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WESTLANDS WATER DISTRICT

12
13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA

15
16 SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY and
17 WESTLANDS WATER DISTRICT,

18 Plaintiffs,

19 v.

20 SALLY JEWELL, et al.

21 Defendants,

22 THE HOOPA VALLEY TRIBE; PACIFIC
COAST FEDERATION OF
23 FISHERMEN’S ASSOCIATIONS;
INSTITUTE FOR FISHERIES
24 RESOURCES; and YUROK TRIBE,

25 Defendant-Intervenors.

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

**FIRST AMENDED COMPLAINT FOR
VIOLATIONS OF RECLAMATION LAW,
THE NATIONAL ENVIRONMENTAL
POLICY ACT, AND THE ENDANGERED
SPECIES ACT, AND FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

26 Plaintiffs San Luis & Delta-Mendota Water Authority (“Authority”) and Westlands Water
27 District (“Westlands”) allege as follows:
28

I.

INTRODUCTION

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3 1. The farms and cities that depend upon water supply from the Central Valley
4 Project (“CVP”) are suffering a severe water shortage. This year CVP agricultural water service
5 contractors located south of the Sacramento-San Joaquin Rivers Delta (“Delta”) have been
6 allocated only 20% of their contract supply; the initial allocation in February was 25% but this
7 was cut by 5% on March 22 due to unusually dry conditions. Orchards and vineyards are
8 suffering severe stress, and row crops have been abandoned and other fields have been left fallow.
9 Already overtaxed groundwater aquifers are being further drained, and in desperation farmers are
10 using poor quality groundwater that damages soil and plants. Going in to 2014, the United States
11 Bureau of Reclamation (“Reclamation”) has projected that storage in CVP reservoirs, including in
12 Trinity Reservoir, will be far below average. Barring an extraordinarily wet winter, south-of-
13 Delta agricultural water service contractors expect to receive a very low initial allocation of CVP
14 water in February 2014, perhaps even a zero percent allocation. Farm workers, farm-related
15 businesses and whole farm communities on the western side of the San Joaquin Valley face a
16 growing water shortage catastrophe. This water shortage is causing physical, social, and
17 economic damage on a landscape scale.

18 2. Given this calamity, it is unthinkable that the Defendants would unlawfully
19 release water from CVP storage to the ocean instead of delivering that supply to water users who
20 desperately need it. But Defendants intend to do exactly that. On August 7, 2013, Defendants
21 announced that beginning on August 13 they will release up to 109,000 acre-feet of water from
22 the already low storage in the CVP’s Trinity Reservoir to the Trinity River. That water, so
23 needed by farms and communities in the western San Joaquin Valley, will be irretrievably lost.

24 3. Defendants’ purpose in making these illegal releases of stored CVP water is to
25 reduce the risk of a possible salmon die-off from disease in the lower Klamath River, downstream
26 of the confluence of the Klamath River and Trinity River. Such a die-off in the lower Klamath
27 River has been documented only one previous year, in 2002. Indeed, years with numbers of
28

1 returning Chinook salmon and flows in the lower Klamath River similar to the conditions
2 expected this year have not resulted in salmon die-offs. Defendants are thus choosing to make a
3 massive release of stored water from the Trinity Reservoir based on the unproven premise that
4 doing so will reduce the risk of a repeat of the unique 2002 event. For this speculative
5 precautionary benefit, Defendants intend to trade the certainty of losing desperately needed water
6 supply in 2013 and deepening the harm to CVP water users and the environment from water
7 shortage.

8 4. This misguided choice is not Defendants' to make; Defendants have no
9 authority to make the planned releases. Instead, the releases would contradict and violate the
10 Defendants' mandatory statutory duties.

11 5. First, the planned releases would violate section 3406(b)(23) of the Central
12 Valley Project Improvement Act ("CVPIA"), Title XXXIV, Pub. L. No. 102-575, 106 Stat. 4700
13 (1992). Under CVPIA section 3406(b)(23), the Secretary of the Interior ("Secretary") has a
14 mandatory duty to implement the flow requirements and criteria specified in a December 19,
15 2000 Decision for Trinity River Mainstem Fishery Restoration ("ROD"). Under the ROD, in
16 2013 Defendants may release up to but not exceeding 453,000 acre-feet of water from the Trinity
17 River Division ("TRD") for the purposes of fishery restoration, propagation and maintenance. If
18 Defendants make the planned August and September fishery releases, they will far exceed the
19 453,000 acre-feet volume limit for fishery releases set by the ROD. Hence, the planned releases
20 would violate the Secretary's mandatory duty under CVPIA section 3406(b)(23) to implement
21 fishery releases in accordance with the ROD.

