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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

SALLY JEWELL, et al.,

Defendants.

THE HOOPA VALLEY TRIBE; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; and YUROK TRIBE,

Defendant-Intervenors.

Case No. 1:13-CV-01232-LJO-GSA

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Judge: Hon. Lawrence J. O'Neill
Date: No Hearing Set
Time: No Hearing Set
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I. INTRODUCTION

This litigation should not be necessary. In section 3406(b)(23) of the Central Valley Project Improvement Act, Congress sought a "final resolution" of the long-running dispute over the proper allocation of the water managed by the Trinity River Division among fishery, water supply and hydropower uses. Central Valley Project Improvement Act, Title XXXIV, Pub. L. No. 102-575 § 3406(b)(23), 106 Stat. 4700 (1992) ("CVPIA"); AR 3019. The Secretary expressly struck that balance in the Trinity River Record of Decision ("ROD"). AR 3019. In 2012 and 2013, to serve the exigencies of the moment, Federal Defendants disregarded that resolution and balance, and their obligations under law. Federal Defendants reopened a contentious issue.

Federal Defendants' actions are a response to the fish die-off in the lower Klamath River in 2002, an event not caused by operations of the Trinity River Division. In the years since 2002, Federal Defendants could and should have developed a coherent, lawful response, one that addresses concerns in the lower Klamath River while protecting Central Valley Project water and hydropower users from losses of supply. They have not. Instead, the record reflects an annual ad hoc, ill-considered approach. And Federal Defendants have failed to protect CVP water and hydropower users from loss, despite promises to do so. Federal Defendants made this litigation necessary.

The administrative record indicates a choice to make the Excess Releases and worry about the legalities later. Federal Defendants' arguments in the litigation are a collection of strained constructions of statutes, post hoc and extra record rationalizations, and outright obfuscations.

The severe drought conditions now afflicting California have compounded the damage done by the Excess Releases. Plaintiffs ask the Court to protect them from the harm of further lost water and power supply, by requiring Federal Defendants to comply with the annual volume limit for fishery releases in the ROD, and the "no injury" rule governing changes to water rights permits. Plaintiffs ask the Court to protect the environment and listed species from further unexamined action and harm, by requiring an environmental impact statement and Endangered Species Act consultation before Federal Defendants take similar action again.

The Court should grant Plaintiffs' motion for summary judgment, and deny the cross motions by Federal Defendants and Defendant-Intervenors.

II. ARGUMENT

A. Plaintiffs Have Standing

Defendants' standing arguments are directly contradicted by precedent, including the principles the Court recently explained and applied in *San Luis & Delta-Mendota Water Authority, et al. v. U.S. Dep't of Interior, et al.*, 905 F. Supp. 2d 1158 (E.D. Cal. 2012).

1. The Declarations Of Plaintiffs' Landowners And Member Representatives May Be Used To Demonstrate Plaintiffs' Standing

As an initial matter, Federal Defendants argue that the "third-party declarations" submitted to the Court in connection with the proceedings for preliminary injunctive relief "cannot form the basis of Plaintiffs' standing." Fed. Defs' Mem. of Points and Authorities in Support of Their Motion for Summary Judgment and Oppn. to Plfs' Motion for Summary Judgment, Doc. 120-1 ("Fed. Mem.") at 16:21-17:1. This ignores that the so-called "third-parties" are not third parties at all, but landowners and member representatives from the San Luis & Delta-Mendota Water Authority ("Authority") and Westlands Water District ("Westlands") service area.[1] The declarations of an organization's members are commonly used to prove the organization's standing, including in the cases Federal Defendants cite in support of their argument.[2] *Friends of the Earth, Inc. v. Laidlaw Envt'l Services (TOC), Inc.*, 528 U.S. 167, 181-183 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563-564 (1992). As part of Plaintiffs' demonstration of their associational standing, the so-called third party declarations were necessary to show that the Authority's and Westlands' members would have standing to sue in their

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[1] Rod Cardella owns and operates Cardella Ranch, a farm located within the Westlands service area (Doc. 18 at ¶ 1); Todd Allen is a farmer who relies on Westlands as his sole source of water supply (Doc. 21 at ¶¶ 1-2); and James Anderson is a farmer, and a partner in Condor Farms located within the Westlands service area (Doc. 23 at ¶ 1). Marty Acquistapace is the farm manager of Blackburn Farming Co., which farms within the Westlands service area (Doc. 17 at ¶ 2); William Bourdeau is the Executive Vice President of Harris Farms, Inc., which farms in the Westlands service area (Doc. 20 at ¶ 2); and Baldomero Hernandez is the Principal and Superintendent for Westside Elementary School District, located in part in the Westlands service area (Doc. 18 at ¶ 2). Each of the declarants has an interest in the water supply at issue, and is adversely affected by reductions in CVP allocations to the Authority's member agencies, including Westlands.

[2] Neither *Lewis v. Casey*, 518 U.S. 343 (1996) nor *Larson v. Valente*, 456 U.S. 228 (1982) address associational standing at all, never mind the issue of whether an organization may use declarations from its members to prove associational standing.

own right. *Laidlaw*, 528 U.S. 167, 181; *see San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of Interior*, 637 F. Supp. 2d 777, 790-91 (E.D. Cal. 2008) (affirming associational standing of the Authority in case challenging Reclamation's implementation of CVPIA § 3406(b)(23) accounting).

Federal Defendants also assert that Plaintiffs "have failed to establish that Westlands can maintain legal actions on behalf of landowners." Fed. Mem. at 17:12-14. Westlands is a California water district formed pursuant to California Water Code section 34000, *et seq*., and the California Water Code grants water districts the ability to commence and maintain any action "to carry out its purpose or protect its interests." Cal. Wat. Code §§ 37850, 35407. And, Westlands meets the requirements for associational standing established by the Supreme Court—Federal Defendants have not questioned that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, [or that] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

2. Plaintiffs Have Proven Each Of The Elements Of Standing

At the summary judgment stage of proceedings, to prove standing, plaintiffs must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion are taken to be true. *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1340 (9th Cir. 1992). Plaintiffs "must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U.S. at 185. In this case, Plaintiffs make both substantive claims and procedural claims pertaining to the Excess Releases. Because the test for standing is relaxed for procedural claims (here the failure to prepare an EIS as required by the National Environmental Policy Act ("NEPA") and the failure to consult as required by ESA section 7), Plaintiffs address the requirements for each in turn.

(a) Substantive Claims

The traditional injury-in-fact, causation, and redressability elements of Article III standing apply to Plaintiffs' claims that the Excess Releases violated CVPIA sections 3406(b)(23) and 3411(a), and 43 U.S.C. section 383. *Laidlaw*, 528 U.S. at 180-81. There was a credible threat of injury—reduced water deliveries to agricultural, municipal, and industrial contractors due to the Excess Releases—when Plaintiffs filed this action on August 7, 2013. *Clark v. City of Lakewood*, 259 F.3d

996, 1006 (9th Cir. 2001) ("Standing is determined by the facts that exist at the time the complaint is filed"). On August 7, 2013, the planned Excess Releases threatened to create an approximately 62,000-109,000 acre-foot ("AF") "hole" in CVP storage, which was likely to impact CVP water supply allocations in 2014. *See* Snow Dec., Doc. 26 at ¶¶ 30, 44; Milligan Dec., Doc. 52 at ¶¶ 10-11. This Court and the Ninth Circuit have found loss of lesser volumes of CVP supply adequate to establish injury-in-fact. *San Luis*, 905 F. Supp. 2d at 1169-1171 (threat of 30,000-35,000 AF hole in storage adequate to satisfy injury-in-fact requirement); *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 701 (9th Cir. 2012) (finding standing based on claim Reclamation improperly dedicated 9,000 AF of water). The impacts to Plaintiffs' members from reduced water supply allocations, including land fallowing, increased groundwater pumping and its attendant effects, increased soil salinity, increased energy use, permanent crop damage, unemployment, and reduced air quality, are well-documented, and have been confirmed in multiple cases in this Court. Freeman Dec., Doc. 22 at ¶¶ 11-26; Nelson Dec., Doc. 24 at ¶¶ 18, 22-24; *see Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1151-1153 (E.D. Cal. 2010).

Causation is established because the threatened reductions in water supply and resultant impacts are fairly traceable to the Excess Releases. In *San Luis*, this Court found "the alleged injury, namely increased risk of reduced allocations in 2012, is fairly traceable to the challenged action: reduced pumping for 14 days in June 2011. Plaintiffs have demonstrated how the pumping reduction produced a 'hole' in storage in San Luis Reservoir that produced a credible threat of future injury." *San Luis*, 905 F. Supp. 2d at 1171. Similarly here, Plaintiffs' threatened injury—an increased risk of reduced allocations in 2013 or 2014—is fairly traceable to the hole in TRD storage created by the Excess Releases. Federal Defendants' focus on whether the Excess Releases ultimately diminished the amount of CVP water in the system available for export is off-base; standing is measured at the time a complaint is filed. *Clark*, 259 F.3d at 1006.

Lastly, redressability is satisfied. When Plaintiffs filed this action, an injunction could provide relief, and the Court's Temporary Restraining Order ("TRO") did in fact provide some relief by reducing the loss of water. And even though the Excess Releases have ended, because they are "capable of repetition yet evading review" (*see* Plaintiffs' Memorandum in Support of Motion for

Summary Judgment, Doc. 113 ("Pl. Mem.") at 9-10), "relief that would prevent repeat injury is sufficient to satisfy the redressability requirement." *San Luis*, 905 F. Supp. 2d at 1172-73. As in *San Luis*, "[d]eclaratory relief prohibiting future instances of the challenged conduct would redress the possibility of future injury in this case." *Id*. at 1173. Permanent injunctive relief would similarly redress the threat of injury to Plaintiffs.[3]

(b) Procedural Claims

"'[A] plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008) (internal citation omitted) . Plaintiffs make this showing, because the procedures in question—preparation of an EIS pursuant to NEPA and completion of ESA section 7 consultation—are designed to protect Plaintiffs' concrete interests. For the second two prongs of standing, "Plaintiffs alleging procedural injury 'must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.'" *Salmon Spawning*, 545 F.3d at 1226 (emphasis in original) (internal citation omitted).

NEPA is a procedural statute, and a claim that an agency unlawfully failed to prepare an EIS is a procedural challenge. *Douglas Co. v. Babbitt*, 48 F.3d 1495, 1500-1501 (9th Cir. 1995); *see Sierra Forest Legacy v. U.S. Forest Service*, 652 F. Supp. 2d 1065, 1076 (N.D. Cal. 2009). Plaintiffs' interests in environmental impacts in the Central Valley and in the Delta are significant, and the 2013 EA itself acknowledges that the Central Valley and the Delta are part of the environment affected by the Excess Releases. AR 26-28. Preparation of an EIS in compliance with NEPA would result in Federal Defendants analyzing and disclosing the effects of late summer and early fall releases and alternatives in an EIS, and would provide an opportunity for public review and comment on that analysis before Federal Defendants make releases.

