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

ANNA K. STIMMEL, Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington D.C. 20044
(tel) 202-305-3895; (fax) 202-305-0506
anna.stimmel@usdoj.gov
BRADLEY H. OLIPHANT, Trial Attorney
Wildlife & Marine Resources Section
999 18th Street, South Terrace, Ste. 370
Denver, CO 80202
(tel) 303-844-1381; (fax) 303-844-1350
bradley.oliphant@usdoj.gov

Counsel for Federal Defendants

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,

and

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

Defendant-Intervenors.

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

FEDERAL DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Judge: Honorable Lawrence J. O'Neill
Date: No Hearing Set
Time: No Hearing Set
Courtroom: No Hearing Set

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INTRODUCTION

Federal Defendants agree with Plaintiffs that this litigation should not be necessary. Since the Trinity River Division ("TRD") was first authorized, Congress has directed Reclamation to preserve and protect fish and wildlife downstream of the facilities. Reclamation took the actions challenged by the Plaintiffs in an effort to balance competing priorities and did so after seeking public comment and analyzing the potential impacts of its actions. Plaintiffs are using this suit in part to inappropriately re-litigate claims that were resolved by the Ninth Circuit in *Westlands Water District v. United States*, 376 F.3d 853 (2004). For the reasons discussed below and in Federal Defendants' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, all of Plaintiffs' arguments fail and Federal Defendants are entitled to summary judgment.

ARGUMENT

I. Plaintiffs Have Failed To Establish Standing.

A. Plaintiffs Fail To Show Standing To Bring A Procedural Challenge.

In their reply, Plaintiffs recognize that they "must demonstrate standing separately for each form of relief sought," Dkt. 125 ("Pls. Reply") at 3; *quoting Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000), and state that the only Endangered Species Act ("ESA") claim they are pursuing is a "procedural claim[]" for "failure to consult" with NMFS. Pls. Reply at 3; *see id.* at 6 ("Federal Defendants are in violation of section 7 of the ESA …. This too is a procedural challenge"). As an initial matter, Plaintiffs' Amended Complaint alleged both a procedural violation of ESA Section 7, Dkt. 95 ¶ 102, and a substantive claim that Reclamation is violating ESA Section 9. *Id.* ¶ 103. Plaintiffs sought relief for the alleged Section 9 violation, *id*, Prayer for Relief ¶ 5, but now concede that they have not separately demonstrated standing for their ESA Section 9 claim or related relief. That form of relief must be denied.

Nor have they demonstrated standing to press their procedural grievances. Plaintiffs' reply notes that causation and redressability requirements are relaxed for procedural claims. *Id.* at 5-6. True enough, but federal law does not recognize procedural injury unmoored from a

concrete injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Thus, Plaintiffs still must first demonstrate that they "suffered an injury in fact that is concrete, particularized, and actual or imminent[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also Natural Res. Def. Council v. EPA*, 542 F.3d 1235, 1244 (9th Cir. 2008). As we discussed, their declarations do not establish any such immediate and concrete injury. *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008); *Friends of the Earth*, 528 U.S. at 183; *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141-1142 (9th Cir. 2013). They are entirely backward looking and, more fundamentally, their alleged harm is only a vague and speculative allusion to the future possibility of impacts to various water-dependent species from what they admit are modest releases of water, or of future allocations that depend on myriad factors beyond the control of either Federal Defendants or Plaintiffs. Dkt. 120-1 ("Fed. Def. Br.") at 17-19. This someday threat is not an imminent concrete injury. *Id.* Nor is there any possibility of imminent concrete injury from the action, because Reclamation's ability to use water from other Central Valley Project ("CVP") sources to meet all flow and temperature requirements ensured that the amount of water in the system would not remain "status quo." *Id.* at 17-18; AR 3 at 00053-54.

Plaintiffs now seek cover under *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220 (9th Cir. 2008). That case is distinguishable. There, three "conservation groups" with avowed interests in protecting ESA-listed salmon and steelhead challenged the federal government's decision to enter into, and remain a party to, a treaty that allegedly allowed Canadian fisheries to overharvest those species. *Id.* at 1222. The Ninth Circuit held that these conservation groups lacked standing to challenge the biological opinion authorizing entry into the treaty and its continued implementation, but had standing to challenge the agencies' failure to reinitiate consultation on the biological opinion. *Id.* at 1225. The panel reasoned that the conservation groups showed various "scientific, educational, aesthetic, recreational, spiritual, conservation, economic, and business interests *in the salmon*," *id.*, and that Section 7 consultation procedures, including "the requirements that [a biological opinion] evaluate both the recovery and survival of listed species, and that [reasonable and prudent alternatives] or

reasonable and prudent measures are proposed," were designed to protect these concrete interests in the species. *Id.* at 1225-26. Thus, Salmon Spawning could pursue its claim because the "ultimate basis" of its standing, according to the Ninth Circuit, was its direct interest in "avoidance of harm to listed species," and ESA Section 7 consultation was designed to protect that specific concrete threatened interest. *Id*. at 1229.

This case stands in sharp contrast. Plaintiffs here have no direct interest in the species themselves, only in their supposed ability to help ensure that a third-party agency does not someday impose more stringent regulation of CVP water supply, where their actual interest lies:

> Plaintiffs have a concrete interest in ensuring [Reclamation] consults … because deterioration in the condition of those species results in more stringent regulation and reduction of CVP water supply…. [T]hreatened harms to ESA-listed species and deterioration in their condition increased the risk of further *pumping restrictions and harm to Plaintiffs' water supply.*

Pls. Reply at 6 (emphasis added). *Salmon Spawning* made clear that "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." *Id*. at 1225; *Chabot-Las Positas Community College Dist. v. EPA*, 482 F. App'x 219, 221 (9th Cir. 2012). Unlike *Salmon Spawning*, the "ultimate basis" for Plaintiffs' standing is not an interest in the species, but the water supply. Thus, while the panel recognized that ESA procedures protect a concrete interest in listed species, Plaintiffs have not shown how those procedures "are designed to protect [their] threatened concrete interest" in their water supply. *Salmon Spawning*, 545 F.3d at 1225.

