been repealed or superseded.

4 Contrary to Plaintiffs’ arguments, nothing in CVPIA section 3406(b)(23) suggests that it
5 preempts or supplants the original 1955 authorization for the TRD. Section 3403(d) defines the
6 Central Valley Project and specifically recognizes 1955 Act as one of its authorizing statutes.
7 Section 3406(a) specifically amends the 1937 Act authorizing the CVP, but the CVPIA has no
8 comparable provision addressing the 1955 Act. Indeed, Section 3406(b)(23), the section upon
9 which Plaintiffs base their argument, expressly explains that it was designed to address the
10 restoration goals of the 1984 Act (explained in more detail below) and says nothing in regard to
11 the 1955 Act.

12 Under the plain language of the 1955 Act, the Secretary has the discretion to determine
13 “appropriate measures” to “insure preservation and propagation of fish and wildlife.” *See, e.g.,*
14 *Trinity County v. Andrus*, 438 F.Supp. 1368, 1376 (1977). This determination of appropriate
15 measures necessarily requires the agency to exercise scientific judgment, and accordingly should
16 be given great deference. *See Delta Smelt Appeal*, 2014 WL 975130 at *17, 23, 25; *Ecology*
17 *Ctr.*, 574 F.3d at 658-59. Here, Reclamation reasonably exercised that discretion in its
18 determination that fall flow augmentation releases are needed because of the unique convergence
19 of conditions to insure preservation and propagation of fall-run Chinook salmon on the lower
20 Klamath River. A 1979 Solicitor’s Opinion explains that the Secretary must prioritize instream
21 flow needs over water exports to the Central Valley as a necessary step to preserve fish and
22 wildlife:

23 [I]n authorizing the Trinity River Division of the CVP in 1955, Congress
24 specifically provided that in-basin flows... determined by the Secretary to be
25 necessary to meet in-basin needs take precedence over needs to be served by out-
26 of-basin diversion. *See* Pub. L. No. 84-386, § 2. In that case, Congress’ usual
27 direction that the Trinity River Division be integrated into the overall CVP, set
28 forth at the beginning of section 2, is expressly modified by and made subject to

1 the *provisos* that follow giving specific direction to the Secretary regarding in-
2 basin needs.

3 Krutliz Mem. (Dkt. 51-3). The Solicitor’s Opinion regarding the 1955 Act was discussed in the
4 Trinity River Restoration Program ROD, and has not been withdrawn or refuted by either the
5 courts or Congress. *See* AR 67 at 03008. It sets forth a reasonable interpretation of the 1955 Act
6 based on the plain language of that statute.

7 Plaintiffs argue that Reclamation is prohibited from making releases to the Trinity River
8 above the annual amounts provided in the ROD by the CVPIA, Pls.’ Mem. at 12. Plaintiffs’
9 argument lacks merit because the ROD does not address flow limits that may be needed on the
10 lower Klamath River. In the 1992 CVPIA, Congress ordered that the Trinity River Flow
11 Evaluation Study (“TRFES”), which was initiated over a decade earlier to evaluate the measures
12 necessary to rehabilitate and support a healthy habitat for natural fishery production in the
13 Trinity River, be completed. CVPIA § 3406(b)(23). Congress further ordered that the
14 recommendations of the TRFES be implemented if the Secretary and Hoopa Valley Tribe
15 concurred in them. *Id.* Interior prepared an EIS/EIR to analyze the impacts of the TRFES flows
16 and alternatives to them. The ROD, which was signed by the Secretary and concurred in by the
17 Hoopa Valley Tribe, directs the implementation of the selected alternative, which includes flow
18 levels for the mainstem of the Trinity River based on the forecasted hydrology for each year.
19 Westlands sued Interior and other agencies challenging the EIS/EIR and the adoption of the
20 ROD, as well as the Biological Opinion issued by NMFS and FWS evaluating the TRFES plan,
21 and the challenge was rejected. *Westlands Water Dist*, 376 F.3d at 878.

22 The ROD prescribes annual flows to restore the mainstem of the Trinity River and says nothing
23 with regard to flows to benefit the fish species that traverse the lower Klamath River. AR 67 at 03017.
24 Because the actions challenged in this lawsuit were designed to increase flows in the lower
25 Klamath River, the ROD does not apply.⁹ In fact, the ROD expressly makes clear that it does not

26
27 ⁹ Plaintiffs acknowledge that, “It is undisputed that the lower Klamath River . . . is the target area” for the action.
Pls.’ Memo. at 21.

1 preclude Interior from taking actions beyond those prescribed in the ROD in order to benefit the
 2 fisheries in the lower Klamath River. AR 67 at 03017 (“[N]othing in this ROD is intended to
 3 preclude watershed restoration and monitoring, provided funding is available, below the
 4 confluence of the Trinity and Klamath Rivers. Because the TRFES and ROD focus on the
 5 Trinity River mainstem and Trinity Basin, watershed restoration and monitoring that benefit
 6 Trinity River fisheries below the confluence of the Trinity and Klamath Rivers may be
 7 considered by the Trinity Management Council.”).¹⁰

8 A review of the CVPIA, a statutory foundation for the ROD, does not lead to a different
 9 conclusion. Reclamation is not interpreting Section 2 of the 1955 Act to “provide Reclamation
 10 authority to make whatever additionally fishery releases the Secretary decides are appropriate,”
 11 as Plaintiff contends. *See* Pls.’ Mem. at 18. Instead, Reclamation recognizes that the CVPIA
 12 and resulting ROD have addressed the release necessary to restore the mainstem of the Trinity
 13 River, but these provisions do not preclude the releases at issue in this case. This is a permissible
 14 interpretation of both the CVPIA and the 1955 Act entitled to deference pursuant to *Chevron*.
 15 *U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

16 Section 3406(b)(23) of the CVPIA required the Secretary to complete the TRFES “to
 17 meet Federal trust responsibilities to protect fishery resources of the Hoopa Valley Tribe, and to
 18 meet the fishery restoration goals of the [1984 Act].” CVPIA § 3406(b)(23). This stated
 19 purpose makes clear that in section 3406(b)(23) of the CVPIA, Congress did not direct the
 20 Secretary to plan for fishery restoration in the lower Klamath through the ROD.¹¹ The fishery

22 ¹⁰ Plaintiffs also raise and then dismiss other authority found in Section 2 of the 1955 Act, a separate proviso from
 23 the one regarding the preservation and propagation of fish and wildlife which directs that “not less than 50,000 acre-
 24 feet shall be released annually from the Trinity Reservoir and made available to Humboldt county and downstream
 25 water users.” Pls.’ Memo. at 16 n.3. Federal Defendants agree that the Secretary did not rely upon this separate
 26 provision as a basis for the actions taken in 2012 and 2013, but disagree to the extent Plaintiffs cite this provision for
 27 any other reason. In fact, this separate provision actually supports Federal Defendants view that the geographic
 28 scope of the 1955 Act’s authority extends beyond the mainstem Trinity River that CVPIA Section 3406(b)(23) and
 the subsequent ROD subsequently addressed.