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[3] Federal Defendants' and Defendant-Intervenor PCFFA's arguments regarding the appropriate remedy in this case (Fed. Mem. at 43-45; PCFFA's Opp'n to Pl. Motion for Summary Judgment; Cross-Motion for Summary Judgment, Doc. 116 ("PCFFA Mem.") at 7-8, 12) need not be addressed until after resolution of the merits. If the Court does find for Plaintiffs on any of their claims, the Court may and should grant injunctive and declaratory relief.

Plaintiffs allege that Federal Defendants are in violation of section 7 of the ESA, for their failure to consult regarding the Excess Releases. This too is a procedural challenge. *Salmon Spawning*, 545 F.3d at 1229. Plaintiffs have a concrete interest in ensuring that the Bureau of Reclamation ("Reclamation") consults regarding the impacts of the Excess Releases on ESA-listed species affected by CVP operations, because deterioration in the condition of those species results in more stringent regulation and reduction of CVP water supply. Second Declaration of Daniel G. Nelson ("Second Nelson Dec.") at ¶¶ 3-4; Nelson Dec., Doc. 24 at ¶¶ 6, 8, 9. The Excess Releases threatened to impair the status and recovery of listed fish species that are the subject of biological opinions that restrict CVP operations, and may thereby lead to additional or prolonged restrictions on CVP operations that adversely affect Plaintiffs' CVP water supply. The Excess Releases reduce the total volume of TRD water available to maintain cold temperatures for ESA-listed salmonids in the Sacramento River. *See* AR 74; SAR 5373-74. These threatened harms to ESA-listed species and deterioration in their condition increased the risk of further pumping restrictions and harm to Plaintiffs' water supply.

Section 7 consultation on the Excess Releases would evaluate impacts to SONCC coho salmon in the Trinity River, Central Valley spring-run Chinook salmon, Sacramento River winter-run Chinook salmon, green sturgeon, and delta smelt. Plaintiffs have an interest in improving the status of these species and in turn decreasing the likelihood of water supply reductions caused by pumping restrictions. Second Nelson Dec. at ¶¶ 4-5.

Compliance with NEPA and the ESA *could* protect Plaintiffs' concrete interests. *Salmon Spawning*, 545 F.3d at 1226. Here, if Federal Defendants prepared an EIS and acknowledged the significant adverse impacts from the Excess Releases, mitigation measures could be required to counteract harm to Plaintiffs' water supply, the human environment in the Central Valley, and biological resources in the Sacramento River and Delta. And, if Federal Defendants completed section 7 consultation, they could analyze adverse impacts to ESA-listed species and require reasonable and prudent measures or alternatives to address those impacts, in a way that improves the status of the species and reduces the likelihood that additional pumping restrictions will be required. Defendants' challenges to Plaintiffs' standing to assert these procedural claims therefore fail.

B. Federal Defendants Lack Authority For The Excess Releases

The Excess Releases violate CVPIA section 3406(b)(23) because they are in excess of the TRD fishery releases identified in the ROD. The (sole) legal authorization for the Excess Releases claimed by Reclamation in the record is section 2 of the Central Valley Project Act of 1955, Pub. L. No. 84-386, 69 Stat. 719 (1955) ("1955 Act"). The 1955 Act, however, does not authorize the Excess Releases. The argument by the Hoopa Valley Tribe ("Hoopa") and Yurok Tribe ("Yurok") that the tribal trust obligation required the Excess Releases is an extra record, post hoc rationalization, and is contrary to law in any event.

1. The Excess Releases Are Subject To The ROD's Annual Volume Limits

Section 3406(b)(23) of the CVPIA (through the ROD) sets permanent annual TRD release volumes "for the restoration and maintenance of the Trinity River fishery." CVPIA § 3406(b)(23). Defendants seek to narrow the statutory directive of CVPIA section 3406(b)(23) to releases made for fish located in the Trinity River, or for modifying the habitat in the Trinity River. *See*, *e.g.*, Fed. Mem. at 21:24-25; 25:9-12. This interpretation fails to account for the statute's plain language. The CVPIA's statutory directive has two key elements – (1) "permanent" flows (2) for the restoration and maintenance of the "Trinity River fishery." The CVPIA does not geographically confine the purpose of the releases to the Trinity River; the purpose is to benefit the Trinity River fishery. There is no such geographic limit for good reason – the Trinity River fishery is not confined to the Trinity River. Instead, the Trinity River fishery, like the water that is released from the TRD, necessarily must travel through the lower Klamath River.

The ROD was the Secretary's response to this mandate. Defendants confuse the primary means the Secretary of Interior ("Secretary") chose in 2000 to accomplish the fishery restoration objective—large spring time releases for the purpose of enhancing habitat conditions in the upper reach of the Trinity River—for the mandate prescribed by Congress. The Excess Releases were intended to restore and maintain the Trinity River fishery; the Excess Releases are subject to the ROD's permanent annual volume limits.

(a) The Excess Releases Were Intended To Benefit The Trinity River Fishery While Migrating Up The Lower Klamath River

Record evidence proves the Excess Releases were "for the restoration and maintenance of the Trinity River fishery." The 2012 and 2013 EAs explain that the Excess Releases were intended to "reduce the likelihood, and potentially reduce the severity" of a fish die-off on the lower Klamath River. AR 1179; AR 16. The releases were needed because "[t]he biological consequences of large-scale fish die-offs could substantially impact present efforts to restore the native *Trinity River anadromous fish community and the fishery*." AR 1179 (emphasis added); *see* AR 17. This record evidence directly ties the Excess Releases to restoration and maintenance of the Trinity River fishery.

Defendant-Intervenor Yurok Tribe argues that even though Trinity River stock may be in the lower Klamath River, "[u]ntil a fish is in the Trinity River basin, it is not part of the Trinity River fishery." Yurok Tribe's Opp'n to Pl. Motion for Summary Judgment and Cross-Motion for Summary Judgment, Doc. 119 ("Yurok Mem.") at 6:1-4. This argument ignores that fish are also described using the river of their origin. Thus, reports regarding the 2002 fish die-off analyzed the effect of the incident on the "Trinity River run," even though the die-off occurred in the lower Klamath River. *See, e.g.*, AR 2372 ("Although a larger number of Klamath River fall-run Chinook died, a greater proportion of the Trinity River run was impacted by the fish-kill"). Scientists analyzed what portion of the fish that died were of Klamath River origin versus Trinity River origin. AR 2922; AR 2865. The Excess Releases were intended to benefit fish of both Trinity *and* Klamath River origin, while they were located in the lower Klamath River. AR 17. The Excess Releases were "for the restoration and maintenance of the Trinity River fishery," and were therefore subject to the CVPIA and the ROD volume limits. CVPIA § 3406(b)(23).

(b) Late Summer And Early Fall Fishery Releases Can Be Made Using The ROD Annual Release Volumes

In CVPIA section 3406(b)(23), Congress directed the Secretary to release a volume of at least 340,000 AF annually to the Trinity River for fishery purposes. Congress further tasked the Secretary with developing "permanent" instream flows and TRD operating criteria for the benefit of the Trinity River fishery. The ROD meets the "permanent" requirement by setting annual volume limits on

releases that vary by water year type. Defendants' interpretation of section 3406(b)(23) and the ROD would defeat the "permanent" mandate in the statute, by allowing Reclamation to release variable, unlimited additional volumes of TRD water for the benefit of fish in the lower Klamath River, above and beyond the volumes set by the ROD.

The ROD does allow flexibility, however, in the timing of releases. AR 3014. To the extent Defendants believe that late summer and early fall releases are necessary to the "restoration and maintenance of the Trinity River fishery," they can make such releases from the annual volume limits set by the ROD, provided they comply with NEPA and the ESA. Defendants protest that using even a relatively modest portion of the ROD's annual volumes for late summer or early fall releases would compromise the objectives of the ROD flows. Fed. Mem. at 24-25; Hoopa Valley Tribe's Response and Cross-Motion for Summary Judgment, Doc. 118 ("Hoopa Mem.") at 5:15-20; Yurok Mem. at 9-10. This post hoc rationalization cannot justify the Excess Releases or excuse the violation of the CVPIA from exceeding the ROD's annual volume limit. *American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 539 (1981) ("*post hoc* rationalizations of the agency or the parties to . . . litigation cannot serve as a sufficient predicate for agency action"). Nothing in the record indicates Defendants ever analyzed the effect that altering the release schedules would have on the objectives described in the ROD. It defies reason and common sense to suggest the release schedules set for each year type in the ROD are so exact that a modest variance would significantly impair achieving the objectives in the ROD. And, the ROD itself provides widely varying volumes of releases from year to year.

The ROD's Adaptive Environmental Assessment and Management Program ("AEAMP") allows the "recommend[ation of] possible adjustments to the annual flow schedule within the designated flow volumes provided for in this ROD . . . to ensure that the restoration and maintenance of the Trinity River anadromous fishery continues based on the best available scientific information and analysis." AR 3005; *see also* AR 3017. The ROD specifically states that "the schedule for releasing water on a daily basis, according to that year's hydrology, may be adjusted . . ." AR 3014. The Yurok Tribe argues that the AEAMP "allows for only 'minor modifications' to the ROD flow schedules" (Yurok Mem. at 8-9), but the ROD does not contain any such limitation, and the cited documents do not define any purported limitation. AR 3087; AR 4030-32. Federal Defendants'

argument that "Interior has concluded that such changes to the annual hydrographs should not occur prior to full implementation of the Program" (Fed. Mem. at 25:16-19) is likewise unsupported by any record citation, or any record explanation supporting this conclusion.

(c) The 1984 Act Does Not Limit The Scope Of Section 3406(b)(23) Releases To Benefitting Fish In The Trinity River

The Trinity River Basin Fish and Wildlife Management Act, Pub. L. No. 98-541, 98 Stat. 2721 (1984) ("1984 Act") established a program for the benefit of fish and wildlife in the "Trinity River Basin." Defendants argue CVPIA section 3406(b)(23)'s reference to the fishery restoration goals of the 1984 Act means the permanent releases it requires apply only to releases for the benefit of fish located in the Trinity River. Fed. Mem. at 23:11-14; Hoopa Mem. at 2-3.

This argument ignores the plain meaning of CVPIA section 3406(b)(23)'s reference to the 1984 Act, which simply describes TRD fishery releases as required "to meet the fishery restoration goals of the [1984 Act] . . ." CVPIA § 3406(b)(23). The "fishery restoration goal" in the 1984 Act is "to achieve the long-term goal of restoring fish and wildlife populations in the Trinity River Basin to a level approximating that which existed immediately before the start of the construction of the Trinity River division." 1984 Act § 1(6). This goal supports making TRD fishery releases to reach Trinity River fish populations *wherever* those fish may be in their upstream migration, if necessary "to achieve the long-term goal" of restoration.[4] The "fishery restoration goals" in the 1984 Act therefore justify TRD releases to restore and maintain the Trinity River fishery, wherever the fish may be located.