Moreover, while causation and redressability standards are "relaxed" in procedural injury cases, Pls. Reply at 6, "the redressability requirement is not toothless in procedural injury cases." *Salmon Spawning*, 545 F.3d at 1227. "There must still be some possibility that granting the requested relief will have an effect on the ultimate injury alleged." *Goat Ranchers of Oregon v. Williams*, no. civ. 08-97-ST, 2009 WL 883581, at *2 (D. Or. Mar. 30, 2009), *citing Salmon Spawning*, 545 F.3d at 1227. Plaintiffs' reply offers no basis for such a possibility here. Specifically, they argue that they meet causation and redressability standards because

compliance with the ESA "*could* protect" their attenuated interests, in that:

> 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.*

Pls. Reply at 6 (emphasis added). This contention is factually and legally unavailing. First, under the ESA, Federal Defendants cannot "require reasonable and prudent measures or alternatives" at all, because proposing such actions is the responsibility of the consulting agency. *See e.g.*, 50 C.F.R. § 402.14(g)(8) (consulting agency responsible for formulating "any reasonable and prudent alternatives, and any reasonable and prudent measures"); *id.* § 402.14(h)(3) (consulting agency "shall include reasonable and prudent alternatives" in its biological opinion); *id.* § 402.14(i)(1)(ii) (consulting agency must "[s]pecif[y] [appropriate] reasonable and prudent measures" in incidental take statement). Unlike *Salmon Spawning*, the consulting agency (the National Marine Fisheries Service ("NMFS")) is not a party in this case.

Plaintiffs also have no basis to suggest that "reasonable and prudent measures or alternatives" could be imposed. The consulting agency develops these measures during formal consultation, which is triggered only "when the acting agency or consulting agency determines that the proposed action is *likely* to adversely affect a listed species or critical habitat." *San Luis and Delta-Mendota Water Authority v. Jewell*, --- F.3d ---, No. 11-15871, 2014 WL 975130, at *5 (9th Cir. Mar. 13, 2014) ("*Delta Smelt Appeal*"); 50 C.F.R. §§ 402.13, 402.14. Here, neither agency made that determination. *See infra* § V. As a matter of law, the biological determinations that were made and which Plaintiffs do not dispute—that the releases will benefit coho salmon and have at most almost no effect on Central Valley species—do not trigger formal consultation.

In sum, Plaintiffs have shown no imminent threat of concrete injury, and their alleged "concrete interest" is distinguishable from the direct interest in the species in *Salmon Spawning*, 545 F.3d 1225-26. Plaintiffs' vague alleged harm is not "fairly traceable" to Reclamation's decision, nor "redressable" by a favorable judicial ruling. Fed. Def. Br. at 18-19. Plaintiffs'

causation and redressability arguments in reply fail to satisfy the standards in *Salmon Spawning*, because they are legally wrong and stretch the term "relaxed" beyond reason. *Salmon Spawning*, 545 F.3d at 1229. At bottom, Plaintiffs' standing rests on a "chain of conjecture"—winding from purportedly required ESA consultation through potential future restrictions to water supplies that may someday be imposed by a third party agency if conditions in this vast and complicated ecosystem were to deteriorate for listed species—too attenuated for standing. *Id.* at 1228.

B. Plaintiffs Fail To Show Standing To Bring Their Substantive Claims.

As we have shown, given Reclamation's ability to use other CVP water to meet all flow and temperature requirements, the augmentation releases would not change the "status quo…." Fed. Def. Br. at 18, *quoting* AR 3 at 00053-54. Allocations for 2013 were not changed because of the 2013 augmentation releases and it was entirely unclear—but "unlikely"—that the releases would affect future allocations. *Id.* at 18; Dkt. 116 ("PCFFA Opp.") at 8, n.4; AR 00028; 00047.

In their reply, Plaintiffs nonetheless claim they satisfy the injury-in-fact requirement because the augmentation releases threatened to cause a "hole" in CVP storage, which was "likely to impact CVP water supply allocations in 2014." Pls. Reply at 4. They claim to satisfy their burden to show causation because future "threatened reductions in water supply" are fairly traceable to the augmentation releases. Pls. Reply at 4. To support these claims, Plaintiffs cite *San Luis & Delta-Mendota Water Authority v. U.S. Department of the Interior*, 905 F. Supp. 2d 1158 (E.D. Cal. 2012) ("*San Luis v. DOI*"), and *San Luis & Delta-Mendota Water Authority v. United States*, 672 F.3d 676 (9th Cir. 2012) ("*San Luis v. U.S.*"). But given the uncertainty about the effects of the augmentation releases on water allocations, those cases are distinguishable.

In *San Luis v. DOI*, for example, injury-in-fact was satisfied because "hydrologic conditions likely to alleviate any such harm were in fact both unpredictable and 'quite unusual.'" 905 F. Supp. 2d at 1171. Causation was established because evidence showed "it was more likely than not that the 'hole' would not fill," and "Federal Defendants have produced no evidence to the contrary." *Id.* at 1172. Similarly, in *San Luis v. U.S.*, causation was established because

"[h]ad Interior [properly] accounted for [water] in question … more water would have been available for allocation to CVP contractors, including those represented in this lawsuit," and that "failure to properly account for the releases would cause additional shortfalls [which] would cause the Bureau to proportionally reduce the amounts of water for delivery to agricultural contractors." 672 F.3d 676, 702-703.

Here, in contrast, the record shows that augmentation releases did not impact 2013 allocations, and there are significant questions as to whether any "hole" in storage would carry over and, if it did so, whether and how it would impact allocations south of the Delta in general, and to Plaintiffs in particular, in 2014. *See* AR 00047 ("Reclamation has not identified any specific impact to water allocations … as a result of the flow augmentation"); AR 2 at 00028 (if Trinity Reservoir "fills during 2014, there would be no effect to water resources"). In fact, the record shows that 2014 allocations were "not likely to be affected," and would "depend on the water year 2014 hydrology and operations objectives." AR 2 at 00028. Thus, unlike Plaintiffs' precedent, it was unclear whether allocations would be affected by the relatively modest augmentation releases.

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

A. Reclamation's Interpretation of the 1955 Act is Entitled to Deference.

"When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'" *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). In such a case, a reviewing court must give deference to the agency's interpretation of the statute. *Chevron*, 467 U.S. at 843. Plaintiffs argue that *Chevron* deference does not apply here because Reclamation did not engage in any formal rulemaking interpreting the Trinity River Division Central Valley Project Act of 1955, Pub. L. No. 84-386, 69 Stat. 719 (1955) ("1955 Act"). *See* Pls. Reply at 16-17. Plaintiffs'

argument misstates *United States v. Mead*. In fact, *United States v. Mead* states that, "the want of [formal rulemaking] does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *See Mead*, 533 U.S. at 230-31.