¹¹ Plaintiffs dispute whether the Secretary’s trust responsibility has any bearing on her decision to release
 supplemental water in 2012 and 2013. *See* Pls.’ Mem. at 19-20. As explained above, Interior, the courts, and
 Congress have all recognized that the Hoopa Valley and Yurok Tribes have trust resources in the Trinity and
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1 restoration goals of the 1984 Act were only related to the mainstem of the Trinity River and not
2 the lower Klamath River. The purpose of the 1984 Act was to “restore the fish and wildlife
3 populations in [the Trinity River Basin] to the levels approximating those which existed
4 immediately before the start of the construction” of the Trinity River Division. Pub. L. No. 98-
5 541, § 2, 98 Stat. 2721 (1984). To achieve this purpose, Congress directed the Secretary to
6 formulate and implement a fish and wildlife management program for the Trinity River Basin
7 that would rehabilitate fish habitats in (A) “the Trinity River between Lewiston Dam and
8 Weitchpec,” and (B) “tributaries of [the Trinity River] below Lewiston Dam and in the south
9 fork of such river.” *Id.* Water flows down the Trinity River from the Lewiston Dam to
10 Weitchpec, which is located at the point where the Trinity River meets the Klamath River. *See*
11 AR 70 at 03225. Because the 1984 Act lists specific areas that the Secretary’s management
12 program must rehabilitate and in so doing omits the lower Klamath River from those areas, it
13 should be understood that the goals of the 1984 Act did not include rehabilitation of fish habitat
14 in the lower Klamath River. *See Silvers v. Sony Pictures Ent.*, 402 F.3d 881, 885 (9th
15 Cir.2005)(quoting *Boudette v. Barnette*, 923 F.2d 754, 756–57 (9th Cir.1991) (“[W]hen a statute
16 designates certain persons, things, or manners of operation, all omissions should be understood
17 as exclusions.”). Thus, the 1984 Act expressly did not direct the Secretary to restore fish habitats
18 in the lower Klamath River, which would be downstream of the confluence of the two rivers at
19 Weitchpec. Thus, Congress only intended to address restoration of the mainstem of the Trinity
20 River through the CVPIA, and did not supplant or modify the 1955 Act with regard to the lower
21 Klamath River. Since the CVPIA does not limit the Secretary’s discretion to take appropriate
22 measures to insure the preservation and propagation of fish and wildlife in the lower Klamath

23
24
25 Klamath Basins that must be protected so that the Tribes can benefit from a meaningful fishery. *See supra* at 3-5,
26 12. Although the ROD certainly addressed the trust needs of the Hoopa Valley Tribe's fishing rights within the
27 mainstem Trinity River, nothing in that decision or otherwise finally resolved needs within the lower Klamath River,
28 for other purposes, or specifically for the Yurok Tribe. Accordingly, the Secretary's trust responsibility provides
additional support for her decision to release supplemental water from TRD in 2012 and 2013 based on the
provisions of the 1955 Act.

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1 River, the 1955 Act applies and provides authority for the action under challenge here.¹²

2 The fact that approximately half of the fall-run Chinook salmon that the action is
3 designed to benefit are returning to the Trinity River does not impact Reclamation's authority to
4 make the fall releases. As discussed above, the 1984 Act specified that it was designed to protect
5 the fish habitat in certain areas, not including the lower Klamath River. The augmentation action
6 is designed to prevent a disease outbreak by targeting a minimum flow of 2,800 cfs in the lower
7 Klamath River as measured at the gauge station at Klamath, near the mouth of the Klamath River
8 (USGS Station KNK) for a short period of time to prevent a disease outbreak. AR 2 at 00020-
9 21. Thus, it is targeting habitat and environmental conditions in the lower Klamath River, not
10 the mainstem of the Trinity River, and it is irrelevant for the purposes of Reclamation's authority
11 to protect this habitat that some of the fish that will benefit from the habitat will then make their
12 way up to the Trinity River.

13 Plaintiffs suggest that, rather than release additional water from storage, Interior could
14 have altered the ROD releases to "budget" water for August and September releases. Pls.' Mem.
15 at 14. This argument is flawed for two reasons. First, Plaintiffs ignore that the restoration efforts
16 set forth in the ROD focus on restoring the mainstem of the Trinity River, especially the 40 miles
17 immediately below the Lewiston Dam, to a "healthy" alluvial river, mimicking the natural
18 hydrograph. Flow releases were designed not only to provide water of sufficient quantity and
19 quality (*e.g.* temperature) for appropriate salmonid habitat and passage while in the river, but
20 also to flush fine sediments and provide other geomorphic benefits that – combined with
21 mechanical river restoration and other measures – would restore the river without seeking to
22 keep *all* Trinity River water supplies within the watershed (such as the Maximum Flow
23 Alternative that Plaintiffs raise and that Interior already rejected). *See* AR 67 at 03004-5.
24 Reducing the ROD flows in order to create a "reserve," as Plaintiffs propose, would defeat the

25
26 ¹² Plaintiffs note that to the extent the 1955 Act conflicts with the CVPIA section 3406(b)(23) the later, more
27 specific statute controls. *See* Pls.' Memo. at 18. With regard to the Secretary's discretion at issue in this case,
28 however, the CVPIA's more specific, but limited and focused direction, does not conflict with the broader authority
and direction provided under the 1955 Act.

1 specific purposes for which the ROD flows were developed, and which were based on over 20
2 years of detailed scientific study and integration of various disciplines (biology, hydrology,
3 geomorphology) into the restoration of the mainstem of the Trinity River. Thus, it would not be
4 consistent with the ROD for Reclamation to “reserve” an amount of water scheduled to be
5 released under the ROD earlier in the year for a late summer flow augmentation release.

6 Second, the planned 2013 fall flow augmentation releases described in the EA are for a
7 different purpose than the flows approved in the ROD. The flow augmentation releases
8 approved in the August 6, 2013 FONSI are designed to increase flow volumes/velocities in the
9 lower Klamath River (not the mainstem of the Trinity River) to keep salmon from holding
10 closely together in limited thermal refugia where disease could quickly spread such as occurred
11 in 2002. Thus, the flow augmentation described in the EA and FONSI addresses specific
12 circumstances in the lower Klamath River. The flows approved in the ROD were developed for
13 the different purpose of restoring habitat and fish populations on the mainstem of the Trinity
14 River, not for avoiding a potentially lethal spread of pathogens on the lower 44 miles of the
15 Klamath River.

16 Additionally, although adaptive management may in the future allow for certain
17 substantial within-year alterations to the ROD’s flow schedule based on Program results and
18 objectives, Interior has concluded that such changes to the annual hydrographs should not occur
19 prior to full implementation of the Program. The Restoration Program adopted by the ROD has
20 yet to be fully implemented, due in part to delays caused by litigation challenges and reduced
21 funding allocations in the early years. *See* AR 64 at 02567. Thus, at this stage in the
22 implementation of the ROD, it would not be prudent for the flow releases set forth in the ROD to
23 be reduced at other times of year in order to provide for the “reserve” Plaintiffs suggest.

24 Finally, even if within-year alterations were an option, Reclamation could not have
25 planned for the 2013 need for augmentation flows when the decision regarding the ROD releases
26 was made and implemented. It was not clear how dry the year would become, particularly in
27 light of the very wet conditions in December, and thus that augmentation releases would be

1 needed, until later in the year. *See* Person Decl. ¶ 7 (Dkt. 55).