The findings in the 1984 Act reflect that its purpose was to provide the Secretary with direction and additional authority to address "activities other than those related to the" TRD. Congress found that factors "other than" TRD operations were having "significant adverse effect on fish and wildlife populations in the Trinity River Basin." 1984 Act § 1(4),(6). Notably, the 1984 Act

[4] The later amendment of the 1984 Act to allow restoration of fish habitats "in the Klamath River downstream of the confluence with the Trinity River" suggests Congress understood that habitat actions may be necessary at locations in the Klamath River to restore the Trinity River fishery. Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1955, Pub. L. No. 104-143 § 3(b), 110 Stat. 1339 (1996).

includes no requirement to makes releases from the TRD for fishery purposes. Other efforts were already underway to address such releases. AR 3008-9 (describing efforts beginning in 1981 to "assess the effectiveness of flow and habitat restoration efforts and make recommendations on measures necessary to address the fishery impacts attributable to the TRD"). In sum, the 1984 Act provides no support for Defendants' attempt to limit the scope of (b)(23) fishery releases to fish located in the Trinity River.

2. The 1955 Act Does Not Authorize The Excess Releases

As the Court has recognized, the CVPIA was "[t]he culmination of Congressional activity to restore the Trinity." Modified TRO, Doc. 62 at 5:3-5. The 1955 Act was only the first of several statutes addressing fish and wildlife affected by the TRD or located in the Trinity River Basin. Only two of the statutes, the 1955 Act and the CVPIA, expressly address releases from the TRD for fishery purposes. Of these two, the CVPIA is the more recent, and more specific regarding releases.

While seeking to narrowly cabin CVPIA section 3406(b)(23) to releases for fish located in the Trinity River, Defendants urge that the proviso in section 2 of the 1955 Act allows for releases to assist any fish located in the lower Klamath River. There is no support in the text of these statutes for this attempted distinction. And, if the 1955 Act were interpreted to allow releases prohibited by section 3406(b)(23), then to that extent the 1955 Act has been supplanted by section 3406(b)(23).

(a) The 1955 Act Authorized Releases To Benefit The Trinity River And Clear Creek Fisheries

The proviso in section 2 of the 1955 Act, on its face, directs and authorizes the Secretary to protect fish and wildlife from the effect of operations of the newly authorized TRD. With respect to geographic locations, the 1955 Act mentions only the Trinity River and Clear Creek (located in the Sacramento Valley), not the Klamath River. 1955 Act § 2;[5] *see Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 861 (9th Cir. 2000) (describing how the 1955 Act ordered the Secretary "to

[5] The proviso in Section 2 reads: "*Provided*, That the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to, the maintenance of the flow of the Trinity River below the diversion point at not less than one hundred and fifty cubic feet per second for the months July through November and the flow of Clear Creek below the diversion point at not less than fifteen cubic feet per second . . .."

take necessary measures to protect the fishery and wildlife resources of the *Trinity River Basin*") (emphasis added); AR 3006 (ROD description of 1955 Act).

Congress addressed the Klamath River fishery in separate legislation. In 1986, Congress enacted the Klamath River Basin Conservation Restoration Area Act, 16 U.S.C. section 460ss et seq., Pub. L. No. 99-552, 102 Stat. 3830 (1986), finding "the Secretary has the authority to implement a restoration program only in the Trinity River Basin and needs additional authority to implement a restoration program in cooperation with State and local governments to restore anadromous fish populations to optimum levels in both the Klamath and Trinity River Basins." 16 U.S.C. § 460ss(9). This finding contradicts Defendants' attempted reading of the 1955 Act, because Defendants contend the 1955 Act already authorized restoration efforts for the Klamath River fishery, using releases from the TRD.

Defendants' attempted distinction between the fish intended to be addressed by the release requirement in the 1955 Act and the release requirement in section 3406(b)(23) is contrived. If the text of the 1955 Act encompasses releases for Trinity River fish while located in the lower Klamath River, then so too does the text in CVPIA section 3406(b)(23).

(b) Defendants' Reading Of The 1955 Act Ignores The TRD's Principal Purpose And That In 1955 Congress Was Advised That Only Minimal Fishery Releases Would Be Necessary

Defendants read section 2 of the 1955 Act to allow essentially unlimited releases for the benefit of fish, on top of the substantial releases required by the ROD, despite the impact that would have on the water supply and hydropower purposes of the TRD. That cannot be what Congress understood and intended in 1955. Indeed, the volume of ROD flows alone far exceeds what Congress expected for fishery releases in 1955.

The 1955 Act authorized the construction, operation, and maintenance of the TRD "for the principal purpose of increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California." 1955 Act § 1. Congress and Reclamation believed "[o]nly a small part of the Trinity River water originating from above Lewiston [was] needed within Trinity River Basin." *To Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Trinity River Development, Central Valley Project, California, under Federal Reclamation Laws Hearing on*

H.R. 123 Before the Subcomm. on Irrigation and Reclamation of the H. Comm. on Interior and Insular Affairs, 83rd Cong. 4 (1954) (statement of Clyde H. Spencer, Reclamation), Exh. 1 to Declaration of Elizabeth L. Leeper in Support of Pl. Request for Judicial Notice ("Leeper Dec."). Accordingly, the direction in section 2 "to adopt appropriate measures to insure the preservation and propagation of fish and wildlife" was placed in the Act as a proviso, an exception to the primary purpose of the Act to export as much water as possible to the Central Valley for water and power supply. Based on the studies and other information before it, Congress understood that only a very small level of TRD releases would be required to "preserv[e] and propagat[e]" Trinity River basin and Clear Creek basin fish and wildlife. The minimal level of TRD releases provided in the 1955 Act was designated to alleviate harms cause by construction of TRD facilities, namely the loss of spawning grounds for Trinity River salmon and steelhead runs. *To Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Trinity River Development, Central Valley Project, California, under Federal Reclamation Laws Hearing on H.R. 4663 Before the Subcomm. on Irrigation and Reclamation of the H. Comm. on Interior and Insular Affairs*, 84th Cong. 41 (1955) (statement of A.N. Murray, Reclamation), Exh. 2 to Leeper Dec.

A 1974 opinion by the Office of the Solicitor analyzing the 1955 Act confirmed that the purpose of the TRD was "to provide as much water as possible to the Central Valley." July 1, 1974 Solicitor's Opinion, Exh. 3 to Leeper Dec. at 4. Accordingly, the Solicitor concluded that the Department of Interior ("Interior") could not alter the functions of the TRD in any way that did "not further the stated purpose of use in the Central Valley and [was], therefore, not authorized by the purpose clause of the Division Act." *Id*. at 1-2. Allowing TRD fishery releases in massive volumes would undermine the principal purpose of the TRD as authorized in 1955 Act itself.[6] It would be akin

[6] Defendants cite a 1979 Solicitor's Opinion to support interpreting the 1955 Act as allowing unlimited fishery releases, but Defendants overstate the significance of that opinion. Fed. Mem. at 20:20-22; Hoopa Mem. at 7:1-10. The focus of the 1979 Opinion was whether a CVP contract for supplies to a wildlife refuge could be amended to have equal priority with agricultural contractors during shortages of CVP water. Doc. 51-3 at 1. The statement in the opinion that the TRD's integration into the CVP was "made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs" was incidental to the primary question answered in the opinion. Doc. 51-3 at 3-4. By contrast, the purpose of the TRD under the 1955 Act was the central question

to allowing the exception to swallow the rule. *See Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1063 (9th Cir. 2009). Section 2 cannot reasonably be interpreted to allow unlimited fishery releases that would largely eliminate the availability of water to meet the "principal" purpose of the TRD.

Of course, as is documented in the ROD, the expectations in 1955 about the level of releases necessary to sustain the fishery proved incorrect. In the succeeding decades the Secretary and Congress took steps to address the effects of the TRD and to increase releases, culminating in the ROD implementing section 3406(b)(23). But Defendants err by seeking to focus on the 1955 Act out of essential context, including the principal purpose of the TRD, and the refinement of the 1955 Act's release requirement in section 3406(b)(23).

(c) CVPIA Section 3406(b)(23) Supplants Any Authority In The 1955 Act For TRD Fishery Releases

"The culmination of Congressional activity to restore the Trinity was the CVPIA and its associated TRROD, which, after environmental review, set up a regime for restoring the Trinity River Fishery." Modified TRO, Doc. 62 at 5:3-5. Federal Defendants and the Hoopa, at least, have acknowledged that "[i]n section 3406(b)(23) of the CVPIA, Congress sought the final resolution . . . regarding permanent instream fishery flow requirements and TRD operating criteria and procedures necessary for the restoration and maintenance of the Trinity River anadromous fishery." AR 3019.

Defendants assert that the release mandate in the 1955 Act "has never been repealed or superseded" and therefore provides legal authority for the Excess Releases, notwithstanding section 3406(b)(23). Fed. Mem. at 20:2-3; *see also* Hoopa Mem. at 7 n.5. Defendants characterize Plaintiffs' argument as one of "implied repeal." This characterization is misleading; that phrase does not even appear in Plaintiffs' brief. Both statutes authorize and direct the Secretary to make releases for the benefit of the Trinity River fishery. But section 3406(b)(23) is both more recent and more specific. Congress did not so much repeal the proviso in section 2 of the 1955 Act regarding releases as refine it. As Plaintiffs have previously explained, if the Court finds a conflict between the two provisions, it should apply the rule of statutory construction that "in case of an irreconcilable inconsistency between

addressed in the 1974 Opinion. Exh. 3 to Leeper Dec. at 1.

[statutes] the later and more specific statute usually controls the earlier and more general one." *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992).

In any event, Defendants' arguments against implied repeal fail. As described above, the legislative history indicates that in 1955 Congress did not expect fishery releases at the level of the ROD, let alone even higher fishery releases. But if section 2 of the 1955 Act were construed to allow fishery releases in excess of the annual volume limits in the ROD, then Congress has impliedly repealed that portion of the 1955 Act. *See In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991) ("when two statutes are partially in conflict, '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary'") (internal citation omitted). The Supreme Court has described two categories of repeal by implication: "(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). The first type of implied repeal applies here.

In CVPIA section 3406(b)(23), Congress directed the Secretary to develop *permanent* releases from the TRD for the restoration and maintenance of the Trinity River fishery. CVPIA § 3406(b)(23)(A). Both the 1999 Flow Report and the ROD acknowledged that CVPIA section 3406(b)(23) was intended to be "the *final resolution* . . . regarding permanent instream fishery flow requirements and TRD operating criteria and procedures necessary for the restoration and maintenance of the Trinity River anadromous fishery." AR 3019 (emphasis added); *see also* AR 3034; AR 3747; AR 3734. No Defendant has addressed let alone contradicted these statements. Permitting additional and variable releases pursuant to the 1955 Act, in addition to the annual volumes determined in the ROD, would be contrary to the direction in CVPIA section 3406(b)(23) to implement the Secretary's decision on permanent flows. That decision, in the ROD, includes annual volume limits on releases.