22 6. Second, the planned releases of water stored by the TRD would violate section
23 3411(a) of the CVPIA, and section 8 of the Reclamation Act, codified at 43 U.S.C. section 383.
24 The lower Klamath River is not an approved place of use under the State water rights permits
25 applicable to the water stored by the TRD. CVPIA section 3411(a) directs that "the Secretary
26 shall, prior to the reallocation of water from any . . . place of use specified within applicable
27 Central Valley Project water rights and licenses to a . . . place of use not specified within said
28 permits or licenses, obtain a modification in those permits and licenses, in a manner consistent

1 with the provisions of applicable State law, to allow such change in . . . place of use.” In
2 addition, section 8 of the Reclamation Act requires Defendants “to proceed in conformity with”
3 State law “relating to the control, appropriation, use or distribution of water used in irrigation.”
4 43 U.S.C. § 483. The planned releases are intended to improve conditions for salmon in the
5 lower Klamath River. Defendants have failed, however to obtain a modification of the authorized
6 place of use in the State permits applicable to the TRD in accordance with State law. The
7 releases therefore would violate the Secretary’s mandatory duties under CVPIA section 3411(a)
8 and 43 U.S.C. section 483 to obtain a modification of the State permits before reallocating TRD
9 water for use in the lower Klamath River.

10 7. Third, the planned releases are a major federal action that will have significant
11 effects on the human environment. Yet, Reclamation has failed to identify and analyze those
12 effects, or consider alternatives, in an environmental impact statement as required by the National
13 Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* In letters to Reclamation dated
14 May 31, 2013 and July 31, 2013, Plaintiffs explained that the planned releases would be unlawful,
15 including for Defendants’ failure to prepare an environmental impact statement under NEPA.
16 The unnaturally high, cold flows to be released from Trinity Reservoir in August and September
17 will adversely affect biological resources in the mainstem of the Trinity River, including western
18 pond turtles, yellow-legged frog, and lamprey, and will result in the destruction of salmon redds
19 in the Trinity River when the unusually high flows recede in late September. The loss of stored
20 water threatens adverse effects on the listed coho salmon in the Trinity River, and Sacramento
21 River winter-run Chinook salmon and Central Valley spring-run Chinook salmon, by reducing the
22 pool of cold water available to maintain cooler temperatures in the upper Trinity River and the
23 upper Sacramento River. The loss of CVP water supply and loss of hydropower generation from
24 the releases will result in adverse effects to the environment throughout much of the CVP service
25 area. It will cause physical impacts to the environment in the Central Valley, including fallowing
26 and related dust emissions, groundwater overdraft and related subsidence, and use of alternative
27 energy sources to compensate for lost hydropower. While Defendants have attempted to
28 minimize or dismiss such effects in their environmental assessment, at a minimum the available

1 information raises substantial questions whether the releases may have a significant effect on the
2 environment. Under NEPA, Defendants therefore must analyze and disclose the effects of the
3 planned releases in an environmental impact statement, and provide an opportunity for public
4 review and comment on that analysis, before making the releases. Defendants' reliance instead
5 on an environmental assessment and a finding of no significant impact is arbitrary and capricious
6 and violates NEPA.

7 8. In August and September 2012, Defendants made releases from the TRD of
8 nearly 40,000 acre-feet for the same purpose. Plaintiffs have been and are still being harmed by
9 the 2012 releases, because the releases created a nearly 40,000 acre-feet hole in TRD storage.
10 Reclamation has not kept its promise to mitigate the loss of water supply from the 2012 releases,
11 nor has it kept its promise to develop a long-term strategy for addressing fish needs in the lower
12 Klamath River. The August and September 2012 releases are unlawful for the same reasons the
13 planned 2013 releases are unlawful: they are in violation of CVPIA section 3406(b)(23) because
14 they are in excess of the volume of fishery releases for 2012 set by the ROD; the 2012 releases
15 violate section 3411(a) of the CVPIA and 43 U.S.C. § 383 because the lower Klamath River is
16 not an approved place of use under the State water rights permits for the TRD; and Defendants
17 have violated NEPA by failing to prepare an environmental impact statement for the 2012
18 releases. In addition to relief regarding the planned 2013 releases, Plaintiffs request that the
19 Court set aside as unlawful Defendants' decision to make the 2012 releases, and enter other
20 appropriate relief.