Here, Congress expressly directed the Secretary to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife." 1955 Act, § 2. The Secretary has interpreted this statute as "limit[ing] the integration of the Trinity River Division with the rest of the Central Valley Project and giv[ing] precedence to in-basin needs." AR 2 at 0017; *see also* 1979 Opinion at 3-4; 1974 Memorandum at 1-2; AR 34 at 1180. The fact that this has been the agency's announced position since at least 1974 and that it has been reaffirmed several times confers weight to the interpretation. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (noting that one of the factors the Court should consider in determining the level of deference to give an agency interpretation is the consistency of the agency's position). Furthermore, although this action was not undertaken by a formal rulemaking process, it was done as part of a public process, and described in the 2012 and 2013 Environmental Assessments ("EAs"), which went through a notice and comment period, and received extensive comments from Plaintiffs regarding the Federal Defendants' legal authority. Additionally, deference is particularly warranted here because the statute itself leaves the Secretary the discretion to determine what "appropriate measures" are. *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990) (explaining that when an agency is given the discretion to implement a statute, the agency's interpretation of a statute is entitled to *Chevron* deference). The Secretary has specifically interpreted this directive as authorizing the flow augmentation releases as "appropriate measures to insure the preservation and propagation of fish and wildlife." AR 2 at 0017; AR 34 at 1180. Plaintiffs have included a relatively lengthy discussion of the difference between *Chevron* and *Skidmore* deference in order to mask the most relevant deference principle in this action, which is that Reclamation's technical determination

and predictive estimates are entitled to considerable deference. *See Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). Deference to agency determinations is at its greatest when that agency is choosing between various scientific options. *Delta Smelt Appeal.* The 1955 Act directs the Secretary to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, and the court owes deference to the agency's determination of the measures that satisfy that directive.

B. Reclamation Properly Relied Upon the 1955 Act for the Authority to Make the Flow Augmentation Releases

Section 2 of the 1955 Act authorized the construction of the Trinity River Division subject to the requirement that the Secretary of the Interior "adopt appropriate measures to insure the preservation and propagation of fish and wildlife."[1] In 2012 and 2013, when it became apparent that conditions in the lower Klamath River similar to those which contributed to the large scale fish die off in 2002 were present, the Secretary adopted appropriate measures to insure against a significant loss of the salmon population, after examining this action in the 2012 and 2013 EAs and taking comment from entities, including Plaintiffs. *See* AR 2; AR 34. Since Reclamation began instituting these measures in 2004, it has undertaken them in furtherance of this mandate to insure the preservation and propagation of fish and wildlife. *See* AR 2; AR 34.

Plaintiffs argue that the authorization in the 1955 Act was either implicitly repealed or superseded by section 3406(b)(23) of the Central Valley Project Improvement Act, Pub. L. No. 102-575, §§ 3401-12, 106 Stat. 4600, 4706-31 (1992) ("CVPIA"), because the CVPIA was enacted later, is more specific, and is irreconcilably in conflict with the earlier mandate in the 1955 Act that, as part of the operation of the TRD, the Secretary must adopt measures to insure

[1] The area the Secretary was required to protect "include[es], **but [is] not limited to**, the maintenance of the flow of the Trinity River below the diversion point . . . and the flow of Clear Creek below the diversion point." 1955 Act § 2 (emphasis added). Thus, Plaintiffs' suggestion that the CVPIA does not authorize the releases to areas other than the Trinity River and Clear Creek and not to the Klamath River is without merit.

the preservation and propagation of fish and wildlife. This argument lacks merit. CVPIA Section 3406(b)(23) directs the Secretary to take action to meet the fishery restoration goals of the 1984 Act. As Federal Defendants discussed in their opening brief, the fishery restoration goals were to be met through rehabilitation of fish habitats in (A) "the Trinity River between Lewiston Dam and Weitchpec," and (B) "tributaries of [the Trinity River] below Lewiston Dam and in the south fork of such river." Pub. L. No. 98-541 § 2, 98 Stat. 2721 (1984). No other geographic areas are mentioned, including the area downstream of the confluence of the Trinity and Klamath Rivers. Accordingly, to the extent that the CVPIA limits Reclamation's authorization to "adopt appropriate measures to insure the preservation and propagation of fish and wildlife," 1955 Act at § 2, it does not do so with regard to the lower Klamath River. As Plaintiffs point out, the 1984 Act was amended in 1996, after the CVPIA's enactment, to extend the goals of the 1984 Act to "the Klamath River downstream of the confluence with the Trinity River." Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1955, Pub. L. No. 104-143 § 3(b), 110 Stat. 1338 (1996). The addition of this language shows that Congress recognized that the goals of the 1984 Act did not involve restoration of the lower Klamath River prior to 1996, but thereafter extended the reach of the 1984 Act to this location.

Additionally, Plaintiffs are incorrect that the flow augmentation releases are "contrary to the direction in CVPIA section 3406(b)(23) to implement the Secretary's decision on permanent flows." Pls. Reply at 15. The flow augmentation releases, which have been made only to remedy an unusual convergence of events, are separate and distinct from ROD releases, which implements the Secretary's decision. The ROD flow measures are for the restoration of fish habitat in the mainstem of the Trinity River and not the lower Klamath River and that the flow augmentation releases challenged in this action are necessary to insure adequate conditions for the fish in the lower Klamath River as they begin their migration. *See* AR 2, 34, 67.

As Federal Defendants have noted previously, the Trinity River Flow Evaluation Study ("TRFES") and EIS, and the ROD, focused on measures necessary to restore habitat conditions

within the 40 miles of Trinity River mainstem immediately below Lewiston Dam, and well above the Klamath-Trinity confluence and the lower Klamath River where these augmentation flows were determined to be necessary to prevent a die off of Trinity River and Klamath River fish.[2] The ROD was focused in this manner because Reclamation concluded that the detrimental effects of TRD construction and operation were particularly severe within this area. AR 67 at 03010; AR 70 at 03244; AR 71 at 03844. The fact that the plan Reclamation developed to meet the requirements of the CVPIA §3406(b)(23) – the ROD - is limited to the mainstem of the Trinity River does not preclude Reclamation from implementing other actions to ensure the preservation of fishery conditions in the lower Klamath River. *See* AR 67 at 03017.