There is no ambiguity regarding the nature of the TRD fishery releases required by CVPIA section 3406(b)(23), and the final resolution sought in that statute cannot work if additional releases

are allowed under the 1955 Act. To the extent the 1955 Act may be interpreted to allow such releases, it was impliedly repealed by CVPIA section 3406(b)(23).

3. No Deference Is Due To Federal Defendants' Interpretation Of The 1955 Act Or CVPIA Section 3406(b)(23)

Federal Defendants claim the Court must give deference to their interpretations of the 1955 Act and CVPIA section 3406(b)(23), citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Fed. Mem. at 14-15, 22. But, *Chevron* deference "does not apply to all statutory interpretations issued by agencies." *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 921 (9th Cir. 2006). *Chevron* deference only applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). "[A]gency interpretations promulgated in a non-precedential manner are 'beyond the *Chevron* pale.'" *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1012 (9th Cir. 2006) (quoting *Mead*, 533 U.S. at 226, 234); *see, e.g., Wilderness Soc'y v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1067-68 (9th Cir. 2003).

Federal Defendants do not cite to any rulemaking as the basis for *Chevron* deference here. Federal Defendants argue:

> Reclamation recognizes that the CVPIA and resulting ROD have addressed the release necessary to restore the mainstem of the Trinity River, but these provisions do not preclude the releases at issue in this case. This is a permissible interpretation of both the CVPIA and the 1955 Act entitled to deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Fed. Mem. at 22:11-15. To support their argument, Federal Defendants point to the 1979 Solicitor's opinion regarding a Grasslands Water District contract as "set[ting] forth a reasonable interpretation of the 1955 Act based on the plain language of that statute." Fed. Mem. at 20-21. The Solicitor's opinion is from 1979, and necessarily does not interpret the CVPIA enacted in 1992. In any event, Solicitor's opinions are not entitled to *Chevron* deference because they does not have the general force of law, and "[n]either can the project-specific documents that rely upon [Solicitor's opinions] be considered to carry the general force of law." *Wilderness Soc'y*, 353 F.3d at 1068.

Federal Defendants do not identify any agency interpretation of the 1955 Act or CVPIA section 3406(b)(23) that carries the "force of law." *Mead*, 533 U.S. at 226-27. The record is entirely devoid of any formal or informal agency interpretation of the 1955 Act or the CVPIA that would support Federal Defendants' interpretations. The only documents in the record asserting that the 1955 Act provides legal authority for the Excess Releases are the 2012 and 2013 EAs, which include a conclusory statement that the 1955 Act provides authorization, but do not analyze the statute, or address the annual volume limits in the ROD. AR 1180; AR 17. Federal Defendants' primary argument—that the 1955 Act authorized the releases despite the annual volume limits in the ROD because the Excess Releases were targeted at fish in the lower Klamath River—appeared only in this litigation. It is not entitled to *Chevron* deference. Fed. Mem. at 21; *see Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988) ("[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"); *Price v. Stevedoring Services of America, Inc.*, 697 F.3d 820, 830-31 (9th Cir. 2012).

Where *Chevron* deference is not warranted, courts look to the factors outlined in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The weight given to an informal agency statutory interpretation "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Federal Defendants' interpretation of the 1955 Act and the CVPIA, and those statutes' application to the Excess Releases, is not entitled to even *Skidmore* deference. Their rationales regarding authority for the Excess Releases in the record are ad hoc and conclusory. The administrative record includes no "thorough" interpretation of the 1955 Act and the CVPIA that explains how the 1955 Act provides legal authority for the Excess Releases despite the annual volume limits set by the ROD. Federal Defendants simply assert that "[u]nder the plain language of the 1955 Act, the Secretary has the discretion to determine 'appropriate measures' to 'insure preservation and propagation of fish and wildlife.'" Fed. Mem. at 20:12-14. As explained above, the Federal Defendants' attempts to exempt the Excess Releases from the ROD limits, based on the geographic location of the fish, is strained and unsupported. Federal Defendants' interpretation of the 1955 Act lacks the "power to persuade," and is

not entitled to deference under *Skidmore*. *Skidmore*, 323 U.S. at 140.

4. The Tribal Trust Obligation Did Not Require The Excess Releases

The Hoopa and Yurok argue that Federal Defendants were authorized to make the Excess Releases, because that authority is necessary to fulfill the federal tribal trust obligation. Hoopa Mem. at 8-10; Yurok Mem. at 12-13. This argument fails because it is contrary to Ninth Circuit precedent defining implied reserved water rights for tribes, and the tribal trust obligation.

The implied reserved water right associated with tribal fishing rights is not a traditional, consumptive water right involving diversion of water from the stream. Rather, this "entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). The Excess Releases cannot be justified as necessary to protect this right. In August and September of 2012 and 2013, when Federal Defendants made the Excess Releases, the TRD was not depleting the natural flow in the Trinity River. In those months, the TRD was releasing six to seven times more water to the Trinity River than was flowing into Trinity Lake. *See* Pl. Request for Judicial Notice at ¶¶ 4-5; Exh. 4 to Leeper Dec. Hence, the Excess Releases were not required to meet the implied reserved water right defined in *Adair*. Instead, the Excess Releases involved greatly increasing flows above natural flow, by making releases of water stored by the TRD at an earlier time. Under *Adair* the tribes have no water rights entitling them to such releases. The lack of any right in the tribes to insist on the release of stored water is consistent with state water law. Under state water law, riparian right holders and senior appropriators cannot compel the release of water stored in an upstream reservoir earlier in the season by a junior appropriator. *Lindblom v. Round Valley Water Co.*, 178 Cal. 450, 457 (1918); *El Dorado Irrigation Dist. v. SWRCB*, 142 Cal. App. 4th 937, 968 (2006).

The Hoopa and Yurok argue that the Secretary has general authority to operate a federal water project to protect tribal water rights, citing *Joint Board of Control v. United States*, 832 F.2d 1127,1131-32 (9th Cir. 1987) and *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1213-14 (9th Cir. 2000). That may be so, but in both of the cited cases, the federal project operations were necessary to protect the senior tribal water rights to instream flow defined in *Adair*. *Joint Board of*

Control, 832 F.2d at 1131; *Klamath Water Users Ass'n*, 204 F.3d at 1213-14. As explained above, the Excess Releases were not necessary to meet the tribes' rights; the tribes have no water right to compel release of the stored TRD water to supplement natural flow. Likewise, the Hoopa's argument that prohibiting the Excess Releases would be an "abrogation of tribal rights" contrary to *Menominee Tribe v. United States*, 391 U.S. 404 (1968) has no merit, because the Excess Releases go well beyond the tribes' rights.

The Hoopa also rely upon *Pyramid Lake Piute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.C.C. 1972) to support the Excess Releases. There, a tribe challenged the Secretary's allocation of water from the Truckee River to an irrigation district, an allocation the tribe alleged exceeded the district's decreed rights and thereby unlawfully reduced flow into Pyramid Lake, which is located on the tribe's reservation. The court found the Secretary erred because he had "disregarded interrelated court decrees" limiting the district's rights and "failed to exercise his authority to prevent unnecessary waste within the District." 354 F. Supp. at 257. Hence, the court ordered the Secretary to develop a new allocation plan. The circumstances in *Pyramid Lake* bear no resemblance to this case.

The Hoopa, in particular, argue in essence that based on a "fiduciary obligation to preserve and protect trust fishery resources," the Secretary has a broad duty to use whatever resources and powers are at her disposal to protect the tribe's fishing rights, regardless of the Secretary's other responsibilities or the consequences. Hoopa Mem. at 9:13-15. In this case, that means using CVP water stored in the TRD, because the Secretary had the ability to order its release (albeit unlawfully), and doing so could benefit the fishery. The Ninth Circuit has squarely rejected the expansive version of the tribal trust obligation espoused by the Hoopa.

In *Gros Ventre Tribe v. United States*, 469 F.3d 801, 803 (9th Cir. 2006), several tribes alleged that "the government had violated specific and general trust obligations to protect tribal trust resources (primarily water rights) by authorizing and planning to expand two cyanide heap-leach gold mines located upriver from the Tribes' reservation." The Ninth Circuit rejected the tribes' claim for breach of trust. The Ninth Circuit explained:

> We recognize that there is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." That alone, however, does not impose a duty on the government to take action

> beyond complying with generally applicable statutes and regulations. Although the Tribes may disagree with the current state of Ninth Circuit caselaw, as it now stands, "unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."

Gros Ventre Tribe, 469 F.3d at 810 (internal citations omitted). Thus, in *Gros Ventre* the court held the trust obligation did not impose a duty on the government to use its authority over federally-owned lands adjacent to the reservation "to manage non-tribal resources, such as the clean-up of nearby gold mine tailings, for the benefit of the Tribes." *Id.* Likewise here, the tribal trust obligation did not impose a duty on the Secretary to use CVP water in the TRD to make the Excess Releases for the Hoopa and Yurok's benefit.[7]

In their EAs, Federal Defendants did not cite a duty imposed by the trust obligation as a source of authority for the Excess Releases. AR 17; AR 1180. Instead, this is a post hoc rationalization offered only by the Hoopa and Yurok.[8] In any event, their claims are unfounded. The federal tribal trust obligation did not impose a duty on Federal Defendants to make the Excess Releases, and hence the trust obligation did not confer any implied authority to make the Excess Releases.

C. CVPIA Section 3411(a) Requires Reclamation To Obtain A Change In The Place Of Use

Federal Defendants attempt to address Plaintiffs' separate claims under CVPIA section 3411(a) and section 8 of the Reclamation Act, 43 U.S.C. section 383, by conflating them under a single heading, and in little more than two pages of briefing. Fed. Mem. at 26:2-28:7. Perhaps as a consequence, Federal Defendants completely neglect their violation of CVPIA section 3411(a). They argue only that the Excess Releases are consistent with CVPIA section 3411(a) "because there is no

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[7] In 2005, the Northern District of California applied these principles to dismiss a breach of trust claim by the Yurok based on the 2002 fish die-off in the lower Klamath River. *See Pacific Coast Federation of Fishermen's Ass'n, et al. v. U.S. Bureau of Reclamation, et al.*, Case No. C 02-02006, Doc. 384 (dated March 7, 2005), Exh. 5 to Leeper Dec., at pp. 14-18.

[8] The Yurok also argues that CVPIA section 3406(b) provides an alternative legal authority for the Excess Releases. Yurok Mem. at 10-11. Federal Defendants did not cite CVPIA section 3406(b) as a source of authority for the Excess Releases(AR 17; AR 1180.), and this post hoc rationalization should be rejected. *American Textile*, 452 U.S. at 539.

requirement under *state law* to change the place of use in the TRD water rights in order to undertake these releases." *Id*. at 26:3-5 (emphasis added). This argument entirely misses the point. They have violated *federal law* by failing to do what section 3411(a) mandates.