21 9. Finally, Defendants' proposed action is contrary to section 7 of the federal
22 Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.* Federal action agencies must
23 consult under ESA section 7 regarding any action that "may affect" a listed species or its critical
24 habitat. 50 C.F.R. § 402.14(a). The proposed releases will affect species listed under the ESA,
25 including coho salmon in the Trinity River, and Sacramento River winter-run Chinook salmon
26 and Central Valley spring-run Chinook salmon in the Sacramento River and its tributaries.
27 Reclamation, as the action agency, has a duty under ESA section 7, 16 U.S.C. § 1536, to consult
28 with the National Marine Fisheries Service ("NMFS") regarding these effects on listed

1 anadromous fish, and with the United States Fish and Wildlife Service (“FWS”) regarding effects
2 on other listed species that may be affected. Reclamation has failed to complete formal
3 consultation with these agencies regarding the effects of the proposed releases as required by
4 ESA section 7. Furthermore, absent a completed biological opinion, Defendants will have no
5 authorization for any incidental take of listed species that results from the releases. Such take
6 would violate ESA section 9, 16 U.S.C. section 1538. On July 11, 2013, Plaintiffs provided
7 Defendants notice of these violations as required by ESA section 11(g), 16 U.S.C. § 1540(g).

8 10. Releasing the water to the Trinity River instead of delivering it to CVP water
9 service contractors south of the Delta will cause Plaintiffs irreparable harm from loss of precious
10 CVP water supply in a time of severe water shortage, and related and other irreparable harm to
11 the environment, including biological resources in both the Trinity River basin and the
12 Sacramento River basin, and to highly productive farmland in the San Joaquin Valley and
13 surrounding communities. If the water is released to the Trinity River, the likely irreparable harm
14 from lower carry over storage in the TRD will extend into 2014, by reducing the amount of the
15 initial 2014 allocation, delaying increases in 2014 contract allocations, and increasing the
16 difficulty of managing the cold water pool for ESA-listed salmon.

17 11. The proposed releases are scheduled to begin on August 13 and conclude by no
18 later than September 30, and hence, will be completed before Plaintiffs can reasonably obtain a
19 final ruling on the merits. Plaintiffs therefore seek temporary and preliminary injunctive relief to
20 prevent the August and September 2013 supplemental releases. In addition, Plaintiffs seek
21 judgment setting aside Defendants’ decisions to make the August and September 2012
22 supplemental releases, and the planned 2013 releases, as unlawful, arbitrary and capricious, an
23 abuse of discretion and in excess of Defendants’ authority, and a permanent injunction against
24 such unlawful releases in the future, as well as other relief.

25 **II.**

26 **JURISDICTION AND VENUE**

27 12. This action states claims against departments and officers of the United States
28 arising under the 1902 Reclamation Act, 32 Stat. 388, and acts amendatory thereof and

1 supplementary thereto including the CVPIA; a claim arising under NEPA; and a claim arising
2 under the ESA. In addition, the claims involve Plaintiffs' interests in CVP water established
3 under contracts entered by the United States pursuant to reclamation law, and operations of the
4 CVP. This Court has jurisdiction of this action pursuant to 28 U.S.C. section 1346(a)(2) and 28
5 U.S.C. section 1331. This Court is authorized to issue injunctive and declaratory relief pursuant
6 to pursuant to Rule 65 of the Federal Rules of Civil Procedure, 28 U.S.C. section 2201, and 5
7 U.S.C. sections 703 and 706.