2 **III. Reclamation Was Not Required to Obtain Authorization for a Change in the Place**
3 **of Use Under its State Permits In Order to Proceed with the Action.**

4 The flow augmentation action is consistent with CVPIA section 3411 and section 8 of the
5 Reclamation Act, 43 U.S.C. § 383, because there is no requirement under state law to change the
6 place of use in the TRD water rights in order to undertake these releases. Plaintiffs argue that
7 Reclamation has violated the water right permits it holds for the TRD because it was allegedly
8 required to petition the State Water Board for a modification of its water rights in order to make
9 these releases but failed to do so. As discussed below, this argument lacks merit for several
10 reasons.

11 Federal law requires Reclamation to proceed in conformity with state law regarding “the
12 control, appropriation, use or distribution of water used in irrigation” and to obtain state-issued
13 water rights for its projects, to the extent it does not interfere with Congressional directives. 43
14 U.S.C. §383; *California v. United States*, 438 U.S. 645 (1978). The CVPIA further states that:

15 [T]he Secretary shall, prior to the reallocation of water from any purpose of use or
16 place of use specified within applicable [CVP] water rights permits and licenses, .
17 . . obtain a modification in those permits and licenses, in a manner consistent with
18 the provisions of applicable State law, to allow such change in purpose of use or
19 place of use.

20 CVPIA § 3411(a).

21 California law requires any entity seeking the right to divert and use water in the State to
22 obtain a permit from the State Water Board. The State Water Board is the entity charged with
23 exercising adjudicatory and regulatory functions in the State with respect to water resources.
24 Cal. Water Code § 174. The State Water Board grants water rights and has concurrent authority
25 with the state courts to enforce conditions of water rights permits. Cal. Water Code § 1350. As
26 plaintiffs have noted, Reclamation proceeded in conformity California law, obtaining permits for
27 the TRD in 1959. *In the Matter of Implementation of Water Quality Objectives for the San*
28 *Francisco Bay/Sacramento-San Joaquin Delta Estuary; A Petition to Change Points of*
Diversion of the Central Valley Project & the State Water Project in the Southern Delta, and A

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1 *Petition to Change Places of Use & Purposes of Use of the Central Valley Project*, Cal. State
2 Water Res. Control Bd., D-1641 (revised), (Mar. 15, 2000), available at
3 [http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf)
4 [649/wrd1641_1999dec29.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf).

5 A permittee must petition the Board to change the point of diversion, place of use, or
6 purpose of use from that which is specified in the permit. Cal. Water Code § 1701. No approval
7 of the Board is needed to bypass water or release it so that it remains in the source for the benefit
8 of fish. This is particularly true in this case, where Reclamation's permits already include
9 minimum instream bypass flows. Consistent with most water rights permits issued in California,
10 the place where the instream bypass flows ultimately leave the facility and flow to the ocean is
11 not included within the water right. *See* Cal. Water Code §1243.5.

12 When it began planning for the augmentation flows in 2012, Reclamation sought
13 confirmation from the State Water Board that it did not need the Board's approval to make fall
14 augmentation releases for the lower Klamath River. Seeking to use an existing State Water
15 Board procedure, Reclamation submitted a temporary urgency change petition to the State Water
16 Board seeking to temporarily change the rights that it holds on the Trinity River with respect to
17 the place of use of water appropriated under the permit.¹³ AR 44. The State Water Board
18 responded to Reclamation's petition by letter explaining that, in accordance with state law,
19 "Reclamation may bypass water without a change approval, and may release water for various
20 purposes that do not require State Water Board approval . . . these purposes include . . . releases
21 made to improve instream conditions for the benefit of aquatic resources." AR 32 at 01165-66.
22 The Board further noted that absent a transfer or change approved by the State Water Board, the
23 bypass or release of water cannot be considered beneficial use under the permit, but this did not
24 change the Board's unequivocal statement that Reclamation may make the releases without
25 approval. *Id.* The State Water Board thus provided its interpretation of State law that

26
27 ¹³ Following the State Water Board's letter, which confirmed that Reclamation did not need Board approval for the
releases, Reclamation withdrew its petitions. AR 31.

1 Reclamation is not required to seek and obtain changes to the water right permits it holds from
2 California before releasing water to augment flows in the lower Klamath River. Plaintiffs are
3 incorrect that making the instream releases without State Water Board action is unlawful. The
4 State Water Board confirmed that it is consistent with California water law, and thus, the
5 augmentation actions are consistent with section 8 of the Reclamation Act and CVPIA section
6 3411(a). Accordingly, Plaintiffs' claim that the 2013 flow augmentation releases violate federal
7 law because they violate state law is without merit.

8 **IV. Reclamation Reasonably Determined that the Fall Augmentation Releases Would**
9 **Not Cause a Significant Impact to the Environment.**

10 Reclamation complied with NEPA by preparing an EA and executing a FONSI for both
11 the 2012 and 2013 releases. In these documents, Reclamation evaluated the proposed actions
12 and reasonably concluded that there was no potential for significant effects on the environment.

13 Agencies need not prepare an EIS before taking any action, but rather they only are
14 required to prepare an EIS for major federal actions that will *significantly* affect the quality of the
15 human environment. 42 U.S.C. § 4332(C). In order to determine if an action will significantly
16 affect the human environment, an agency may prepare an EA, and, if, through the EA, the
17 agency concludes that the action will not have a significant effect on the human environment, the
18 agency need not issue an EIS, but instead must issue a Finding of No Significant Impact
19 (“FONSI”). 40 C.F.R. §§ 1501.4(b), (e), 1508.13. In challenging a FONSI, a plaintiff must raise
20 “‘substantial questions whether a project may have a significant effect’ on the environment.”
21 *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citation
22 omitted). Here, Reclamation complied with these regulations by considering the environmental
23 impacts of the 2012 and 2013 actions and reasonably concluded that none of the impacts would
24 have a significant impact. The EAs and FONSI therefore, did not violate NEPA.

25 In compliance with NEPA, Reclamation prepared a draft EA, which described the
26 proposed action, examined an alternative, and considered the environmental impacts.
27 Reclamation released the draft EA for public comment, and after fully considering all of the

1 comments it received (including comments from Plaintiffs), it finalized the EA and signed a
2 FONSI on August 6, 2013. The EA and FONSI demonstrate that Reclamation took a hard look
3 at the proposed action and reasonably concluded that while there exists the potential for adverse
4 impacts, those impacts are not significant.

5 Plaintiffs allege that Reclamation failed to properly consider the following potential
6 impacts: (a) impacts to CVP water supply, (b) impacts to hydropower generation, (c) impacts to
7 cold water pool management, and (d) impacts to biological resources. Contrary to Plaintiffs'
8 assertion, Reclamation considered all of these potential impacts and concluded that none of them
9 would be significant. Each is addressed in detail below.