CVPIA section 3411(a) provides in relevant part:

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

CVPIA § 3411(a). Section 3411(a) establishes a requirement under *federal law* that Reclamation obtain a modification of its CVP water right permits and licenses prior to reallocating water to a place outside the authorized place of use.

It is undisputed that the lower Klamath River is not within the approved places of use under the water rights permits for the TRD. It is undisputed that the Excess Releases were intended to be a beneficial use of CVP water, to improve conditions for fish located in the lower Klamath River. The Secretary applied TRD water to an instream beneficial use outside of the place of use approved by the State water right permits applicable to the TRD. Under section 3411(a), the Secretary was required to obtain the necessary changes to its CVP water rights before applying CVP water to use in the lower Klamath River. It is undisputed the Secretary did not do so. That failure violated section 3411(a).

Without addressing what section 3411(a) requires, Federal Defendants essentially argue that under state law they are free to abandon stored CVP water, and therefore did not need to obtain modifications of the CVP water rights to make the Excess Releases. Federal Defendants assert that no approval of the California State Water Resources Control Board ("SWRCB") is "needed to bypass water or release it so that it remains in the source for the benefit of fish." Fed. Mem. at 27:6-8. Federal Defendants mistakenly rely on a letter from the Deputy Director of the SWRCB's Division of Water Rights ("Staff Letter") as excusing them from obtaining the necessary modifications to CVP water right permits to beneficially use stored water within the lower Klamath River. Fed. Mem. at

27:12-28:7 (citing AR 32 at 01165-66).[9]

Any suggestion that Reclamation merely abandoned this water is a fiction. The record amply demonstrates that the Excess Releases were a purposeful use of TRD water to benefit fish in the lower Klamath River. While it may be true, as suggested by the Staff Letter, that a water rights holder may abandon water by releasing it from a reservoir without obtaining the SWRCB's approval, under section 3411(a) Reclamation must obtain the SWRCB's approval before reallocating CVP water to a place of use outside the *approved* place of use. For *use* of CVP water in the lower Klamath River, section 3411(a) required that Reclamation first obtain the necessary modifications to the approved place of use.[10] In sum, the Excess Releases violate CVPIA section 3411(a) by using CVP water outside the geographic place of use approved by the State water permits applicable to the TRD.

D. Reclamation's Use Of Water Outside The Authorized Place Of Use Is A Trespass Under California State Law And Violates 43 U.S.C. Section 383

Reclamation law requires Reclamation "to proceed in conformity with" State law "relating to the control, appropriation, *use* or distribution of water used in irrigation." 43 U.S.C. § 383 (emphasis added). California law dictates that "[t]he issuance of a permit gives the right to take and use water only to the extent and for the purpose allowed in the permit." Cal. Wat. Code § 1381. It also dictates that the diversion or use of water other than as authorized is a trespass. Cal. Wat. Code § 1052(a).

Reclamation's water right permits do not allow use of TRD water in the lower Klamath River, so the Excess Releases were not in accordance with the terms and conditions of Reclamation's permits. *See* Walter Dec., Doc. 27, Exhs. 1-12, Docs. 27.1 – 27.12. Consequently, the Excess Releases violate California Water Code sections 1381 and 1052(a) because they are unauthorized uses

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[9] Federal Defendants characterize the letter as a response to Reclamation's request for "confirmation" that it did not need the State Water Board's approval to make the Excess Releases for the lower Klamath River. Fed. Mem. at 27. In fact, as Federal Defendants admit, Reclamation submitted a temporary urgency change petition seeking a modification of its water rights to include the lower Klamath River within the approved place of use. *Id.*; AR 1252-62.

[10] Federal Defendants cite no authority under reclamation law for it to abandon CVP water. Congress authorizes water projects to make beneficial use of water, not waste it by abandonment. In addition, as previously explained by Plaintiffs, Reclamation's failure to obtain a change in the approved place of use risks partial forfeiture of the CVP water rights. *See* Pl. Mem. at 21-23.

of water that constituted trespass. Because the Excess Releases violated California water law, they also violate 43 U.S.C. section 383.

Federal Defendants fail to address California Water Code sections 1381 or 1052(c), instead citing back to portions of the Staff Letter. First, Federal Defendants inaccurately describe the letter as providing the SWRCB's official interpretation of California law. Fed. Mem. at 27-28. To the contrary, the letter is from staff, the Deputy Director of a Division of the SWRCB. AR 1166. The Staff Letter is not the official opinion of the SWRCB and it has no precedential or binding effect. *See* SWRCB Order WR 96-1, 1996 WL 82542 at *8, n. 11 (1996); SWRCB Order WQ 2001-05-CWP, 2001 WL 293726 at *7 (Mar. 7, 2001). Second, the letter clearly states that "absent a transfer or other change approved by the State Water Board, the Division cannot consider the bypass and/or releases of water for such [instream] purposes as a beneficial use unless Reclamation's permitted place of use includes the streams where the water is bypassed and/or released." AR 1166. The staff cautioned that the proposed releases could not be recognized as an authorized beneficial use of CVP water unless and until Reclamation received approval to include the lower Klamath River within the authorized place of use. By not making a beneficial use of CVP water recognized by state law, Reclamation puts the CVP's water rights at risk of forfeiture. *See* Doc. 113 at p. 22. Reclamation did not obtain such approval. Third, the letter does not say that making an intended use of TRD water in the lower Klamath River would be lawful under California law. It plainly is not, and the notion that Reclamation simply abandoned the water is a fiction. The Excess Releases were not a lawful use of CVP water under California law, and hence violated the mandate in 43 U.S.C. section 383.

E. Reclamation Violated NEPA By Failing To Prepare An EIS In 2012 And 2013

Defendants argue that there were no substantial questions about whether the Excess Releases may cause significant degradation of the human environment. This argument ignores past rulings concerning the CVP and the Council for Environmental Quality ("CEQ") regulations directing an agency to consider the context and intensity of the action's environmental effects. Plaintiffs, as well as Federal Defendants' staff, raised multiple substantial questions regarding potential impacts on water supply, power generation, water temperature effects, and biological resources. Defendants have not provided a convincing statement of reasons why the potential effects are insignificant, instead they

offer excuses for failing to take the hard look required by law. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1988) ("An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant").

1. Reclamation Failed To Provide A "Convincing Statement Of Reasons" Explaining Why Substantial Questions Raised By Plaintiffs Are Insignificant

As Federal Defendants acknowledge, a plaintiff challenging a Finding of No Significant Impact ("FONSI") must only demonstrate that "substantial questions" exist as to whether a project may have a significant impact on the environment. Fed. Mem. at 28; *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (noting that a NEPA plaintiff "need not demonstrate that significant effects will occur").

Federal Defendants ignore the nature of the context and intensity analysis necessary to determine whether an action may have a significant impact on the human environment. 40 C.F.R. § 1508.27; *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008). A project is "highly controversial" if there is a "substantial dispute [about] the size, nature, or effect of the major Federal action[11] rather than the existence of opposition to a use." 40 C.F.R. § 1508.27(b)(4); *Blue Mountains*, 161 F.3d at 1212. "An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain. *Preparation of an EIS is mandated* where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent 'speculation on potential . . . effects.'" *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1240 (9th Cir 2005) (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731-32 (9th Cir. 2001)) (emphasis added).

Here, further collection of data would have prevented speculation about the degree of water

[11] PCFFA proffers the inherently contradictory arguments that the Excess Releases are within the scope of Federal Defendants' routine management actions, and thus do not trigger NEPA, yet simultaneously constitute exceptional, short-term "emergency" actions. *See* PCFFA Mem. at 1-6. Plaintiffs reject that argument, but because Federal Defendants have not taken this position and have prepared an EA that did not advance the lack of major federal action justification, Plaintiffs will not respond further to this argument.

supply impact to Plaintiffs versus CVP contractors in general caused by the Excess Releases. In addition, further analysis of the hydropower impacts would have provided time to do an analysis rather than defaulting, as Reclamation did, to a statement that hydropower impacts "would be complex to determine and quantify." AR 27. Preparing an EIS would have allowed Reclamation to use temperature models and consider actual effects on Shasta Reservoir cold-water storage rather than extrapolate from 15-year-old temperature effects studies. Finally, Reclamation could have collected data on the effects of raising the stage in the Trinity River on the 3,000 to 7,000 previously identified salmon redds and the frog/turtle species instead of assuming that the effects would be similar to effects under the ROD flow regimes. Without taking the time to evaluate the data available on these factors, Reclamation guarantees that its analysis of the Excess Releases was speculative and not the hard look required by law.

(a) Water Supply

Prior cases have determined that it was "beyond dispute" that reductions in CVP water deliveries have the potential to significantly affect the human environment. *Consol. Salmonid Cases*, 688 F. Supp. 2d 1013, 1034 (E.D. Cal. 2010). Likewise, in the 1999 Trinity River Mainstem Fishery Restoration Environmental Impact Statement/Report ("TRMFR/EIS"), the impacts to the CVP water supply were a large part of its analysis. AR 3203-3709. Despite these past examples, Federal Defendants now downplay the significance of the water supply impacts. Reclamation impermissibly spreads the effects analysis to the entire CVP system, misrepresents the likelihood for an allocation change, and speculates that the water supply effects might be avoided if Trinity Reservoir fills during a drought year. AR 28-29. Reclamation also did not explain the reasons for its change of policy on the significance of Central Valley impacts between this case and the TRMFR/EIS. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009) (finding it would be arbitrary or capricious to fail to provide a reasoned explanation for disregarding facts and circumstances that underlie or were engendered by a prior policy).

Federal Defendants argue that water supply impacts are insignificant because water forecasts had "already been determined and would not change whether or not the fall augmentation releases were made." Fed. Mem. at 29. This argument is not consistent with the conclusion reached by

Reclamation's Central Valley Operations Manager, Ronald Milligan. Milligan Dec., Doc. 52 at p. 4. Mr. Milligan did not categorically state that the allocations would not be increased. Mr. Milligan's statement is evidence that the effect of the Excess Releases on the Central Valley allocation is uncertain as that term is used in the CEQ significance intensity factor. 40 C.F.R. § 1508.27(b)(5). Resolution of "policy and technical issues" are necessary to determine the size of the impact of the federal action. This is the very type of issue that mandates an EIS. *Native Ecosystems Council*, 428 F.3d at 1240.

Federal Defendants claim further that the water supply impacts were insignificant because the Excess Releases constitute only 3-4.5% of Trinity Reservoir's volume, and therefore a small proportion of the overall CVP water supply. *See* Fed. Mem. at 29-30. Likewise, Federal Defendants deflected Plaintiffs' questions regarding the effect of the Excess Releases on Trinity storage and thus on CVP allocations in subsequent years with the same reference to the entire CVP system or the wishful analysis that maybe Trinity Reservoir would fill in future years. *Id*.