Plaintiffs continue to mischaracterize Federal Defendants' position as allowing "essentially unlimited releases," and they argue that Federal Defendants were required to revise the ROD flow schedule to include the flow augmentation releases. *See* Pls. Reply at 8-10. Plaintiffs ignore that the ROD was based on over 20 years of detailed scientific study resulting in the determination that the ROD flow levels and other measures were essential not only to mimic the natural hydrograph, but also to restore a healthy mainstem Trinity River. *See, e.g.* AR 70 at 03281-3644; AR 71 at 03978-4034 (in particular tables 8.2 and 8.3). ROD flow releases also are necessary to flush sediments and provide other geomorphic benefits that – combined with mechanical river restoration and other recommendations – restore the mainstem of the Trinity River while allowing deliveries outside the watershed. AR 67 at 03004-05, 03007, 3015-16.

The 1979 Solicitor's Opinion cited by Federal Defendants in their opening brief makes clear that the 1955 Act authorizing the TRD, integrated the TRD into the CVP subject to the direction that "in-basin needs take precedence over needs to be served by out-of-basin

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[2] Plaintiffs previously challenged Federal Defendants' interpretation of CVPIA §3406(b)(23) as allowing the ROD to be focused in this manner, and the Ninth Circuit rejected Plaintiffs' arguments, recognizing that "the federal agencies were within their discretion in focusing the EIS on mainstem rehabilitation as a part of promoting fishery basin-wide." *Westlands Water Dist. v. United States*, 376 F.3d 853, 867 (9th Cir. 2004).

diversion." Memorandum from the Solicitor to Assistant Secretary – Land and Water Resources, *Proposed Contract with Grasslands Water District* (December 7, 1979) ("Krulitz Memorandum" or "1979 Opinion") (Dkt. 51-3) at 3-4 ("Congress' usual direction that the Trinity River Division be integrated into the overall CVP as set forth at the beginning of section 2 [of the 1955 Act], is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs."). Plaintiffs' suggestion that a 1974 Memorandum from the Assistant Regional Solicitor, a document that they are now improperly seeking to insert into the record, nullifies this later opinion, is without merit. The 1974 Memorandum cited by Plaintiffs addresses whether flood control releases could be made and does not address the authority that Reclamation considered in moving forward with the recommendation for the in-basin releases. Memorandum from the Assistant Regional Solicitor to the Regional Director, Bureau of Reclamation, Sacramento, *Request for Opinion re Authority of the Secretary of the Interior to Alter Present Functions and Accomplishments of the Trinity River Division, Central Valley Project*, (July 1, 1974) ("1974 Memorandum") (Dkt. 128-3) at 1-2. The 1974 Memorandum recognizes that releases to fulfill in-basin needs and releases for flood control were treated differently by Congress. *Id.* at 2. Additionally, similar to the 1979 Opinion, the 1974 Memorandum recognizes that "[u]tilizations of water benefitting the Trinity Basin . . . are set forth as exceptions to full integration [in the CVP]." *Id.* at 1-2. Thus, not only does Plaintiffs' suggestion that the 1974 Memorandum is more applicable than the 1979 Opinion fail, even the 1974 Memorandum supports the Solicitor's determination that Congress gave Reclamation the authority to make the flow augmentation releases.

C. Reclamation met its trust obligations to the Hoopa Valley and Yurok Tribes

Plaintiffs suggest that the Federal Defendants' trust obligations to the Hoopa Valley and Yurok Tribes provide no support for the action because those Tribes' water rights only attach to "natural flow" and cannot require a release of previously stored water. As an initial matter, Plaintiffs have improperly asked the court to take judicial notice of Reclamation's daily

operations reports for August-September 2012 and August-September 2013, even though Reclamation made its determinations that the releases were necessary through a public process months before these operations reports were prepared. The reports were not relied upon by Reclamation in making its decision and they do nothing to explain the technical terms or the factors that Reclamation considered.[3] Generally, in a review of agency action of this nature, the scope of judicial review is limited to the administrative record that formed the basis of the agency decision. *Ctr. for Biol. Diversity v. USFWS,* 100 F.3d 1443 (9th Cir. 1996). This improper attempt to supplement the record with post-hoc materials that were not considered in the agency's decision-making process should be denied.

Plaintiffs' arguments regarding the Federal Defendants' trust obligations also contradict both the specific authorizations related to the TRD as well as general case law. Both the 1955 Act and the CVPIA specifically authorize the use of TRD supplies for the benefit of the Trinity River fishery, and the CVPIA also specifically recognizes the trust responsibility to the Hoopa Valley Tribe. The ROD itself also calls for the release of stored water, in part to meet this obligation to the Tribe.

The U.S. Supreme Court has determined that under certain circumstances federal reserved water rights can be satisfied from stored water. *Arizona v. California,* 373 U.S. 546, 596-601 (1963) (confirming reserved water rights for five Indian reservations); *Arizona v. California,* 376 U.S. 340, 343-46 (1964) (decreeing for those reservations "water controlled by the United States"). *See also Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032, 1033 (9th Cir. 1985) (affirming the authority to "order the water released" based on the

[3] The reports in fact confuse issues and provide further support for the need to defer to agency expertise in these issues. Even if the fact that water used for flow augmentation was released from storage was relevant to this issue, which it is not, the State Water Board regulations do not consider water to be "stored" unless it remains in a reservoir for more than 30 days. Thus, daily inflow and release data does not show the amount of water released from storage or simply "regulated," and further data would be needed to determine whether, under state law, the excess releases involved the release of "stored water" and the extent of these amounts.

Nation's reserved fishing right); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261 (9th Cir. 1984) (finding that authorized project purposes may be superseded by tribal rights for the use of stored water).

III. Reclamation Complied with State Law.

A. Plaintiffs' Challenge Under Section 8 of the Reclamation Act is Without Merit

Section 8 of the Reclamation Act preserves the ability of states to determine the appropriation, use, and distribution of water for irrigation and requires the Secretary to proceed in conformity with state law when acquiring and using water for Reclamation projects. 43 U.S.C. § 383; *see also California v. United States*, 438 U.S. 645, 653 (1978). Section 8 does not provide Plaintiffs with a vehicle to attempt to "enforce" Reclamation's compliance with state law, particularly when the State of California was consulted and concluded that no permit was required to make the flow augmentation releases.