10 **A. Impacts to CVP Water Supply**

11 In the 2012 EA, Reclamation reasonably concluded that there would be no impacts to
12 CVP water supply in 2012 due to the 2012 action because water supply forecasts for the water
13 year had already been made and would not change whether or not the fall augmentation releases
14 were made. AR 34 at 01186. Similarly, in the 2013 EA, Reclamation reasonably concluded that
15 there would be no impacts to CVP water supply in 2013 due to the 2013 action because water
16 supply forecasts for the water year had already been determined and would not change whether
17 or not the fall augmentation releases were made. AR 2 at 00028. Reclamation recognized that,
18 depending on the year type, there was a potential for some impact to water available for CVP
19 deliveries in the years following the actions, but noted that deliveries will depend on hydrology
20 and operational objectives. With the knowledge that Reclamation had available at the time, it
21 recognized in the 2012 and 2013 EAs that if the Trinity Reservoir fills in 2013 and 2014,
22 respectively, there will be no impact to water resources available for potential uses. AR 34 at
23 01187; AR 2 at 00028. Reclamation also recognized that the Reservoir may not fill, and in that
24 case, up to the amount of water used for the action may not be available for other potential
25 purposes. AR 34 at 01187; AR 2 at 00028. However, as noted in the EAs, because "CVP
26 facilities are operated in a coordinated fashion, and annual water allocations to contractors are
27

1 determined by supply conditions throughout the system, it is unlikely that any allocations to
2 individual contractors would be reduced.” AR 34 at 01192; AR 2 at 00038. Thus, the notion
3 that a reduction in annual water supply attributable to a prior flow augmentation release would
4 fall entirely, or even substantially, on Plaintiffs here ignores the coordinated forecast and
5 delivery of CVP project water and therefore rests on a flawed premise.

6 In addition, even if the entire amount estimated to be needed for the actions were
7 released, the impact to water supply would not be significant. The 48 TAF of water estimated to
8 be needed for the action in 2012 was less than 3 percent of the forecasted volume in the Trinity
9 Reservoir at the beginning of water year 2013 and about 2 percent of the forecasted volume for
10 the end of April 2013. AR 34 at 01186-87. As The 62 TAF of water estimated to be needed for
11 the action in 2013 was about 4.5 percent of the forecasted volume in the Trinity Reservoir at the
12 beginning of water year 2014 and 3 percent of the forecasted volume for the end of April 2014.
13 AR 2 at 00028. Water in the Trinity Reservoir is only one part of the CVP water supply, and the
14 water estimated to be needed for the 2012 and 2013 action was thus a very small proportion of
15 the overall CVP water supply.

16 **B. Impacts to Hydropower Generation**

17 Because current water year supply forecasts were already set at the time of the EAs and
18 those would not change dependent on whether the action occurred, it was reasonable for
19 Reclamation to conclude that there would be no effects to hydropower generation in the year of
20 the actions. With regard to the years following the actions, Reclamation recognized that if the
21 reservoir does not fill and there are no significant safety-of-dams releases, some portion of the
22 water used for the actions may not be available for later release through the Clear Creek Tunnel,
23 Carr Powerplant, the Spring Creek Tunnel and Powerplant, and the Keswick Dam Powerplant,
24 and thus, some potential power generation could be lost. AR 34 at 01192; AR 2 at 00027.
25 Reclamation calculated that if 92 TAF of water was released to implement the 2012 action
26 (including unlikely emergency flows), a maximum of 119,400 megawatt hours of power
27

1 generation could be lost. AR 34 at 01193. Similarly, Reclamation calculated that if 62 TAF of
2 water was released to implement the 2013 action, a maximum of 75,330 megawatt hours of
3 power generation could be lost. AR 2 at 00027. The TRD generates an average of 1,200
4 gigawatt hours annually. See <http://www.usbr.gov/projects/index.jsp>. The maximum amount of
5 power production that could eventually be foregone due to the 2012 and 2013 flow augmentation
6 is about 10% and 6% of the average annual TRD power production respectively. It was
7 reasonable Reclamation to conclude that these maximum potential impacts were not significant.
8 See *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (“[I]t
9 does not follow that the presence of some negative effects necessarily rises to the level of
10 demonstrating a *significant* effect on the environment.”)(emphasis added).

11 Plaintiffs rely significantly on Redding Electric Utility’s (“REU”) comments to support
12 its argument that potential loss in power generation would be significant. See Pls.’ Mem. at 32.
13 REU’s comments focus on the financial impacts of the potential loss. Financial impact alone
14 would not significantly impact the human environment. See *Ashley Creek Phosphate Co. v.*
15 *Norton*, 420 F.3d 934, 942-43 (9th Cir. 2005) (noting that NEPA analysis need not address
16 economic impacts that are not tethered to the environment).

17 **C. Impacts to Cold Water Pool Management**

18 Reclamation recognized that Trinity Reservoir storage is important for temperature
19 management. AR 34 at 01186; AR 2 at 00024. Releases from deep portions of the Trinity
20 Reservoir are used to meet cold water needs to the Trinity River and the Sacramento River
21 Basin. AR 2 at 00025. Reclamation further acknowledged that the period of “greatest
22 temperature reduction need in the Sacramento River Basin occurs during the warmer months
23 when irrigation and the M&I demands are highest and water temperature concerns of the
24 mainstem Sacramento River exist for several listed fish under the ESA.” AR 2 at 00026.

25 The 2012 and 2013 EAs explained, however, the augmentation releases would not result
26 in significant impacts to the cold water resource needs. AR 34 at 01187; AR 2 at 00026-27.

1 Temperature of water released from the Trinity Reservoir penstocks may be a concern for
2 downstream use when storage dips to 1 MAF and below. AR 2 at 00027. When the 2012 EA
3 was prepared, Trinity Reservoir storage was projected to be 1.835 MAF at the beginning of water
4 year 2013. AR 34 at 01186. Even if the action used the full 48 TAF analyzed in the EA, that
5 would still leave 1.787 MAF in storage. When the 2013 EA was prepared, the end of water year
6 storage in 2013 the Trinity River was projected to be 1.362 MAF (without implementation of the
7 action). AR 2 at 00027-28. Even if the action used the full 62 TAF analyzed in the EA, that
8 would still leave 1.3 MAF in storage. Because projected storage after implementation of the
9 2012 and 2013 actions would be well above the 1 MAF threshold for concern regarding water
10 temperatures, it was reasonable for Reclamation to conclude that the action would not have
11 significant effects on cold water pool management in 2013. *See* AR 33 at 01172; AR 1 at 00006.
12 Additionally, citing to the TRMFR/EIS, the 2013 EA notes that “water temperature objectives
13 could be met a high percentage of the time” with even lower storage volumes in the reservoir.
14 AR 2 at 00025. Both of these conclusions involve the exercise of Reclamation’s judgment on
15 technical matters involving reservoir water temperature and management, areas within
16 Reclamation’s expertise which are owed a high degree of deference. *See Delta Smelt Appeal*,
17 2014 WL 975130, at *17, 23, 25; *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207,
18 213 (9th Cir. 1989) (“Deference to an agency’s technical expertise and experience is particularly
19 warranted with respect to questions involving engineering or scientific matters.”). Moreover,
20 although there was uncertainty with regard to the storage levels at the end of the water years
21 following the actions, this is not cause to prepare an EIS as further study could not resolve this
22 uncertainty. *See Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 870 (9th Cir.
23 2005) (“Preparation of an EIS is mandated where uncertainty may be resolved by further
24 collection of data or where the collection of such data may prevent ‘speculation on potential . . .
25 effects. The purpose of an EIS is to obviate the need for speculation’”) (quoting *Nat’l Parks*
26 *& Conservation Ass’n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001)). Accordingly,
27 Reclamation’s conclusion was reasonable given the information available.