Federal Defendants' system-wide explanation is unconvincing. In the TRMFR/EIS, Reclamation correctly recognized "agricultural water service contractors are the CVP contract holders who are assumed to be most affected by reductions in CVP water supplies." AR 3323. Reclamation also concluded that the effect of disrupting water supply to CVP was "[s]ignificant declines on the west side of the region attributed to the Preferred Alternative." AR 3364. Federal courts have disapproved attempts to reduce the significance of an impact by spreading the analysis to a larger area. *See Anderson v. Evans*, 371 F.3d at 489-493 (analysis of local whaling impacts on the Strait of Juan de Fuca and the northern Washington Coast cannot be avoided by wider analysis of the whaling impact on the overall California gray whale population).

Reclamation's hope that Trinity Reservoir would fill and eliminate the impacts, was rebutted effectively by Mr. Milligan who stated: "there is about a 50% chance that the entire combined storage deficit of the 2012 and 2013 flow augmentation actions will remain in the spring of 2014 at Trinity and Shasta Reservoirs. …[T]here is a about a 10% chance that there will be no cumulative effect on the combined storage of Trinity and Shasta Reservoirs." Milligan Dec., Doc. 52 at ¶ 10. Reclamation explains away this high likelihood of cumulative effect stating that "it is not possible to meaningfully

evaluate how a potential slightly lower Trinity Reservoir storage in 2014 may exacerbate system-wide supply conditions in the future." AR 29. This statement differs markedly from the TRMFR/EIS where Reclamation not only modeled the effects of reduced Trinity exports but produced detailed graphs comparing the effects on CVP agricultural contractors, CVP Municipal-Industrial contractors and State Water Project contractors. AR 3323, 3331-3333. Once again Federal Defendants have offered an unreasonable and unconvincing answer to a substantial question raised by Plaintiffs.

Here, the issue is not whether the effects will necessarily occur but whether Plaintiffs raised substantial questions about the water supply effect of the proposed Excess Releases meriting a fuller examination of the issue. Reclamation, instead of taking a hard look at the issue or modeling the issue as it did in the TRMFR/EIS, speculated about the size of the impact or tried to downplay the impacts on Plaintiffs by spreading the impacts to the entire CVP. Reclamation knew water service contractors are the CVP contract holders who are assumed to be most affected by reductions in CVP water supplies. It was unreasonable to determine that water supply impacts were not significant.

(b) Hydropower Generation

Federal Defendants acknowledge that some power generation could be lost as a result of the Excess Releases, but claim that the "maximum potential impacts" would be about 10% and 6% of average TRD power production in 2012 and 2013, respectively. Fed. Mem. at 30-31. Federal Defendants fail to acknowledge, however, that in 2012 Reclamation did not discuss impacts to hydropower generation at all. *See* AR 1186-88. In 2013, contrary to their papers, Reclamation found that the decreased power generation in 2014 "would be complex to determine and difficult to quantify," but otherwise made no attempt to quantify or analyze whether hydropower impacts would be significant. AR 27. As argued above, the fact that an issue is complex and difficult to determine is not a reason that it is insignificant; just the opposite, this is a reason for taking a harder analytical look at the issue in an EIS.

Further, Reclamation argues it can avoid analyzing the significance of a hydropower impact because Redding Electric Utility ("REU") highlighted financial impacts in its comments. *See* Fed. Mem. at 31. Consideration of financial impacts is appropriate under NEPA, where financial impacts are also tied to environmental impacts. *See* 40 C.F.R. §§ 1508.27(a) (agency required to analyze

action in several contexts, including context of society as a whole), 1508.27(b) (severity of impact analyzed using multiple factors, including relationship to other actions that may be cumulatively significant). In this case, there is a nexus to reduction in low-carbon hydropower generation at the likely cost of an increase in generation from higher carbon energy sources. AR 59 (comment from REU noting carbon-free nature of lost hydroelectric power). REU's comments highlight substantial questions about whether the effects on hydropower generation will have a significant impact on the environment.

(c) Temperature/Cold Water Pool Management

Plaintiffs' comments on the Excess Releases warned that they could affect the ability to maintain temperatures for listed species on the Sacramento River. AR 555-56. Questions affecting listed species and compliance with current biological opinions are typically deemed significant. 40 C.F.R. § 1508.27 (b) (9) and (10).

Despite only analyzing 62,000 AF of the 109,000 AF proposed action, Federal Defendants state that the substantial questions about temperature effects were not significant, arguing that the Excess Releases would not reduce Trinity Storage below one million acre feet (1MAF). Fed. Mem. at 31-32. Citing the TRMFR/EIS, Federal Defendants also argue that the water temperature objectives could be met a high percentage of the time at lower storage volumes. *Id*.

The 1MAF rationalization applies to the Trinity River instream temperature needs, but does not address the substantial questions about Sacramento temperature effects caused by the Excess Releases. Federal Defendants derive the 1MAF argument from the 2013 EA. There, Reclamation did not cite a source for its conclusion that 1MAF would mitigate temperature concerns, yet even that unsupported statement appears to be made in the context of temperature concerns in the Trinity River and not the Sacramento River. AR 26-27 ("This is because the end of water year 2013 storage volume in Trinity Reservoir is projected to be 1.362 MAF, which is well above the storage threshold of approximately 1 MAF where the temperature of water released through the penstocks may be a concern for *downstream use*.") (emphasis added). Further corroboration that the 1MAF analysis did not apply to meeting Sacramento temperature requirements is found in how the lead agencies (U.S. Fish and Wildlife Service, Reclamation, the Hoopa, and Trinity County), conducted the effects

analysis in the TRMFR/EIS. AR 3375-81. The lead agencies used three models to model the water quality and temperature effects caused by the release schedules proposed by each alternative evaluated. AR 3378. The TRMFR/EIS never used a 1MAF Trinity storage value as a proxy for the detailed water temperature models. *See* AR 3374-78.

The TRMFR/EIS argument is similarly misleading because that modeling considered lesser flows than experienced when the Excess Releases are added to the ROD flows and is based on obsolete modeling assumptions. Even the outdated modeling indicated significant temperature impacts due to change in Trinity exports to the Sacramento basin. The TRMFR/EIS modeling runs used 1995 assumptions about future CVP reservoir and demand levels. AR 3387. The number of monthly violations for instream temperature criteria and Shasta carryover were sensitive to the assumptions concerning projected 2020 demand. AR 3386-87. The EIS/EIR modeling effort also assumed 1995 era CVP biological opinion operational limitations as well as 1995 water quality regulations. AR 3369; AR 3372; AR 3378. These assumptions no longer apply.

In order for the TRMFR/EIS modeling to have relevance to the effect of the Excess Releases analysis, Reclamation would need to model the larger total release amounts and use 2013 demand and environmental requirements. Reclamation made no attempt in the EA or its papers to provide a reasoned explanation of how analysis based on the TRMFR/EIS had continuing relevance. *See* AR 24-25. Without such an explanation, it is unreasonable to ignore the substantial question concerning temperature effects raised by Plaintiffs.

Further, Federal Defendants ignore the fact that Reclamation sought to be relieved from certain Bay-Delta Water Quality Control Plan requirements in May 2013 in order to protect the Shasta Reservoir cold water pool. AR 73. Federal Defendants fail to reconcile this request—which indicates that at least in May 2013, Reclamation felt that 100,000 AF to 200,000 AF of storage was significant for maintaining the cold water pool—with the 2013 EA's conclusion that a possible storage reduction of over 100,000 AF would only have a "minor" impact on cold water resources. This belies Federal Defendants' current contention that such an amount of lost storage would have an insignificant impact on the cold water pool.

(d) Biological Resources

Federal Defendants argue that there was no significant adverse impact to turtles, frogs, and Trinity River salmon. Fed. Mem. at 33. But Reclamation included only three sentences of analysis on these issues. AR 31-32. Federal Defendants seek to bootstrap extra-record evidence about the significance of impacts to the Trinity River non-endangered species, but this evidence is not sufficient to replace the analysis they did not do in the EA. *American Textile,* 452 U.S. at 539.

Federal Defendants cobble together an odd argument that because the turtles, frogs, and lamprey were adversely affected by the Trinity Project in the past, any new impacts caused by the Excess Releases were unimportant. Fed. Mem. at 33. Even if this argument is scientifically correct, it did not appear in the EA. *American Textile*, 452 U.S. at 539. Federal Defendants now cite material concerning spring flow recommendations for the yellow-legged frog. Fed. Mem. at 33. Because the paper is not discussed in the EA, there is no explanation for why spring flow recommendations are relevant to an early fall release.

Plaintiffs raised significant questions about the effect of the flows on turtles, but Reclamation did not address the concerns except in a cursory way. In the EA, Reclamation stated the proposed action would not affect "egg masses." The problem with this response is that egg masses are not the life stage at risk by late summer and early fall flows, instead tadpoles and the metamorphosis stages are the life stages in the Trinity River at the time of year proposed for the Excess Releases. AR 1860; AR 1818; AR 1822-24.

Plaintiffs also raised concerns about the effect of the Excess Releases on salmon redds. AR 554. Reclamation did not do any analysis on the question raised. AR 32-33. This is despite the importance attached to rehabilitation of salmon redds by the U.S. Fish and Wildlife Service, Yurok Tribal Fishery Program, and the Hoopa Tribal Fishery Department. AR 1402-62. The three entities map and report on salmon redds annually and have identified anywhere from 3000 to 7000 redds on the Trinity River. AR 1408, 1423. The TRMFR/EIS showed graphic evidence that Chinook salmon spawn during the period planned for the Excess Releases. AR 3395. While Federal Defendants state there is no likelihood of significant adverse impacts to spring-run Chinook (Fed. Mem. at 33), at best this is a case of impacts that may be both beneficial and adverse. In such a case, a significant effect

may exist even if the federal agency believes that on balance the effect will be beneficial. 40 C.F.R. § 1508.27 (b) (1). The action agency should explain its rationale for why the beneficial effects outweigh the adverse effect of stranding salmon redds with high unnatural pulse flows. *Envt'l Protection Information Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1197 (N.D. Cal. 2004).

2. Reclamation Failed To Analyze The Full Amount Of Excess Releases

Reclamation's 2013 EA and FONSI fail to analyze the full amount of water that could be used for the Excess Releases. Notwithstanding the fact that up to 109,000 AF would be released if so-called "emergency" flows were needed, Reclamation only analyzed the impacts of releasing up to 62,000 AF of Trinity Reservoir water. AR 20.

NEPA requires consideration of the full impacts of a proposed federal action. As part of its analysis in an EA, an agency must consider the direct, indirect, and cumulative impacts of a proposed federal action. *Ctr. for Envt'l Law and Pol'y v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1006 (9th Cir. 2011). CEQ regulations require that all cumulative effects of a proposed action that may reasonably be anticipated be included in the EA or EIS, and prohibit the "segmentation" of various components of a planned action into smaller projects to avoid studying the cumulative impacts of the entire action or development. 40 C.F.R. §§ 1508.25, 1508.27(b)(7); *Save Barton Creek Ass'n v. Fed. Highway Admin.*, 950 F.2d 1129, 1140 (5th Cir. 1992).