A recent Ninth Circuit opinion considered and rejected an attempt to use Section 8 in much the same way that Plaintiffs attempt to use the provision in this suit. In *Wild Fish Conservancy v. Jewell*, 730 F.3d 791 (9th Cir. 2013), the Ninth Circuit examined a challenge alleging that Reclamation had violated section 8 by diverting water for use in a fish hatchery without a permit. Rather than determining whether Washington law required a modification to Reclamation's permits in order to operate the off-channel hatchery operations, the court held that plaintiffs could not invoke section 8 in these circumstances to compel enforcement of state law against federal agencies. 730 F.3d at 798. The court noted that the state agency with authority over water rights had notice of the operations that the Conservancy was challenging and had indicated that it "either deem[ed] a permit unnecessary as a matter of state law" or had "elected to address the underlying instream flow and fish passage issues by alternative means." *Id.* at 799. The court explained that overriding the state agency's interpretation of state law and exercise of enforcement discretion would be "more likely to frustrate than further [the] statutory

objectives of section 8." *Id. (citing Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). The court thus refused to allow the Conservancy to pursue the claim, because allowing the Conservancy to independently enforce the permit requirement would contradict state law and the clear Congressional intent in the Reclamation Act. *See also San Luis Unit Food Prods. v. United States*, 709 F.3d 798, 806 (9th Cir. 2013) (rejecting a section 8 claim seeking to enforce California Water Code §1702 because that section "does not instruct the Bureau to do anything.").

The instant suit is similar to *Wild Fish Conservancy* and should result in a similar dismissal of Plaintiffs' invocation of Section 8 here. As Federal Defendants previously noted, before making the releases in 2012, Reclamation sought confirmation from the State Water Resources Control Board ("State Water Board") that modification of the permits was not needed, using the established State Water Board procedure of a change petition, because, while Reclamation had determined that the change was not necessary, this was the best suited process for confirming Reclamation's position.[4] Through this process, Reclamation obtained the

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[4] Under the provisions of the California Water Code, the State Water Board, and the Attorney General acting through the state courts, have the authority to prevent trespass and control the unauthorized diversion and use of water. Cal. Water Code §1052. In addition, in California, the State Water Board has been given general authority over the planning and allocation of water resources. *IID v. SWRCB*, 225 Cal.App.3d 548 (1990) (noting that the State Water Board has "broad, openended, expansive authority to undertake comprehensive planning and allocation of water resources."). *See also* Cal. Water Code §106 (establishing state power over waters), §174 (establishing the State Water Board as an entity tasked with providing orderly and efficient administration of water), §275 (authorizing the State Water Board to take actions to prevent waste and unreasonable use).

Plaintiffs make the puzzling contention that Reclamation has "failed to address California Water Code sections 1381 or 1052(c)." Section 1381 merely establishes that a permit is effective so long as water is being used for beneficial purposes, and section 1052(c) authorizes the Attorney General, upon request of the SWBCB, to institute actions to stop unauthorized diversions. The State Water Board has not questioned Reclamation's continued use of water under the permits for beneficial purposes nor has it requested that the Attorney General pursue an action against Reclamation. Thus, Federal Defendants see no reason to address these sections in any further

requested confirmation that it could bypass water or release it without a change.[5] Reclamation thus proceeded in conformance with California law in undertaking this action.

B. Federal Defendants did not violate Section 3411(a) of the CVPIA.

Section 3411(a) of the CVPIA requires that "the Secretary shall, prior to the reallocation of water from any purpose of use or place of use specified within applicable Central Project water rights permits and licenses to a purpose of use or place of use not specified within said permits or licenses, obtain a modification in those permits or licenses in a manner consistent with the provisions of applicable State law . . . ." Reclamation's releases of 39,000 af of water in 2012 and 17,500 af in 2013 were not reallocations of water from any purpose or place of use to any other purpose or place of use. These flows were provided from releases or bypasses of water that had not yet been delivered for CVP consumptive uses or other purposes, and making the releases did not change the allocations for those years.

In addition, the flow augmentation was undertaken in a manner consistent with the provisions of applicable State law, and this was confirmed by the State Water Board. Reclamation sought and received input from the State Water Board staff that by releasing or bypassing Trinity River water, it would not be creating the potential for any loss of the Trinity River water rights or be vulnerable to any claim that it was acting in a manner inconsistent with its water rights. Reclamation thus complied with the requirements of Section 3411(a).

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detail. Plaintiffs original memorandum emphasized the process set forth in section 1701-1705, but as noted in *San Luis Unit Food Processors*, 709 F.3d at 806-807, the plain meaning of these sections mandates only a petition process, followed by action by the Board. It does not require specific action by Reclamation beyond the actions already taken.

[5] Curiously, Plaintiffs assert that Reclamation has failed to proceed in conformance with the federal laws respecting State sovereignty over water, but at the same time, they are asking a federal court to disregard or overrule the views of a senior official in the California agency charged with interpreting and enforcing the requirements of the California Water Code. To the extent that Plaintiffs are asking the Court to ignore the conclusions of the State Water Board Division of Water Rights regarding the requirements of California law, referral to the state agency for further determination would be more consistent with the state interests the Plaintiffs are purporting to advance.

IV. Reclamation Was Not Required to Prepare an Environmental Impact Statement.

Agencies are only required to prepare an Environmental Impact Statement ("EIS") for major federal actions that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(C). For a plaintiff to be successful on a claim that an agency's decision not to prepare an EIS was arbitrary and capricious, the plaintiff must raise "'substantial questions whether a project may have a significant effect' on the environment." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citation omitted). However, the burden of establishing that an agency's decision was arbitrary and capricious is on the party that brings an Administrative Procedure Act ("APA") case, see *Committee to Pres. Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1555 (10th Cir. 1993), and therefore, a plaintiff cannot be successful simply by speculating on possible effects that the agencies should have analyzed or uncertainties that could have been removed through further study as Plaintiffs did here. Plaintiffs must support their speculative assertions. Additionally, because agencies are entitled to rely upon their own experts and methodologies, *see Delta Smelt Appeal*, 2014 WL 975130, at *17, 23, 25, a plaintiff cannot simply argue that the agency should have analyzed potential effects in a different manner.