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1 **D. Impacts to Biological Resources**

2 As noted in the FONSI, providing the augmentation flows would not substantially affect
3 any listed or endangered species. AR 33 at 01172; AR 1 at 00008; *see also* Section V.A, *infra*
4 (discussing Reclamation's consideration of impacts on ESA-listed species). There is no
5 likelihood of significant adverse impacts to Western pond turtle, yellow-legged frog, Pacific
6 lamprey, spring-run Chinook salmon, or coho salmon in the Trinity River. Changes caused by
7 the presence and operation of the TRD, such as reduction of water temperature, increased
8 sedimentation, and decreased range of flow velocities, have already fundamentally reduced the
9 amount of suitable habitat for the Western pond turtle. SAR 5 at 04921 and 04922. The yellow-
10 legged frog has also been negatively impacted by the TRD for decades. SAR 10 at 05206. Flow
11 augmentation in 2012 and 2013 would not likely further adversely impact tadpoles as steady
12 flows during June and July, before augmentation began, ensure that tadpoles are mobile enough
13 to avoid stranding with river flow changes. SAR 10 at 05209. Developing juvenile Pacific
14 lamprey burrow into silty substrates where they remain for four or five years before emigrating
15 to the ocean, therefore they are subjected to the same flow magnitudes, and risk of displacement,
16 annually under the ROD flow regimes as with the generally lesser flow augmentation increases.
17 AR 70 at 03394. There is no likelihood of adverse impacts on winter-run Chinook salmon,
18 spring-run Chinook salmon, and steelhead in the Sacramento River. AR 2 at 00033 and 00034.
19 While there may be some conflicting views on whether the augmentation releases will impact
20 biological resources, this is a matter of scientific judgment and the agency's determination is
21 entitled to deference. *See Delta Smelt Appeal*, 2014 WL 975130, at *17; *Ecology Ctr.*, 574 F.3d
22 at 658-59 (same). As discussed further below, the FONSI discusses the possibility of the
23 proposed action increasing water temperatures in the Sacramento River Basin and even
24 quantifies the potential temperature increases, which are minor. After considering this
25 information, Reclamation reasonably concluded that the proposed action would not have a
26 significant impact on the quality of the water (i.e. water temperature), and thus, would not
27

1 significantly impact biological resources. AR 1 at 8.

2 **E. Reclamation Was Not Required to Consider Emergency Releases in the 2013**
3 **EA.**

4 Finally, Plaintiffs argue that the 2013 EA was insufficient and thus Reclamation's
5 decision was arbitrary and capricious because the EA did not analyze the impact of release up to
6 109 TAF feet, as could have occurred as part of the action if water temperatures remained about
7 23 degrees Celsius and emergency releases had to be made because of signs of a disease
8 outbreak. Such analysis was not required because it was highly unlikely that releases above 62
9 TAF would be needed to implement the action in 2013,¹⁴ and if additional releases were made, it
10 would be due to an emergency situation. The Council on Environmental Quality ("CEQ") was
11 created by NEPA and is charged with issuing regulations implementing NEPA, and its
12 regulations are entitled to deference. 42 U.S.C. § 4344; *Andrus v. Sierra Club*, 442 U.S. 347,
13 357-58 (1979). CEQ regulations address the procedures that must be followed to comply with
14 NEPA in emergency situations. *See* 40 C.F.R. § 1506.11; *see also Winter v. Natural Res. Def.*
15 *Council, Inc.*, 555 U.S. 7, 18 (2008)(acknowledging that in emergency situations agencies may
16 be authorized to implement "'alternative arrangements' to NEPA compliance.") Because no
17 emergency releases were needed, Reclamation did not have to follow these procedures.

18 **V. Reclamation Satisfied Its Obligations Under The ESA.**

19 Plaintiffs' fifth claim alleges that Reclamation failed to satisfy its ESA obligations "to
20 consult with NMFS and FWS regarding the [augmentation releases']" affects on listed "SONCC
21 coho salmon in the Trinity River, Central Valley spring-run [C]hinook salmon, . . . green
22 sturgeon and delta smelt . . ." Am. Compl. ¶¶ 98, 102. Plaintiffs abandon in silence their claim
23 that Reclamation failed to consult with FWS regarding Delta Smelt. Pls.' Mem. at 39-42. They
24 still repeatedly insist, however that "Reclamation has not initiated consultation with NMFS
25 regarding [the 2013 augmentation release]." *Id.* at 42; *id* at 39; ("Reclamation never initiated

26
27 ¹⁴ By 2013, augmentation had occurred in three previous years and there had not been an need for an emergency
release in any of those years.

1 consultation with NMFS”); *id.* at 41(“Reclamation has *never* initiated consultation”). As
2 discussed below, Plaintiffs’ claim fails for a variety of reasons; it also misreads the ESA, is
3 belied by the facts, and cannot justify overturning Reclamation’s reasoned analysis and
4 conclusions.

5 **A. Reclamation’s Analysis Was Rational And Supported By The Record.**

6 In this case, Reclamation’s 2013 EA and ESA Section 7 compliance memorandum
7 expressly considered the effects of the 2013 augmentation release on ESA-listed species under
8 the jurisdiction of NMFS, including SONCC coho salmon and listed Sacramento River and
9 Central Valley species. AR 2 at 00029 (analyzing “Coho salmon populations . . . part of the
10 Southern Oregon/Northern California Coasts Evolutionarily Significant Unit”); AR2 at 00031-32
11 (analyzing the effects to “[s]everal anadromous fish species [that] use the waterways in which
12 Trinity River water is used in the Sacramento River Valley . . . includ[ing] the following
13 Federally-listed species: Central Valley steelhead, spring- and winter-run Chinook salmon, and
14 the Southern DPS population of North American green sturgeon”); AR2 at 00039-41 (ESA
15 Section 7 “Consultation and Coordination”); AR 3 at 00052. As the record makes clear,
16 Reclamation concluded that based on modeling results of the impacts of the augmentation
17 releases to water temperatures, “listed fish in the Klamath Basin and the Central Valley may be
18 affected,” and that “it is appropriate to consider the effect to listed fish and designated critical
19 habitats in the context of ESA section 7(a)(2) consultation.” AR 3 at 00052-53. The record
20 shows that the releases were expected to benefit listed coho, AR 2 at 00040, and could have a
21 minor effect on Central Valley species, but that the “status quo” would be “maintained,” because
22 Reclamation had enough operational flexibility to release water from Shasta Reservoir to make
23 up for the augmentation release and meet all flow and temperature conditions. AR 3 at 00053-
24 54.

25 Tellingly, on the substance of the fundamental biological determinations about the
26 potential effects to these listed fish, Plaintiffs are silent. They do not dispute, for example, that
27

1 Reclamation and “NMFS representatives” developed the recommendations that “formed the
2 basis of the Proposed Action,” expressly “considered any affects to threatened SONCC coho
3 salmon associated with implementation, and concluded that there may be minor benefits related
4 to additional available rearing habitat during this time period.” AR 2 at 00040, 00051
5 (Reclamation considered all comments related to the species and addressed them in the final
6 EA).