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

12 14. The Authority's principal place of business is located within Merced County.
13 Westlands' principal place of business is located within Fresno County. The claims alleged in
14 this action involve CVP water that is or should be available for use on lands and in communities
15 situated within the counties of Stanislaus, Merced, Fresno, and Kings in the state of California,
16 which lands and communities are within the boundaries of the United States District Court for the
17 Eastern District of California. Further, acts or omissions giving rise to the claims occurred within
18 the boundaries of the United States District Court, Eastern District of California, and will
19 substantially impact land and communities situated within the counties of Stanislaus, Merced,
20 Fresno and Kings. Therefore, venue in this judicial district is proper pursuant to 28 U.S.C.
21 section 1402, 28 U.S.C. section 1391(b)(2), 16 U.S.C. § 1540(g)(3)(A) and Rule 120 of the Local
22 Rules of the United States District Court, Eastern District of California.

23 **III.**

24 **PARTIES**

25 15. Plaintiff Authority is a joint powers authority formed pursuant to California
26 Government Code section 6500 *et seq.* The Authority consists of 29 member public agencies, 27
27 of which contract with Reclamation for water supply from the CVP. Water delivered to the
28 Authority's members by the CVP is used within areas of San Joaquin, Stanislaus, Merced, Fresno,

1 Kings, San Benito, and Santa Clara Counties, California. Some of the CVP water delivered to its
2 members is supplied via California's State Water Project ("SWP") pumps and facilities located
3 within the Delta. Among the purposes for which the Authority was formed is to preserve and
4 protect the quantity and quality of surface and groundwater supplies available for use within the
5 boundaries of its member agencies. The Authority is authorized to commence and maintain suits
6 on behalf of its member agencies. Pursuant to an agreement between the Authority and the
7 United States, which became effective March 1, 1998, responsibility for the operation and
8 maintenance of some facilities of the Delta Division of the CVP was transferred to the Authority.
9 Based upon this agreement, the Authority operates the Jones Pumping Plant, the Delta-Mendota
10 Canal, and other related facilities of the CVP.

11 16. Plaintiff Westlands is a member of the Authority. Westlands provides water to
12 an area of approximately 600,000 acres in Fresno and Kings Counties on the western side of the
13 San Joaquin Valley. Westlands is authorized to commence and maintain on behalf of landowners
14 within its boundaries any action involving or affecting the ownership or use of water. Westlands
15 holds vested contractual rights to receive water from Reclamation for distribution and use within
16 Fresno and Kings Counties. Westlands also holds vested contractual rights to receive additional
17 water under the Stipulated Judgment entered on December 30, 1986, in the consolidated cases of
18 *Barcellos and Wolfsen, Inc., et al. v. Westlands Water District* and *Westlands Water District v.*
19 *United States of America*, Nos. CV 79-106 OWW and CV F-89-245 OWW (E.D. Cal.)
20 (collectively "*Barcellos*"). Most of Westlands' CVP water is supplied via CVP pumps and
21 facilities located within the Delta, but some of Westlands' CVP water can also be supplied via
22 SWP pumps and facilities located within the Delta.

23 17. Defendant Sally Jewell is the Secretary of the United States Department of the
24 Interior, and is named herein in her official capacity, for her actions and failures to act in an
25 official capacity, or under color of legal authority. The Secretary is responsible for the
26 administration of the 1902 Reclamation Act and acts amendatory thereof and supplementary
27 thereto, including the CVPIA.

28 18. Defendant United States Department of the Interior ("Interior") is responsible

1 for the administration of the 1902 Reclamation Act and acts amendatory thereof and
2 supplementary thereto, including the CVPIA. The CVP is a water project authorized,
3 constructed, maintained and operated pursuant to these laws.

4 19. Defendant Bureau of Reclamation is an agency of the United States, within the
5 Department of the Interior, and is charged with administration of the 1902 Reclamation Act, and
6 acts amendatory thereof and supplementary thereto, including the CVPIA. Reclamation operates
7 the CVP, including the Trinity River Division.

8 20. Defendant Michael Connor is the Commissioner of the United States Bureau of
9 Reclamation (“Commissioner”), and is named herein in his official capacity, for his actions and
10 failures to act in an official capacity, or under color of legal authority. The Commissioner is
11 responsible for administration of the 1902 Reclamation Act and acts amendatory thereof and
12 supplementary thereto, including the CVPIA.