Even where there is uncertainty as to a potential effect, if further study and analysis would not help remove that uncertainly, an EIS is not necessarily required. "[T]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for such speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982). If data or information is not available, an agency certainly cannot be required to consider it in an EIS. *See Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 594 (9th Cir. 1981). Plaintiffs are incorrect that further collection of data and analysis in an EIS would have resolved uncertainties or prevented speculation on potential effects of the flow augmentation releases. *See* Pls. Reply at 24-25. In its analysis in its EAs, Reclamation explained that certain effects were uncertain or

difficult to quantify. *See, e.g.*, AR 2 at 12 (explaining that the potential impact on cold water storage is dependent upon whether the Trinity reservoir fills or spills or if safety-of-dams releases occur, and that power generation "would be complex to determine and quantify depending on the particular refill patterns at Trinity Reservoir, whether safety-of-dams releases occur at Trinity Dam in 2014, Shasta Reservoir operations, etc."). However, an EIS would not remove these uncertainties because further study would not allow Reclamation to better understand or more accurately predict future hydrology and thus how much water would be available in the future for purposes such as cold water storage, deliveries to CVP contractors, and power generation. *See, e.g.*, AR 34 at 1188 ("[T]he complexities and uncertainties of accurately predicting water surface elevations that far in the future are tied to variable and unpredictable precipitation patterns . . . "). Accordingly, Plaintiffs have not met their burden to demonstrate that there are substantial questions regarding whether the project will have a significant effect on the environment that could be resolved through further study in an EIS.

Plaintiffs' note that the ROD found that implementation of the ROD flow regime would result in a significant impacts to the CVP water supply and suggest that it is inconsistent for Reclamation to conclude that the flow augmentation releases would not cause a significant impact to CVP water supplies. This is not the case. The comparison of implementation of the ROD flow regime to the lower Klamath River flow augmentation action is not appropriate. First, the action described in the ROD changed and called for increased flows in the Trinity River in all years, while the augmentation actions are contemplated only under certain, unusual conditions. Second, the magnitude of the increased flows are very different, with the ROD flow changes being much larger.

Regarding the remainder of Plaintiffs' arguments regarding whether Federal Defendants were required to prepare an EIS, Plaintiffs have failed to rebut Federal Defendants' arguments, and accordingly, Federal Defendants rely upon their prior briefing. *See* Fed. Defs. Br. at 28-34, Fed. Defs. Opp. to Pls. Mots. For TRO & PI (Dkt. 51) at 23-25.

V. Plaintiffs Fail To Show Reclamation Violated The ESA.

In their reply, Plaintiffs suggest that "Federal Defendants' ESA argument boils down to an 'almost, not quite, but close enough' defense." Pls. Reply at 33. Though a pithy sound bite, this assertion is untrue. Our position is that the agencies' biological analyses and Reclamation's determination that short-term augmentation flows were consistent with the limits of ESA Section 7(d)—which controls during ongoing consultation—were reasonable, had record support, and are unchallenged. Plaintiffs' hyper-technical reading of the ESA, in contrast, lacks legal support and defies common sense. Their reply confirms that their ESA claim lacks merit.

A. Reclamation Reasonably Determined That ESA Section 7(d) Was Controlling And Satisfied Its Requirements.

All parties and the record agree that Reclamation expressly recognized its ESA consultation obligations and considered the effects of the 2013 augmentation release on listed species. *See e.g.* Pls. Reply at 32-33; Fed. Def. Br. at 35; AR 2 at 00029, 31-32, 39-41; AR 3 at 00052. Nor is there any dispute that Reclamation and NMFS biologists together developed the recommendations that "formed the basis of the Proposed Action," expressly "considered any affects to threatened SONCC coho salmon associated with implementation, and concluded that there may be minor benefits related to additional available rearing habitat during this time period." AR 2 at 00040; AR 3 at 00051. The record also shows that Reclamation analyzed potential effects of the action on listed Central Valley species at issue and found them to range from absolutely none to potentially a "relatively minor reduction" in available cold water resources, AR 2 at 00027-28—at most "less than 0.1 [degree Fahrenheit]" change in temperature in the Sacramento River, AR 3 at 00053—which was "similar" to doing nothing at all. AR 2 at 00033-34. And, recognizing that it was currently in ESA consultation with NMFS regarding this water system and these species, Reclamation properly considered whether its action complied with ESA Section 7(d) and reasonably determined it did. Fed. Def. Br. at 39, 42-43; AR 3.

Despite all of this, Plaintiffs still insist that Reclamation failed to consult at all with NMFS on the augmentation releases. Pls. Reply 32-36. This claim is untrue. Indeed, if

Reclamation were determined to skirt its ESA obligations, as Plaintiffs suggest, it would not have recognized those obligations, worked with NMFS to develop the action, and analyzed its effects on ESA-listed species, and then also take the additional step to determine whether its action comported with ESA Section 7(d). In other words, the record demonstrates that Reclamation was aware of its ESA obligations, and correctly recognized that when, as here, an action agency and consulting agency have initiated or reinitiated consultation in accordance with Section 7(a)(2) of the ESA, Section 7(d) governs review of the action agency's conduct. 16 U.S.C. § 1536(d) ("After initiation of consultation … the Federal agency … shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.").

This fact, that consultation is ongoing between NMFS and Reclamation, perfectly explains Reclamation's conduct as it relates to the releases and shows that Reclamation fully carried out its legal obligations. To briefly recap: TRD operations—including the export of water out of Trinity Reservoir—are part of the 2008 biological assessment ("2008 BA") that Reclamation used to initiate consultation on the coordinated operations of the CVP and State Water Project ("SWP"). Fed. Def. Br. at 40; PCFFA Opp. at 10. That 2008 BA has never been superseded or withdrawn; it examines the affects of project operations on all listed species at issue in this case, and the "action" described therein includes the storage, diversion, and delivery of water from all CVP facilities, including the Trinity. Fed. Def. Br. at 40; PCFFA Opp. at 10. NMFS's 2009 Biological Opinion ("2009 Salmonid BiOp"), which followed that 2008 BA, now governs operation of the CVP; it too includes and considers the export of water—in amounts greater than are at issue here—out of the Trinity Reservoir as part of CVP operations. *Id; id.*

Plaintiffs complain that the exact volume and timing of the 2013 augmentation releases were not expressly considered in the 2009 Salmonid BiOp. *See, e.g.*, Dkt. 113 ("Pls. Mem.") at 40-41. But there is no such exacting requirement for a biological opinion such as this, which extends for decades, to address every conceivable operational situation that could arise in this

highly complex system. *See Delta Smelt Appeal*, 2014 WL 975130, at * 3 (CVP "largest federal water management project in the United States") (citation omitted). It is sufficient and reasonable for Reclamation (and NMFS, which worked on the action with Reclamation) to conclude that the 2009 Salmonid BiOp, which includes storage and delivery of water from Trinity Reservoir as part of CVP operations, encompassed this situation as part of those Trinity River Division operations. BiOp at 34; *see* PCFFA Opp. at 10, *citing* 2009 Salmonid BiOp at 72, 229-32.