Here, the "emergency" releases of up to 109,000 AF are not only "reasonably foreseeable" future actions, but they were foreseen by the Federal Defendants as part of the proposed action. AR 21.[12] Nonetheless, Federal Defendants argue that they are not required to analyze the impacts of 109,000 AF in the 2013 EA because such releases would be due to an emergency situation. Fed. Mem. at 34. This reasoning does not comport with the requirements of NEPA that all reasonably foreseeable impacts must be analyzed, not merely "likely" impacts.

Federal Defendants contend further that if additional, emergency releases were required, the releases would be governed by NEPA's emergency exception. Fed. Mem. at 34. Under the

[12] Reclamation staff acknowledged that the EA needed to analyze the full 109,000 AF. AR 414. Likewise multiple reviewers raised the same issue. AR 420; AR 426.

"emergency exception" to NEPA, an agency should consult with the CEQ about making alternative arrangements to customary NEPA procedures if "emergency circumstances make it necessary to take an action with significant environmental impacts without observing the [procedures]." 40 C.F.R. § 1506.11. Such alternative arrangements are limited to actions "necessary to control the immediate impacts of the emergency." *Id*. Here, the "emergency exception" is not available because the action was foreseeable and planned in advanced of the emergency.

In sum, the record demonstrates that Reclamation failed to take a "hard look" at the impacts of the Excess Releases and Reclamation failed to supply a convincing statement of reasons why the effects of the Releases are insignificant and do not require analysis in an EIS. By improperly attempting to evade NEPA's EIS requirement for actions that have a significant impacts on the human environment, Reclamation acted arbitrarily, capriciously, and not in accordance with law.

F. Reclamation Violated The ESA By Failing To Consult Regarding The Excess Releases

1. The ESA's Consultation Requirements Must Be Strictly Enforced

Reclamation failed to consult with the appropriate expert wildlife agency regarding the Excess Releases and failed to meet its obligations under the ESA to avoid jeopardizing any listed species or adversely modifying critical habitat. 16 U.S.C. § 1536(a)(2). Ninth Circuit precedent establishes that the threshold for triggering consultation is set "relatively low" and that the ESA's procedural consultation requirements should be strictly enforced. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Here, Federal Defendants concede that they were required to consult with NMFS regarding the proposed Excess Releases because the "may affect" threshold was triggered. Fed. Mem. at 35:16-24 (citing AR 3 at 00052-53), 38:12-14; *see Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1030 (9th Cir. 2012) (holding Forest Service had a duty to consult before approving mining activities, where Forest Service did not dispute that the mining activities "may affect" critical habitat of coho salmon).

Once the consultation requirement was triggered, Federal Defendants only had two possible pathways for satisfying their ESA obligations – an informal consultation resulting in a concurrence

letter, or a formal consultation which concludes with a biological opinion.[13] *See* 50 C.F.R. §§ 402.13 (describing informal consultation process), 402.14 (describing formal consultation process). "Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, and (2) the relevant Service (FWS or NMFS) concurs with that determination." *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (citing 50 C.F.R. § 402.14(b)).

The record and Federal Defendants' own briefing reveal that Reclamation failed to conduct either informal or formal consultation under ESA section 7 with NMFS regarding the proposed Excess Releases' potential effects on ESA-listed species and critical habitat.[14] Reclamation did not receive a concurrence letter from NMFS, and therefore did not conduct and complete informal consultation. Nor did Reclamation engage in formal consultation with NMFS regarding the proposed Excess Releases; there is no evidence of initiation of formal consultation in the Excess Releases, let alone a completed biological opinion. As a matter of law, Federal Defendants violated the ESA and their section 7 duties by proceeding with the Excess Releases without first consulting with the appropriate expert wildlife agency. Federal Defendants' ESA argument boils down to an "almost, not quite, but close enough" defense under which they seek to be absolved of the section 7 consultation requirements. This position cannot be accepted.

2. The Record Confirms That Reclamation Did Not Engage In Informal Consultation Regarding The Excess Releases

Defendants' briefing contains careful word choices and obfuscation which, if not scrutinized, could create the false impression that Reclamation "consulted" with NMFS regarding the proposed Excess Releases' potential effects on listed species and critical habitat as required by the ESA. *See,*

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[13] PCFFA refers to the fact that the ESA's "implementing regulations authorize some departure from normal consultation standards in emergencies." PCFFA Mem. at 10:2-3. However, neither PCFFA nor Federal Defendants argue that Reclamation conducted emergency consultation for 2013 Excess Releases. *See* 50 C.F.R. § 402.05.

[14] Federal Defendants mischaracterize Plaintiffs' ESA claim by stating that the alleged error is failure to initiate "formal consultation" with NMFS. Fed. Mem. at 38:16-19. Plaintiffs' ESA claim is that Reclamation failed to conduct *any* consultation with NMFS regarding the effects of the proposed Excess Releases – either formal or informal.

e.g., Fed. Mem. at 32:6-7 (the "close inter-agency coordination" between Reclamation and NMFS "*amounts to* informal consultation" (emphasis added)); PCFFA Mem. at 9:11-13 ("the flow augmentation was planned in *collaboration* with NMFS" (emphasis added)). However, what is glaringly absent from Federal Defendants' briefing is a clear and concise assertion that Reclamation consulted with NMFS on the proposed Excess Releases. *See* Fed. Mem. at 34:17-43:15. This absence is easily explained – Reclamation in fact did not consult with NMFS under ESA section 7 regarding releasing water from the TRD in excess of the ROD's annual flow volumes.

Federal Defendants repeatedly assert that they "considered" the effects of the Excess Releases on ESA-listed species under the jurisdiction of NMFS. Such consideration is only the first step in satisfying their ESA section 7 duties and is not equivalent to "consultation." Fed. Mem. at 36:6-15, 8:8-13; *see* 50 C.F.R. §§ 402.13 (informal consultation), 402.14 (formal consultation). Federal Defendants seek to rely on the fact that NMFS biologists were "'involved'" in the development of the recommendations that "'formed the basis'" for the proposed Excess Releases. Fed Mem. at 32:2-6. According to Federal Defendants, "this close inter-agency coordination *amounts to* informal consultation." *Id*. at 39:6-7 (emphasis added). However, what is missing from Federal Defendants' narrative and discussion of the record is a critical product of informal consultation – a concurrence letter from NMFS stating that NMFS concurs in Reclamation's determination that the proposed Excess Releases will not adversely affect a listed species or critical habitat. 50 C.F.R. § 402.13(a). This procedural step is a clear requirement of informal consultation, and there is no such concurrence letter in the record. No amount of obfuscation can alter that dispositive fact.[15]

The record contains an example of the type of concurrence letter Reclamation needed to receive from NMFS (but did not) to satisfy the requirements for informal consultation. As PCFFA points out (PCFFA Mem. at 9:13-16), Reclamation received a concurrence letter from NMFS related to the 2004 fall fishery releases. AR 2358-60 ("2004 Concurrence Letter"). The 2004 Concurrence

[15] Defendant-Intervenor PCFFA complains Plaintiffs seek a "hyper-technical" application of the ESA and the ESA regulations. PCFFA Mem. at 10:6, 11:15-16. Plaintiffs seek compliance with the law, including governing precedent. PCFFA's true complaint is with the Ninth Circuit, which insists upon strict compliance with the ESA section 7's procedural requirements. *Thomas v. Peterson*, 753 F.2d at 764.

Letter refers to Reclamation's 2004 request to initiate informal consultation regarding the 2004 proposed releases and provides NMFS's concurrence that the proposed releases were not likely to adversely affect listed species. AR 2359. The 2004 Concurrence Letter makes it clear that it "concludes" the ESA informal consultation. AR 2360. This letter provides a clear example of the concurrence letter Reclamation needed to receive to conduct informal consultation regarding the 2013 Excess Releases, but did not.

3. Federal Defendants' Assertions That Reclamation Is Now Conducting Formal Consultation With NMFS Lack Record Support

Lacking record support for any actual consultation regarding the Excess Releases, Defendants' briefs resort to bald assertions and a smoke-and-mirrors defenses that obscure reality. First, Federal Defendants assert that "Reclamation is already in ESA consultation with NMFS regarding the species" under NMFS's jurisdiction. Fed. Mem. at 39:25-27. To support this assertion, Federal Defendants cite to their "ESA Section 7 memorandum," which contains the same bald, blanket assertion without citing any supporting documentation evidencing ongoing section 7 consultation with NMFS regarding TRD operations or releases in excess of the annual ROD flows. *Id*. (citing AR 53). Nor does the record contain any documentation of such a consultation. This lack of evidence is easily explained – Reclamation has not reinitiated consultation with NMFS regarding TRD operations after the remand of the 2009 Salmonid BiOp. Federal Defendants later concede this fact but argue that this Court's remand of the 2009 Salmonid BiOp should be deemed a "functionally reinitiated consultation." Fed. Mem. at 41:20-23.

As this Court, Plaintiffs, and presumably Federal Defendants, are well-aware, this Court's remand of the 2009 Salmonid BiOp does not equate to Reclamation reinitiating formal consultation with NMFS as required by the consultation regulations. 50 C.F.R. §§ 402.14(c); 402.16. Reclamation, not the Court, is the one who must reinitiate formal consultation with NMFS. When Reclamation does reinitiate consultation, it will be evidenced in documentation developed by Reclamation and transmitted to NMFS. Notably, Federal Defendants have not produced any such documentation. If Reclamation had in fact reinitiated consultation, Federal Defendants could easily point the Court to documentary evidence, but they have not. Initiation of consultation requires a

written request, containing information about the project and affected species, commonly referred to as an "initiation package." 50 C.F.R. § 402.14(c). Federal Defendants' assertions that Reclamation has "effectively reinitiated" consultation and therefore is in "consultation" with NMFS regarding TRD operations are simply false. *See* AR 40 ("Reclamation *plans* to submit a consultation package that includes a supplemental/updated BA describing a proposed operation of the CVP/SWP to NMFS, to facilitate the remand of the [OCAP] Opinion, consistent with section 7(a)(2) of the ESA") (emphasis added); *see also* Doc. 114-2 at 38 (Reclamation's January 2014 Remand Update, identifying anticipated date for submitting new BA to NMFS as September 2014).

Federal Defendants concede that releases from the TRD in excess of the ROD's annual flows were not part of the TRD operations described in the 2008 Biological Assessment ("BA"), and therefore were not considered in the 2009 Salmonid BiOp. Federal Defendants state: "Plaintiffs' suggestion that the original description of the Trinity River Division Operations did not include a discussion of this specific operational decision, [Cite], ignores the fact that Reclamation's 'supplemental' BA *can* include that information as part of the proposed Trinity River Division operations . . ." Fed. Mem. at 42:3-6 (emphasis added). This statement concedes two facts. First, releases in excess of the ROD's annual releases were not considered in the consultation process that resulted in the 2009 Salmonid BiOp.[16] Second, to-date Reclamation has not provided NMFS with a supplemental BA that includes a description of such excess releases.