7 Nor do Plaintiffs contest that the potential effects of the proposed action to listed Central
8 Valley species at issue—specifically, a potential “less than 0.1 [degree Fahrenheit]” change in
9 temperature in the Sacramento River, AR 3 at 00053—would be “similar” to doing nothing at
10 all. AR 2 at 00033-34. Nor could they, as the record shows that the potential effects of the
11 proposed action on the Sacramento River Basin and the Central Valley species were properly
12 explained and well-supported. As discussed above, the EA recognized that “Trinity Reservoir
13 storage is important for providing the cold water needs of the Trinity River and ... Sacramento
14 River in the Sacramento River Basin.” AR 2 at 00024. It acknowledged that “Trinity Reservoir
15 water ... is used to support environmental ... needs of the Sacramento River Valley, extending
16 through the Sacramento-San Joaquin Delta [and] is important for ... assisting in meeting the
17 water temperature requirements in the mainstem Sacramento River below Keswick Dam.” AR 2
18 at 00026. It further acknowledged that “the cold water of Trinity Reservoir would be reduced by
19 up to 62 TAF,” and that the period of “greatest temperature reduction need in the Sacramento
20 River Basin occurs during the warmer months when irrigation and the M&I demands are highest
21 and water temperature concerns of the mainstem Sacramento River exist for several listed fish
22 under the ESA.” AR 2 at 00026.

23 As explained above, Reclamation concluded that the 2013 release “would not result in
24 significant affects to the cold water resource needs for the immediate year.... because the end of
25 water year storage volume in Trinity River is projected to be ... well above the storage threshold
26 ... where the temperature of water released through the penstocks may be a concern for
27 downstream use.” AR 2 at 00026-27. There would also be “no changes to planned CVP water

1 operations as a result of implementation of the Proposed Action,” AR 2 at 00048, and it “would
2 not affect water supply allocations managed as part of the CVP in 2013, or water operations
3 within the Central Valley,” because “water allocations ... have already been determined for
4 2013, and the supplemental water would not affect the projected volume of water to be exported
5 to the Sacramento River Basin in 2013.” AR 2 at 00028.

6 Reclamation also considered the potential effects of the action on listed species in 2014,
7 including recognizing the uncertainties in predicting whether any such impacts would occur. For
8 example, the EA explained that water allocations for 2014 were “not likely to be affected,” but
9 acknowledged that actual affects to water allocations and listed species, “will depend on the
10 water year 2014 hydrology and operational objectives.” AR 2 at 00028. If Trinity Reservoir “fills
11 during 2014, there would be no effects to water resources available for all potential purposes,”
12 but if it does not fill in 2014, “some water volume, up to the amount released ... may not be
13 available for other potential purposes.” AR 2 at 00028. Reclamation further explained:

14 Trinity and Shasta Reservoirs are operated in coordinated fashion. Depending on
15 the details of future operations and the fill pattern at both reservoirs, the Proposed
16 Action may reduce the available cold water resources used to meet temperature
17 objective in the Sacramento River in 2014. Changes to the ability to achieve
18 temperature objectives would be expected to be minor, as would the associated
19 affects to ESA-listed salmon and steelhead [in the Sacramento River Basin].

20 AR 2 at 00034. While water volume used for flow augmentation in the lower Klamath River was
21 actually 70 percent lower than analyzed, Fed. Defs.’ Answer (Dkt. 103) at ¶ 51, modeling
22 showed that even with full implementation, the effects ranged from absolutely none at all to a
23 “relatively minor reduction” in available cold water resources, depending on whether there were
24 reservoir spills, or substantial safety-of-dams releases, as there were in December 2012 through
25 early 2013. AR 2 at 00027-28.

26 Specifically, modeling demonstrated that at its fullest implementation, the cold water
27 pool reduction from the 2013 release “could result in an increase in water temperatures at
28 Lewiston Dam of a few tenths of a degree Fahrenheit when the flow augmentation releases are

1 completed.” AR 2 at 00026-27. In the Sacramento River, the temperature impact was even
2 smaller, “expected to be less than 0.1 [degree Fahrenheit].” AR 2 at 00034. Based on these
3 fractional changes to in-river temperatures, Reclamation rationally concluded that “the influence
4 of the Proposed Action would be similar to the No Action Alternative and there would be no
5 substantial effects to the biota of the Sacramento River in 2013.” AR 2 at 00033-34; AR 3 at
6 00053. The Court must give its greatest deference to agency decisions, such as this, that are
7 based upon the agency’s choice among different scientific models. *Delta Smelt Appeal*, 2014
8 WL 975130, at *17. In its ESA Section 7 memorandum, Reclamation further concluded that
9 because “Reclamation still retains discretion to provide flow and temperature conditions that are
10 consistent with currently anticipated conditions with respect to the listed fish,” the 2013 release
11 will merely “continue the status quo as to listed species” AR 3 at 00054. In sum, Reclamation
12 properly considered the effects of its action on the listed species and reasonably concluded that
13 the release would benefit coho salmon, and have either no affect at all to only a “minor” effect
14 on ESA-listed salmonids and steelhead in the Sacramento River Basin.

15 **B. The Court Should Deny Plaintiffs’ Fifth Claim Because Plaintiffs’**
16 **Procedural Arguments Are Without Merit.**

17 While Plaintiffs do not contest the substance of Reclamation’s reasoned determinations,
18 they insist that Reclamation erred by not initiating formal consultation with NMFS on the effects
19 of the 2013 augmentation release to SONCC coho salmon and Central Valley listed species. Pls.’
20 Mem. at 37-42. Plaintiffs also maintain that Reclamation must prepare a biological assessment
21 evaluating the release before any formal consultation can begin. In addition, Plaintiffs contend
22 that it was improper for Reclamation to consider whether the proposed action would foreclose
23 the formulation of any future reasonable and prudent alternatives as required by ESA Section
24 7(d). *Id.* But Plaintiffs’ procedural arguments fail, as discussed below.

25 First, Plaintiffs assert that it was “legal error to conclude that consultation was not
26 required [for SONCC coho salmon] if Reclamation decided that proposed action would have a
27 beneficial effect on a listed species.” Pls.’ Mem. At 40. To the extent Plaintiffs’ vague statement

1 and citation to Federal Defendants' answer is meant to suggest that Reclamation failed to consult
2 at all with NMFS, that contention is wrong. As discussed above, Reclamation recognized its
3 ESA Section 7 obligations, including in its EA (AR 2 at 00012) and ESA Section 7
4 memorandum (AR 3 at 00052), and expressly "involved" NMFS biologists in "development of
5 the recommendations that formed the basis of the Proposed Action," and in considering its
6 potential effects to listed species. AR00040. At a minimum, this close inter-agency coordination
7 amounts to informal consultation, a process that by definition includes "all discussions,
8 correspondence, etc., between [NMFS] and [Reclamation] ... designed to assist [Reclamation] in
9 determining whether formal consultation ... is required." 50 C.F.R. § 402.13(a).