And the record shows that consultation regarding TRD operations is ongoing. Regarding Southern Oregon and Northern California Coast ("SONCC") coho salmon, NMFS's 2009 Salmonid BiOp states that NMFS intends to issue a coho-specific BiOp based on the 2008 BA:

> NMFS will analyze the effects of the Trinity River Division portion of the proposed action on SONCC coho salmon in a separate biological opinion…. NMFS is in the process of conducting a separate consultation on the effects of the Trinity River Division operations on listed coho salmon in the Trinity River.

Fed. Def. Br. at 40, *citing* 2009 Salmonid BiOp at 222, 587. NMFS has not issued that separate BiOp, which will "terminate" formal consultation, 50 C.F.R. § 402.14(*l*), and thus that consultation continues. Fed. Def. Br. at 40; AR 3 at 00053 ("Reclamation was also informed of NMFS's intent to issue a separate biological opinion addressing SONCC coho salmon …. To date, Reclamation has not received that biological opinion, and consultation continues.").

Plaintiffs repeatedly characterize this straightforward conclusion as a "bald assertion." *See* Pls. Reply at 35, 37. That is insufficient to overturn agency action, as "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) (cited approvingly by *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). Plaintiffs offer no evidence, let alone "clear evidence," to question whether Reclamation truly has yet to receive NMFS's forthcoming coho biological opinion—which "terminate[s]" formal consultation—or that inter-agency consultation regarding the effects of the TRD on SONCC coho salmon is therefore ongoing.

Nor have Plaintiffs shown that consultation regarding the Central Valley listed species at

issue is languishing in a judicially imposed purgatory. As we explained, the 2009 Salmonid BiOp addressed the effects of the Trinity River Division on the listed Central Valley species at issue. Fed. Def. Br. at 40-41. The Court remanded the 2009 Salmonid BiOp to NMFS; in so doing, it upheld the BiOp's jeopardy determination and did not vacate any portion of ongoing operations under during the ongoing remand; nor did it impact in any way the 2008 BA. *In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802 (E.D. Cal. 2011).[6] The Court "required Reclamation and [NMFS] to complete a BiOp analyzing the impact of CVP and SWP operations on five aquatic species, including three salmonid species, and a related NEPA analysis, in accordance with a schedule that calls for issuance of a Record of Decision by Reclamation by April 29, 2016." *Consol. Salmonid Cases*, 1:09-cv-01053 Dkt. 753 at 2. As Defendant-Intervenors correctly noted, these Plaintiffs have supported two extensions of that remand so that they could participate in a "collaborative" process with Federal Defendants to develop new science. PCFFA Opp. at 11, n.7; *Consol. Salmonid Cases*, 1:09-cv-01053, Dkt. 734 at 1 (Mar. 5, 2014) (Plaintiffs' joinder to motion "for a three-year extension of the current remand schedule); *id.*, Dkt. 753 at 4, n.1 (no objection to additional year-long extension).

Contrary to Plaintiffs' claim, Pls. Reply at 36, Federal Defendants do not concede that during these past several years, consultation between the agencies has not yet begun. While we noted that Reclamation was considering providing a supplement to its 2008 BA, Fed. Def. Br. at 42, neither Court order nor the ESA requires it to do so in order to initiate consultation with NMFS, as Plaintiffs contend. As a matter of law, formal consultation was initiated with Reclamation's submission of its 2008 BA. 50 C.F.R. § 402.14(c). The Court's order merely remanded the 2009 Salmonid BiOp that had "terminated" that formal consultation, 50 C.F.R. § 402.14(*l*)(1), but left wholly intact the 2008 BA that initiated the consultation. Thus, formal consultation is ongoing. *Salmon Spawning*, 545 F.3d at 1224 ("Formal consultation begins with a

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[6] That opinion is on appeal to the Ninth Circuit, which recently overturned the same district court's related decision remanding the Delta Smelt BiOp. *San Luis Delta Mendota Water Auth. V. Jewell*, 2014 WL 975130.

written request by the agency planning to take action ('action agency'), and concludes with the issuance of a biological opinion ('BiOp') by … the 'consulting agency.'"). That sensible conclusion explains why, in remanding the 2009 Salmonid BiOp, the Court did not separately require Reclamation to reinitiate formal consultation by a date certain to get the process moving, because no such requirement was needed. Plaintiffs' insistence that Reclamation must again initiate formal consultation with NMFS, Pls. Reply at 36, is unavailing. Indeed, under their "strict" view of the ESA, if Reclamation does not first submit a new "initiation package," Pls. Reply at 36, Plaintiffs could sue Reclamation for failing to ever initiate formal consultation, even after NMFS issues its remanded BiOp based on the 2008 BA. That is absurd.

In short, consultation between NMFS and Reclamation with regard to the SONCC coho salmon and the listed Sacramento River and Central Valley species is underway. During this consultation, Section 7(d) authorizes Reclamation to operate the Trinity River Division—including Trinity Reservoir—while consultation is ongoing, as long as it does not represent an irreversible or irretrievable commitment of resources that would foreclose any future reasonable and prudent alternative. 16 U.S.C. § 1536(d).

To that end, Reclamation recognized that Section 7(d) controlled, and expressly considered whether implementing the 2013 action prior to receiving the remanded 2009 Salmonid BiOp would violate ESA Section 7(d). AR 3 at 00054. Reclamation reasonably explained that the action was consistent with the limits of ESA Section 7(d) for several reasons. Among them, Reclamation explained that the "2013 late-summer flow augmentation release will continue the status quo as to listed species in that Reclamation still retains discretion to provide flow and temperature conditions that are consistent with currently anticipated conditions with respect to the listed fish." *Id*. The 2013 augmentation flow was not expected to preclude development of RPA measures during ongoing consultation, Reclamation reasoned, because

> [t]he volume of Trinity Reservoir water used for augmentation and not available for other purposes (e.g., river temperature control) will only be a 'deficit' in Trinity … Reservoir[] until the reservoirs fill [or] have significant Safety-of-Dam

> releases (at Trinity)…. It is likely that one or all of these conditions will happen before issuance of the new CVP/SWP Opinion.