13 21. Defendant David Murillo is the Regional Director of the United States
14 Department of the Interior, Bureau of Reclamation, Mid-Pacific Region (“Regional Director”),
15 and is named herein in his official capacity, for his actions and failures to act in an official
16 capacity, or under color of legal authority. The Regional Director is responsible for the
17 administration of the 1902 Reclamation Act and acts amendatory thereof and supplementary
18 thereto, including the CVPIA, within the Mid-Pacific Region. The Mid-Pacific Region includes
19 California. The Regional Director is responsible for operation of the CVP, including the Trinity
20 River Division, and the Klamath Project on the Klamath River. The Regional Director is the
21 Contracting Officer under contracts entered between Reclamation and CVP contractors, including
22 members of the Authority.

23 IV.

24 SUMMARY OF FACTS GIVING RISE TO CLAIMS

25 **The Central Valley Project And The Trinity River Division**

26 22. The CVP is the largest water storage and delivery system in California, covering
27 29 of the state’s 59 counties. The CVP consists of 21 reservoirs capable of storing 12 million
28 acre-feet of water, 11 power plants, 500 miles of major canals, aqueducts and tunnels. The CVP

1 provides water to irrigate approximately 3.25 million acres of farmland and supplies water to
2 more than 2 million people through more than 250 long-term water contracts in the CVP service
3 area. Most of the CVP service area is within the Central Valley. Approximately 90% of the
4 portion of CVP water delivered to contractors located south of the Delta is used for agricultural
5 purposes.

6 23. In 1955, Congress authorized the construction, operation and maintenance of the
7 TRD as “an addition to and integral part of” the CVP, for “the principal purpose of increasing the
8 supply of water available for irrigation and other beneficial uses in the Central Valley of
9 California.” Act of August 12, 1955, Pub.L. No. 84-386, 69 Stat. 719.

10 24. The TRD stores and regulates water from the Trinity River. The Trinity River
11 originates in northwest California, near the city of Weed, and flows generally southward until it is
12 impounded by Trinity and Lewiston Dams. The mean annual inflow to Trinity Reservoir from
13 the Trinity River is about 1.2 million acre-feet. Trinity Reservoir has a storage capacity of 2.4
14 million acre feet. Water is released from Trinity Reservoir to the Trinity River through Trinity
15 Dam and Powerhouse, until it flows to the much smaller Lewiston Reservoir seven miles
16 downstream. From Lewiston Reservoir, water regulated by the TRD may again be released to the
17 Trinity River through Lewiston Dam, or diverted eastward to the Sacramento River watershed.
18 Water released to the Trinity River from Lewiston Dam flows generally westward some 112 river
19 miles until entering the Klamath River. The Klamath River discharges into the Pacific Ocean
20 approximately 40 river miles downstream of its confluence with the Trinity River. Alternatively,
21 water in Lewiston Reservoir may be diverted at Lewiston Dam to the Sacramento River
22 watershed through Clear Creek Tunnel, which conveys the water into Whiskeytown Reservoir.
23 From there, the water either is transported through the Spring Creek Tunnel and discharged into
24 Keswick Reservoir, located on the Sacramento River downstream from Shasta Reservoir, or is
25 released from Whiskeytown Reservoir to Clear Creek, which flows into the Sacramento River
26 downstream from the Keswick Reservoir.

27 25. As water is diverted into the Sacramento River watershed and conveyed to the
28 Sacramento River, it passes through several hydroelectric plants, and thereby generates

1 electricity. Power production as a result of cross-basin diversion of Trinity River water through
2 TRD powerplants is approximately three times greater than power production at Shasta Dam for
3 an equivalent amount of water released. Prior to the ROD, Trinity Reservoir typically reached its
4 greatest storage level at the end of May. Under the pattern of Trinity releases prescribed by the
5 ROD, maximum storage may occur by end of April, or early in May.

6 26. The TRD's water diversions each year from the Trinity River into the Central
7 Valley watershed are integrated with operations of the Shasta Division of the CVP, to supply
8 water to CVP water service contractors and others, and to generate hydropower. The water
9 diverted to the Sacramento River watershed is also used to comply with environmental protection
10 and restoration requirements, including water quality in the Sacramento River and Delta, and to
11 supply water to wildlife refuges. Water that is diverted by the TRD and conveyed to the Central
12 Valley is potentially available for delivery to the Authority's members through CVP facilities,
13 among other uses. On the other hand, Trinity River water that is released to the Trinity River at
14 Lewiston Dam is irretrievably lost to any further CVP uses, including delivery to the Authority's
15 members.