10 Federal Defendants' answer also does not support Plaintiffs' suggestion that no
11 consultation occurred; in truth, the answer merely stated that *initiating formal* consultation in this
12 context was not required. Dkt. 103 at ¶ 65. To the extent Plaintiffs dispute that conclusion, and
13 claim instead that Reclamation needed to *initiate formal* consultation with NMFS, they are
14 wrong for several reasons. First, that position ignores the fact that the ESA requires formal
15 consultation only "when the acting agency or consulting agency determines that the proposed
16 action is *likely* to adversely affect a listed species or critical habitat." *Delta Smelt Appeal*, 2014
17 WL 975130, at * 5 (citing 50 C.F.R. §§ 402.13, 402.14). As noted above, "adverse effect"
18 means an effect that is not "beneficial." Endangered Species Consultation Handbook, 3-12
19 (<http://fws.gov/endangered/esa-library/#consultations> (visited Feb. 27, 2014)) ("Beneficial
20 effects are contemporaneous positive effects without any adverse effects to the species"). Here,
21 the recommendations that formed the basis of the 2013 release were developed by Reclamation
22 and NMFS biologists; both NMFS and Reclamation considered its effects; and the record
23 indisputably shows that the 2013 release was expected to benefit coho salmon. AR 2 at 00040.
24 Formal consultation was thus not required. *Delta Smelt Appeal*, 2014 WL 975130, at *5.

25 Second, even if formal consultation were required, Reclamation is already in ESA
26 consultation with NMFS regarding the species, AR00053, and thus did not violate the ESA by
27 not initiating such consultation. Specifically, Reclamation's 2008 Biological Assessment for the
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1 long-term operation of the CVP and State Water Project (“SWP”), submitted to NMFS (“2008
2 BA”), included “[p]roposed operation of the Trinity River Division of the CVP Trinity River
3 Division operations,” as part of its proposed action. AR00053. When NMFS issued its Biological
4 Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project
5 and State Water Project (“2009 Salmonid BiOp”), it repeatedly made clear that “NMFS will
6 analyze the effects of the Trinity River Division portion of the proposed action on SONCC coho
7 salmon in a separate biological opinion.” *Consolidated Salmonid Cases*, No. 1:09-cv-1053-LJO-
8 BAM, AR00106302 (2009 Salmonid BiOp at 222); *id.* at AR00106667 (2009 Salmonid BiOp at
9 587) (“NMFS is in the process of conducting a separate consultation on the effects of the Trinity
10 River Division operations on listed coho in the Trinity River”).¹⁵ The record confirms that this
11 consultation regarding SONCC coho salmon is ongoing: “Reclamation was also informed of
12 NMFS’s intent to issue a separate biological opinion addressing SONCC coho salmon informed
13 by the 2008 BA. To date, Reclamation has not received that biological opinion, and consultation
14 continues.” AR 3 at 00053 (emphasis added). There is thus no need to again initiate this
15 consultation.

16 Plaintiffs’ arguments about the Central Valley listed salmon and steelhead likewise fail.
17 Their underlying assertion that a biological assessment is always required to initiate formal
18 consultation, Pls.’ Mem. at 38, is refuted by the ESA’s implementing regulations, which
19 expressly state that a biological assessment is mandatory only where the agency is proposing to
20 engage in a “major construction activity.” 50 C.F.R. § 402.12(b) (procedures required for Federal
21 actions that are “major construction activities”); *see id.* at § 402.01(a) (same). The regulations
22 define a “major construction activity” as a “construction project (or other undertaking having
23 similar physical impacts) which is a major Federal action significantly affecting the quality of the
24

25 ¹⁵ The 2009 Salmonid BiOp is publically available online at http://www.westcoast.fisheries.noaa.gov/publications/Central_Valley/Water%20Operations/Operations,%20Criteria%20and%20Plan/nmfs_biological_and_conference_opinion_on_the_long-term_operations_of_the_cvp_and_swp.pdf

1 human environment” as referred to in NEPA. 50 C.F.R. § 402.02; *see* 48 Fed. Reg. 29,990 (Jun.
2 29, 1983) (“biological assessment would not have to be prepared for every agency action,” only
3 for “any major construction activity”). Plaintiffs fail to show that the 2013 release of water
4 constitutes a major construction activity; thus, their claim that a biological assessment was
5 required fails.

6 Plaintiffs’ related suggestion that Reclamation has not initiated formal consultation with
7 NMFS in the *Consolidated Salmonid Cases* ignores this Court’s orders in that case and is
8 without merit. Proposed operation of the TRD of the CVP was described in the 2008 BA
9 submitted to NMFS. AR 3 at 00053. The 2009 Salmonid BiOp expressly “analyze[d] the effects
10 of the proposed action, including the Trinity River Division, on listed Central Valley
11 anadromous fish species and Southern Residents” *Consolidated Salmonid Cases*, No. 1:09-
12 cv-1053-LJO-BAM, AR106114 at (2009 Salmonid BiOp at 34). This Court remanded the 2009
13 Salmonid BiOp to NMFS in September 2011 “for further consideration in accordance with [the
14 Court’s 279-page] decision and the requirements of law,” and put the agencies on a remand
15 schedule to undertake and complete ESA consultation on the remanded the 2009 Salmonid BiOp.
16 *Consolidated Salmonid Cases*, 791 F. Supp. 2d 802; Doc. No. 655 (Dec. 12, 2011).

17 “It is well settled that a previous agency determination in a Biological Opinion cannot be
18 amended or supplemented with post-determination analysis or evidence without reinitiating the
19 consultation process.” *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*,
20 226 Fed. Appx. 715, 717 (9th Cir. 2007). Accordingly, the Court’s Memorandum Decision and
21 Final Judgment (Including Schedule For Remand), wherein the Court remanded the 2009
22 Salmonid BiOp to be redone to comply with the Court’s various instructions and under the
23 Court’s schedule, functionally reinitiated consultation. *Consolidated Salmonid Cases*, No. 1:09-
24 cv-1053, Doc. No. 655 (Dec. 12, 2011). Moreover, in the *Consolidated Salmonid Cases*, this
25 Court did not invalidate or vacate the 2008 BA upon which the remand is taking place or upon
26 which the 2009 Salmonid BiOp was based. *Id.* (remanding without vactur the 2009 Salmonid
27 BiOp). Thus, to the extent a biological assessment on the operation of the Trinity River Division

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1 was required, it was already provided to NMFS. Indeed, Reclamation plans to provide NMFS a
2 “supplemental/updated BA” to facilitate the ongoing consultation regarding the remand opinion.
3 AR00053. Plaintiffs’ suggestion that the original description of the Trinity River Division
4 operations did not include a discussion of this specific operational decision, Pls.’ Mem. at 40,
5 ignores the fact that Reclamation’s “supplemental” BA can include that information as part of
6 the proposed Trinity River Division operations, which is currently the subject of the ongoing
7 consultation between NMFS and Reclamation, and which can be incorporated into NMFS’s
8 remanded opinion as appropriate. In short, the record supports Reclamation’s conclusion that it
9 is in consultation with NMFS on SONCC coho salmon and on operation of the Trinity River
10 Division. Plaintiffs’ disbelief has no significance under the APA. “The presumption of regularity
11 supports the official acts of public officers, and, in the absence of clear evidence to the contrary,
12 courts presume that they have properly discharged their official duties.” *United States v. Chem.*
13 *Found., Inc.*, 272 U.S. 1, 14-15 (1926) (cited approvingly by *Nat’l Archives & Records Admin. v.*
14 *Favish*, 541 U.S. 157, 174 (2004)). Therefore, “the agencies’ actions are judged in accordance
15 with their stated reasons.” *Spiller v. White*, 352 F.3d 235, 242 (5th Cir. 2003).