AR 3 at 00054. Finally, Reclamation reasonably concluded that the augmentation release was also "consistent with the 2009 [Salmonid] Opinion RPA Action I.2.2.C." *Id*. Based on these determinations, Reclamation reasonably concluded that "the action would not constitute an irreversible or irretrievable commitment of resources which would have the effect of foreclosing the formulation or implementation of any RPA measures which would not violate section 7(a)(2) of the ESA." *Id.* The law requires nothing more.

B. Plaintiffs' Process Arguments Are Without Merit.

In reply, Plaintiffs still fail to even attempt to explain how augmentation releases would run afoul of ESA Section 7(d). Nor do they dispute that the releases will benefit SONCC coho salmon and will have zero to at most almost no impact on listed Central Valley species. Instead, they simply press their perceived paperwork transgressions with more extreme rhetoric. In five pages, they charge the United States with "obfuscation" and "obscur[ing] reality" three times, contend that the United States uses "smoke-and-mirror[s]," and insist at least four times that it must "resort" to "bald" assertions that the Court can disregard. Pls. Reply at 32-37. Plaintiffs' overheated arguments are unfounded and fail to show that Reclamation violated the ESA.

For instance, Plaintiffs again insist that Reclamation must initiate formal consultation on the augmentation releases with "a written request" with NMFS. Pls. Reply at 36. Even putting aside the ongoing consultation, Plaintiffs do not dispute that the augmentation releases will benefit SONCC coho salmon and have almost no impact on listed Central Valley species. What, then, is their basis to suggest that formal consultation was even required? In truth, they have none. As the Ninth Circuit recently confirmed in a case involving these Plaintiffs, formal consultation is required only "when the acting agency or consulting agency determines that the proposed action is *likely* to adversely affect a listed species or critical habitat." *Delta Smelt Appeal*, 2014 WL 975130, at *5; 50 C.F.R. §§ 402.13, 402.14. Here, neither Reclamation nor NMFS made any such determination, and the biological determinations that were made, and

which Plaintiffs accept, confirm that Plaintiffs have no basis to claim Reclamation violated the ESA by not formally consulting. Nonetheless, as we explained, even *if* formal consultation *were* required, it would not matter, because Reclamation and NMFS are engaged in Section 7 consultation regarding the species at issue, and Reclamation reasonably concluded that its action was within the limits of Section 7(d). *Supra*.

Plaintiffs' reply fares no better regarding informal consultation. They note that the record contains a 2004 concurrence letter from NMFS that past augmentation releases were not likely to adversely affect listed species. Pls. Reply at 35. True, but that merely confirms that Reclamation acknowledges that it may seek NMFS's concurrence that the effects of a proposed action are not likely to adversely affect listed species, as it did in 2004, AR 2358-60, if that had been the proper course. Here it was not; the agencies are already in consultation, and the ESA does not require Reclamation to overlay informal consultation on top of ongoing consultation.

Next, Plaintiffs note that our opening brief used the term "amounts to," and insist that it was meant as "obfuscation," designed to "create the false impression that Reclamation 'consulted' with NMFS …." Pls. Reply at 33. That is unfounded. The term was used to alternatively explain that *if* Plaintiffs *were* suggesting that informal consultation (on top of ongoing consultation) was needed, the agencies' close collaboration to develop the proposed action and analyze its effects would satisfy both the regulatory definition of that term, which includes "all discussions, correspondence, etc., between the [consulting agency] and the [action] agency … designed to assist the [action] agency in determining whether formal consultation ... is required," 50 C.F.R. § 402.13(a), and any common-sense understanding of it. At bottom, it is immaterial, because Reclamation's course—analyzing impacts and determining whether the action complied with Section 7(d)—was legally sufficient and should be upheld.

Plaintiffs insist that Federal Defendants "abandoned their original position that they did not have to consult on coho salmon" because the releases would benefit the species. Pls. Reply at 36. This assertion reflects several errors. First, it was never Federal Defendants' position that no consultation was required, only that "initiating formal consultation" was not needed, as we stated

in our answer and again made clear again in our opening brief:

> Federal Defendants' answer also does not support Plaintiffs' suggestion that no consultation occurred; in truth, the answer merely stated that initiating formal consultation in this context [that is, where an action will benefit a listed species and the agencies are already consulting] was not required.

Fed. Def. Br. at 39. Also, contrary to Plaintiffs' claim, there were multiple reasons that initiating formal consultation was unnecessary, namely that the action benefits coho salmon, and more fundamentally, that consultation was ongoing. Both are valid. The former is consistent with the ESA, which requires formal consultation only when "the proposed action is *likely* to adversely affect a listed species or critical habitat." *Delta Smelt Appeal*, 2014 WL 975130, at *5. Here, the record indisputably shows that the 2013 releases were expected to benefit coho salmon, AR 2 at 00040, so formal consultation was not required. The latter reason is also valid, as the record confirms that Reclamation is in consultation with NMFS regarding the species, AR 3 at 00053, and thus did not violate the ESA by not initiating it. Fed. Def. Br. at 39-40. Plaintiffs' claim that the Court may disregard these facts as "bald assertions," Pls. Reply at 37, is refuted above.

At bottom, Reclamation fully complied with its ESA obligations. Plaintiffs' process arguments are without merit and their Fifth Claim for Relief should be denied.

CONCLUSION

The Court should grant Defendants' Motion for Summary Judgment and Deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted this 15th day of May, 2014.

ROBERT G. DREHER
Acting Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

By: /s/ Anna K. Stimmel
ANNA K. STIMMEL, Trial Attorney
Natural Resources Section
P.O. Box 663

Washington, D.C. 20044-0663
anna.stimmel@usdoj.gov
(202) 305-3895

BRADLEY H. OLIPHANT, Trial Attorney
Wildlife & Marine Resources Section
999 18th Street, South Terrace, Ste. 370
Denver, CO 80202
bradley.oliphant@usdoj.gov
303-844-1381

Attorneys for Federal Defendants

Of Counsel:

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

Stephen R. Palmer
Assistant Regional Solicitor
Office of the Regional Solicitor
Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825-1890