Finally, with respect to potential effects on coho salmon, Federal Defendants have abandoned their original position that they did not have to consult on coho salmon because they determined the proposed releases would have a "beneficial effect." *See* Doc. 103 at ¶ 65. Instead, Federal Defendants now assert "the record confirms" that Reclamation is in ongoing "consultation" with NMFS regarding SONCC coho salmon. Fed. Mem. at 40:10-15. However, the record "evidence" the

[16] PCFFA argues that the Excess Releases fall within the "action" considered in the 2008 BA because the "action" is simply the storage, diversion and delivery of water from all CVP project facilities, which includes the TRD. PCFFA Mem. at 10:8-23. In reality, the 2008 BA identifies TRD operations as implementing the ROD's annual volumes for each water-year type. *See* Doc. 114-1 at p. 4, p. 3, Table 2-1. It is undisputed that the 2013 Excess Releases exceeded the ROD's annual volumes for that year and that water-year type. Such excess releases were not described in the 2008 BA and were not part of the "action" previously consulted on.

Federal Defendants cite in support of this assertion is again only Reclamation's bald assertion in the "ESA Section 7 memorandum." Federal Defendants have failed to provide any evidence of the initiation package required by 50 C.F.R. section 402.14(c), and the Court cannot be asked to excuse what should be but is not in the record, and simply accept Reclamation's bald assertion.

Federal Defendants present the issue of whether Reclamation is in consultation with NMFS as a matter of opinion, rather than of fact. Fed. Mem. at 42:8-10 ("the record supports Reclamation's conclusion that it is in consultation with NMFS on SONCC coho salmon and on operation of the Trinity River Division"). In reality, the procedural requirements for initiating, conducting, and completing consultation are clear and Federal Defendants' apparent belief that Reclamation is in consultation with NMFS regarding TRD operations is belied by the record and evidence before the Court. Federal Defendants fail to identify any record evidence to support their bald assertions that Reclamation is in "ongoing consultation" with NMFS regarding operation of the Trinity River Division, or that Reclamation ever consulted with NMFS regarding the 2013 Excess Releases. *See* Fed. Mem. at 42:16-17. Instead, the record confirms that Reclamation failed to consult regarding the Excess Releases, and as a matter of law, has violated its ESA section 7 obligations and duties.

Reclamation's failure to consult has potential consequences for both protected species and those who are impacted by harm to those species, such as the Plaintiffs and their members. It is critical that Reclamation be required to consult with the appropriate expert agency before taking actions that could impact protected species and undermine the efforts to improve the species' status, and lead to additional regulation that further restricts Plaintiffs' water supply.

G. Response To The Public Trust Argument By Amicus California Department Of Fish And Wildlife

In its amicus brief, the California Department of Fish and Wildlife ("CDFW") opposes Plaintiffs' First Claim – that the Excess Releases violated CVPIA section 3406(b)(23). CDFW argues that Reclamation's decision to make the Excess Releases "was not only consistent with, but [was] required by, California law, as incorporated by federal reclamation law, including the CVPIA." Cal. Dep't of Fish and Wildlife's *Amicus Curiae* Brief in Opp'n to Pl. Motion for Summary Judgment and in Support of Defs' Cross-Motion for Summary Judgment on the First Claim for Relief, Doc. 122

("CDFW Br.") at 18:1-3. CDFW identifies the public trust doctrine, including the "codification" of that doctrine in California Fish and Game Code section 5937, as the California law that supposedly required the Excess Releases. *Id.* at 13-18.[17] This argument fails, for at least three reasons.

1. CDFW's Argument Is An Impermissible Post Hoc Rationalization For the Excess Releases

Under the APA, a court must review an agency's action based on the rationale for the action expressed by the agency in the administrative record, and not a new rationale provided later during litigation. *American Textile*, 452 U.S. at 539. Nothing in the record here indicates that Reclamation considered the public trust doctrine or Fish and Game Code section 5937, let alone that Reclamation concluded that California law required it to make the Excess Releases. Hence, the rationale offered by CDFW cannot be a basis for sustaining Reclamation's action, and the Court need not consider it further.

2. California Law Did Not Require Reclamation To Make The Excess Releases

(a) Neither The SWRCB Permit Terms Nor Section 5937 Required The Excess Releases

CDFW's amicus argument is an abstraction unsupported by the conduct of the relevant state administrative agencies. There is no indication in the record that the SWRCB, the state agency responsible for administering California water rights, or CDFW itself, the state agency responsible for enforcement of Fish and Game Code section 5937, ever advised Reclamation that it was required by California law to make the Excess Releases. And for good reason.

The water right permits for the TRD do not require the Excess Releases. Condition 8 of the permits expressly defines Reclamation's obligation to make releases to the Trinity River for the benefit of fish. Doc. 27-3, Doc. 27-5, Doc. 27-7, Doc. 27-9. Condition 8 requires minimum releases ranging from 150 cfs to 250 cfs, depending on the month. *Id.* Reclamation more than meets the permit release requirements by complying with the ROD. In particular, during the months of August

[17] Consistent with the Court's Minute Order, Doc. 124, Plaintiffs confine this response to CDFW's legal argument regarding the public trust doctrine.

and September, the ROD requires minimum releases of 450 cfs, 300 cfs more than the required minimum releases for those months under the permits. AR 3038.

Section 5937 requires the owner of a dam to pass sufficient water to the stream below the dam "to keep in good condition any fish that may be planted or exist below the dam." Cal. Fish & Game Code § 5937. The terms "good condition," which "fish" are protected, and how far "below the dam" fish must be protected are not further defined. The purpose of section 5937 is to prevent a dam owner or operator from diverting too much water and thereby causing harm to fish below the dam by drying up the stream. Lewiston Dam did not cause the conditions in the lower Klamath River in 2012 and 2013 that led to the Excess Releases. The TRD was not drying up the Trinity River below Lewiston Dam; the ROD's August and September releases of 450 cfs typically *exceed* natural flow. Reclamation made the Excess Releases to address conditions not caused by operations of the dam, conditions in a location at least 100 miles downstream from the dam, below the confluence of the Klamath and Trinity Rivers. AR 23. Finding an obligation in section 5937 to make the Excess Releases from Lewiston Dam in these circumstances would stretch it beyond all reasonable bounds.

(b) The Public Trust Doctrine Did Not Require The Excess Releases

CDFW's amicus brief does not address the release requirements in the State water right permits applicable to the TRD, or explain how section 5937 can reasonably be read to require Reclamation to make releases to address conditions not caused by Lewiston Dam. Instead, CDFW argues that "the public trust doctrine requires the protection of public trust resources, values and uses, including fishery resources, unless such protection is either infeasible or manifestly unreasonable." CDFW Br. at 12 n. 6. Thus, in CDFW's view, the public trust doctrine per se requires Reclamation to take whatever actions it reasonably can to protect fish, including releasing stored TRD water to the detriment of other CVP uses. That is not the law.

The public trust doctrine does not prohibit avoidable harm to fish. The California Supreme Court has made clear that "[t]he state must have the power to grant . . . rights to appropriate water *even if diversions harm the public trust uses.*" *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 426 (1983) (emphasis added). As the court explained:

> The population and economy of this state depend upon the

> appropriation of vast quantities of water for uses unrelated to instream trust values . . . . [I]t would be disingenuous to hold that such appropriations are and always have been improper to the extent that they harm public trust uses, and can be justified only upon theories of reliance or estoppel.

National Audubon Society, 33 Cal. 3d at 446.

More recently, in another case involving CVP permits, the California Court of Appeal rejected the same argument CDFW makes here. *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 778 (2006). The court explained:

> Seizing on the phrase "whenever feasible," the Audubon Society parties contend that "conflicts between public trust values and competing water uses must, whenever possible, be resolved in favor of public trust protection." . . .
>
> We are not persuaded. . . . [I]n determining whether it is "feasible" to protect public trust values like fish and wildlife in a particular instance, the Board must determine whether protection of those values, or what level of protection, is "consistent with the public interest." . . . While the Board had a duty to adopt objectives to protect fish and wildlife uses and a program of implementation for achieving those objectives, in doing so the Board also had a duty to consider and protect all of the other beneficial uses to be made of water in the Bay-Delta, including municipal, industrial, and agricultural uses.

Id. If the SWRCB were to revisit the TRD water right permit terms, it might well decide that using TRD water for Excess Releases is *not* in the public interest, considering all competing needs for the water. In any event, no such reconsideration occurred here. CDFW's argument presumes that such reconsideration is unnecessary, because under its view the public trust doctrine necessarily required Reclamation to use TRD water to make the Excess Releases to protect fish, without consideration of the harm to competing CVP water supply and hydropower uses. As the *National Audubon* and *State Water Resources Control Board Cases* make clear, the public trust doctrine imposes no such duty.

3. If California Law Required The Excess Releases, It Would Be Preempted By CVPIA Section 3406(b)(23)

In *California v. United States*, 438 U.S. 645, 678 (1978), the Supreme Court directed that under Section 8 of the federal Reclamation Act of 1902, 43 U.S.C. section 383, "the Secretary [of Interior] should follow state law in all respects not directly inconsistent with [congressional] directives." In *United States v. California*, 694 F.2d 1171, 1177 (9th Cir. 1982), the Ninth Circuit

further elaborated that "a state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme."

For the reasons explained above, there is no conflict between CVPIA section 3406(b)(23) and the true application of the public trust doctrine and section 5937. Hence, the Court need not reach the issue of preemption here. But if someday the SWRCB were to revisit the TRD water right permits, and thereafter direct Reclamation to exceed the annual volume limits for fishery releases set by the ROD, its order would clash with the mandate in section 3406(b)(23), and hence would be preempted.

CDFW argues that in the CVPIA Congress created a "duty to comply with state law" that is a "first order priority for the CVP." CDFW Br. at 9-11. This is nonsense. CDFW stands *California v. United States* on its head – under CDFW's theory the express provisions of the CVPIA including section 3406(b)(23) govern only if they do not conflict with state law. Under its view, the California legislature may nullify every provision in the CVPIA if it so chooses. Nothing in the CVPIA sections CDFW cites, including sections 3403(f), 3406(a), 3406(b)(1) or 3406(b)(2), or any other provision of CVPIA, can reasonably read as so abdicating federal supremacy. If state law conflicts with the directive in section 3406(b)(23), then state law must yield.

III. CONCLUSION

For the foregoing reasons, the Court should enter judgment for Plaintiffs on all claims regarding the 2012 and 2013 Excess Releases. The Court should find the Excess Releases violated CVPIA sections 3406(b)(23) and 3411(a), 43 U.S.C. section 383, NEPA, and the ESA, and grant Plaintiffs' motion for summary judgment.

Dated: April 29, 2014

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