16 27. Reclamation times exports of TRD water to the Sacramento River watershed
17 based on a determination of how to make best use of a limited volume of Trinity water, in concert
18 with releases from Shasta, to help conserve coldwater pools and to meet temperature objectives
19 on the upper Sacramento and Trinity Rivers, as well as power production economics. A key
20 consideration in the export timing determination is the thermal degradation that occurs in
21 Whiskeytown Reservoir related to residence time of transbasin exports in the lake, and air
22 temperatures. To minimize such thermal degradation effects, transbasin export patterns are
23 typically scheduled to provide an approximate 120,000-acre-foot volume in late spring to create a
24 thermal connection to Spring Creek Powerhouse before larger transbasin volumes are scheduled
25 during the hot summer months. Typically, to avoid warming and function most efficiently for
26 temperature control, the water flowing from the Trinity through Whiskeytown Reservoir must be
27 sustained at fairly high rates. When the total volume of Trinity water available for export is
28 limited, that may in turn compress the time period for which effective temperature control

1 releases can be made from Whiskeytown Reservoir to cool water in the Sacramento River for the
2 benefit of listed salmonid species. In general, lowering the quantity of water available for export
3 from the TRD increases the reliance on the cold water pool in the deeper waters of Shasta
4 Reservoir to maintain sufficiently cold temperatures in the Sacramento River for salmonids.

5 **CVPIA Section 3406(b)(23) And Releases For The Trinity River Fishery**

6 28. In 1992, in the CVPIA, Congress sought to bring a final resolution to a decades-
7 old dispute over the appropriate level of releases to the Trinity River for the Trinity River fishery.
8 In CVPIA section 3406(b)(23), Congress established a process to define the appropriate level of
9 releases from the TRD to restore and maintain the Trinity River fishery. Congress directed the
10 Secretary to develop “permanent instream fishery flow requirements and Trinity River Division
11 operating criteria and procedures for the restoration and maintenance of the Trinity River
12 fishery.” The Secretary did so, culminating in the ROD, adopted on December 19, 2000. A copy
13 of the ROD is attached as Exhibit 1. The ROD was based in part on a Trinity River Flow
14 Evaluation Study (“Final Flow Report”) completed in 1999, a Draft Environmental Impact
15 Statement/Draft Environmental Impact Report (“DEIS/DEIR”) dated October 1999 and a Final
16 Environmental Impact Statement/Environmental Impact Report (“FEIS/EIR”) completed in
17 October 2000.

18 29. Until 2002, there had not been a recorded incident of a fish die-off in the lower
19 Klamath River. The Final Flow Report did not recommend, and the DEIS/DEIR and FEIS/EIR
20 did not analyze the environmental impacts of, flow releases in the months of August and
21 September above 450 cfs for the purpose of reducing the risk of fish disease in the lower Klamath
22 River. As described below, however, the ROD allows Reclamation to adjust the schedule of
23 releases within a year, subject to an annual limit on the total volume of fishery releases that varies
24 with water year type. Adjustments to the release schedule are subject to compliance with the
25 requirements of NEPA and the ESA.

26 30. In CVPIA section 3406(b)(23), Congress directed that if the Hoopa Valley Tribe
27 concurred in the release and operating criteria and procedures developed by the Secretary, then
28 they “shall be implemented accordingly.” The Hoopa Valley Tribe concurred in the flow

1 requirements and related operating criteria in the ROD, and indicated that concurrence by signing
2 the ROD on December 19, 2000. As a result of that concurrence, the Secretary has a mandatory
3 duty under CVPIA section 3406(b)(23) to follow the release requirements and criteria for fishery
4 flows as set forth in the ROD.