16 Given the ongoing consultation between Reclamation and NMFS regarding operation of
17 the Trinity River Division, Reclamation specifically considered whether implementing the 2013
18 action prior to receiving the remanded 2009 Salmonid BiOp would violate ESA section 7(d) in
19 its ESA Section 7 memorandum. AR 3 at 00052-54. Reclamation concluded that it would not:
20 “the action would not constitute an irreversible or irretrievable commitment of resources which
21 would have the effect of foreclosing the formulation or implementation of any RPA measures
22 which would not violate section 7(a)(2) of the ESA.” AR 3 at 00054. The record supports this
23 determination. The ESA memorandum explains that “[t]he 2013 late-summer flow augmentation
24 release will continue the status quo as to listed species in that Reclamation still retains discretion
25 to provide flow and temperature conditions that are consistent with currently anticipated
26 conditions with respect to the listed fish.” AR 3 at 00054. Similarly, the memo explained that
27 the flow augmentation action in 2013 was not expected to preclude development of RPA

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1 measures during the ongoing consultation because “[t]he volume of Trinity Reservoir water used
2 for augmentation and not available for other purposes (e.g., river temperature control) will only
3 be a ‘deficit’ in Trinity ... Reservoir[] until the reservoirs fill [or] have significant Safety-of-Dam
4 releases (at Trinity).... It is likely that one or all of these conditions will happen before issuance
5 of the new CVP/SWP Opinion.” AR 3 at 00054. Finally, the memorandum explained that the
6 augmentation release was also “consistent with the 2009 [Salmonid] Opinion RPA Action
7 I.2.2.C”:

8 If the end of September storage in Shasta Reservoir is below 1.9 million acre-feet
9 (MAF), this action states, among other requirements, ‘Starting in early October ...
10 curtail discretionary water deliveries to the extent that these do not coincide with
11 temperature management for the species.’ In the summer of 2013, Trinity
12 Reservoir exports to the Sacramento River Basin have been managed to conserve
the cold water pool in Shasta Reservoir in anticipation that then end of September
storage in Shasta will be less than 1.9 MAF.

13 AR 3 at 00054. At bottom, the record confirms that in addition to its thorough analysis of the
14 biological effects of the proposed action, Reclamation fully and properly considered the complex
15 circumstances under which this augmentation release arose. The law requires nothing more.

16 **VI. Remedy**

17 Plaintiffs have requested a permanent injunction in this case. *See* First Am. Compl. at 37.
18 Although Federal Defendants maintain that they have not violated in provision of law, in the
19 event that the Court finds in Plaintiffs’ favor in this case, the Court should remand the decision
20 back to the agency to comply with the Court’s order. The Court should not enjoin Reclamation
21 from making the augmentation releases while the agency’s decision is on remand.

22 Even when a NEPA violation is found, injunction does not issue automatically. *Forest*
23 *Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995). Similarly, where
24 there is an ESA violation identified, any injunction must be narrowly tailored to address the
25 purported harm. *National Wildlife Fed’n v. NMFS*, 422 F.3d 782, 800 (9th Cir. 2005). Injunctive
26 relief requires the court “to engage in the traditional balance of harms analysis, even in the
27

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1 context of environmental litigation.” *Forest Conservation*, 66 F.3d at 1496 (citations omitted).
2 In *Winter v. NRDC*, 555 U.S. 7 (2008), the Supreme Court reversed the Ninth Circuit’s
3 injunction and allowed continuing sonar testing while the U.S. Navy prepared a supplemental
4 EIS, notwithstanding the Ninth Circuit’s finding that the agency had failed to comply fully with
5 NEPA and the potential for significant adverse impacts of continued sonar testing on marine
6 mammals, including species protected under the ESA and Marine Mammal Protection Act, 16
7 U.S.C. §§ 1361-1421. The Supreme Court’s holding, requiring that a plaintiff demonstrate
8 irreparable injury as a prerequisite to injunctive relief, expressly applies to a permanent
9 injunction, as well as a preliminary injunction. 555 U.S. at 31-32. The Ninth Circuit has ruled
10 that federal courts must apply *Winter* in determining irreparable harm, balancing the equities,
11 and considering the public interest in deciding whether to issue an injunction in a case involving
12 NEPA claims. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1018-19, 1022 (9th Cir. 2009). On
13 remand, the district court in that case rejected the plaintiffs’ request for injunctive relief. *Sierra*
14 *Forest Legacy v. Rey*, 670 F.Supp.2d 1106 (E.D.Cal. 2009), *stay pending appeal denied*, 691
15 F.Supp.2d 1204 (E.D.Cal. 2010).

16 This Court, therefore, carefully must balance the equities and consider the effect on each
17 party and all resources of granting or withholding an injunction even if it finds a NEPA violation
18 because it is a “fundamental principle that an injunction is an equitable remedy that does not
19 issue as of course.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987).
20 Additionally, the Court should refrain from imposing an injunction where, as in the present
21 circumstances, doing so may result in unwarranted harm to environmental resources or not serve
22 the overall public interest. When issuance of an injunction would result in greater environmental
23 harm than if the injunction were denied, the court should deny the injunction. *Am. Motorcyclist*
24 *Ass’n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983); *Alpine Lakes Prot. Soc’y v. Schlapfer*, 518 F.2d
25 1089, 1090 (9th Cir. 1975). In *Alpine Lakes*, the court refused to enjoin logging activity in an
26 area of insect infested trees. 518 F.2d at 1090. The court found that “unusual circumstances”
27

1 required a careful weighing of the equities and denied injunction. *Id.* In *American Motorcyclist*,
2 the court similarly denied an injunction to prevent BLM from implementing the CDCA Plan,
3 notwithstanding an alleged violation of FLPMA, concluding that the “public interest in
4 protecting and managing the CDCA would be severely disserved by enjoining the Plan.” 714
5 F.2d at 967; *see also Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 739 (9th Cir.
6 2001) (endorsing limited injunction because current regulations are “more environmentally
7 protective” than previous regulations).

8 This Court has already engaged in the balancing of equities in this case and determined
9 that considering the “enormous risk to the fishery,” the balance weighed in favor of permitting
10 the augmentation to proceed. Order Lifting Temporary Restraining Order and Denying Motion
11 for Preliminary Injunction (Dkt. 91) at 19. All of the factors considered by the Court in its
12 consideration of Plaintiff’s request for a preliminary injunction are equally applicable to
13 Plaintiffs’ request for a permanent injunction, and accordingly, the Court should deny Plaintiffs’
14 request for a permanent injunction.

15 CONCLUSION

16 For the reasons stated herein, the Court should grant Defendants Motion for Summary
17 Judgment and Deny Plaintiffs’ Motion for Summary Judgment.

18 Respectfully submitted this 21st day of March, 2014.

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28 Federal Defendants’ Memorandum of Points and Authorities in Support of Their Motion for
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Case No. 1:13-cv-1232-LJO-GSA

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