5 31. CVPIA section 3406(b)(23) provides in full:

6 (23) in order to meet Federal trust responsibilities to protect the
7 fishery resources of the Hoopa Valley Tribe, and to meet the fishery
8 restoration goals of the Act of October 24, 1984, Pub. L. 98-541,
9 provide through the Trinity River Division, for water years 1992
through 1996, an instream release of water to the Trinity River of
not less than 340,000 acre-feet per year for the purposes of fishery
restoration, propagation, and maintenance and,

10 (A) by September 30, 1996, the Secretary, after consultation
11 with the Hoopa Valley Tribe, shall complete the Trinity River Flow
12 Evaluation Study currently being conducted by the U.S. Fish and
13 Wildlife Service under the mandate of the Secretarial Decision of
14 January 14, 1981, in a manner which insures the development of
recommendations, based on the best available scientific data,
regarding permanent instream fishery flow requirements and Trinity
River Division operating criteria and procedures for the restoration
and maintenance of the Trinity River fishery; and

15 (B) not later than December 31, 1996, the Secretary shall
16 forward the recommendations of the Trinity River Flow Evaluation
17 Study, referred to in subparagraph (A) of this paragraph, to the
18 Committee on Energy and Natural Resources and the Select
19 Committee on Indian Affairs of the Senate and the Committee on
Interior and Insular Affairs and the Committee on Merchant Marine
and Fisheries of the House of Representatives. If the Secretary and
the Hoopa Valley Tribe concur in these recommendations, any
increase to the minimum Trinity River instream fishery releases
established under this paragraph and the operating criteria and
20 procedures referred to in subparagraph (A) shall be implemented
21 accordingly. If the Hoopa Valley Tribe and the Secretary do not
22 concur, the minimum Trinity River instream fishery releases
established under this paragraph shall remain in effect unless
increased by an Act of Congress, appropriate judicial decree, or
23 agreement between the Secretary and the Hoopa Valley Tribe.
Costs associated with implementation of this paragraph shall be
24 reimbursable as operation and maintenance expenditures pursuant
to existing law.

25 CVPIA § 3406(b)(23) (Pub. Law No. 102-575, 106 Stat. 4600, 4720-4721) (emphasis added).

26 32. The instream flow release schedule for the Trinity River in the ROD
27 dramatically increased the volume of CVP water annually dedicated to instream fishery flows as
28 compared to the annual volume of 340,000 acre-feet provided for by CVPIA section 3406(b)(23).

1 On average, the ROD increased the volume of releases to the Trinity River by 75% compared to
 2 the CVPIA's 340,000 acre-feet interim dedication. (ROD at p. 20.) The annual volume of
 3 releases under the ROD ranges from 368,000 acre-feet in a critically dry year to 815,000 acre-feet
 4 in an extremely wet year. (ROD at p. 12.) The ROD specifies a schedule of annual instream flow
 5 release volumes and peak flow rates for five different water-year classifications, set forth in Table
 6 1 of the ROD, as follows:

Water-year Class	Volume (Acre-feet)	Peak Flow (cfs)	Peak Flow Duration (days)
Critically dry	369,000	1,500	36
Dry	453,000	4,500	5
Normal	647,000	6,000	5
Wet	701,000	8,500	5
Extremely wet	815,000	11,000	5

13 In accord with the statutory requirement that the Secretary develop "permanent" fishery flow
 14 requirements, the ROD provides that "the schedule for releasing water on a daily basis, according
 15 to that year's hydrology, may be adjusted but the annual flow volumes established in Table 1 may
 16 not be changed." *Id.* The alternative selected in the ROD includes an Adaptive Environmental
 17 Assessment and Management ("AEAM") Program. One of the functions of the AEAM Program
 18 is to "recommend possible adjustment to the annual flow schedule within the designated flow
 19 volumes provided for in the ROD or other measures in order to ensure that the restoration and
 20 maintenance of the Trinity River anadromous fishery continues based on the best available
 21 scientific information and analysis." (ROD at p. 3, emphasis added.) The information related to
 22 the fish die-off in the lower Klamath River in is an example of the information that under the
 23 ROD may lead to an adjustment of the annual release schedule within the designated flow
 24 volumes. The timing of releases can be adjusted to respond to changing conditions and new
 25 scientific information, subject to other regulatory requirements such as ESA consultation and
 26 NEPA review, but the permanent annual volume limits established in the ROD for fishery
 27 restoration and maintenance purposes cannot be exceeded.

1 33. The ROD explains that the flow regime adopted in the ROD meets the
2 Secretary’s statutory obligations, and meets federal trust responsibilities to both the Hoopa Valley
3 Tribe and the Yurok Indian Tribe. The ROD provides: “The necessity for these actions results
4 from the various statutory obligations of the Department as well as the federal trust responsibility
5 to the Hoopa Valley and Yurok Indian Tribes. For the reasons expressed in this ROD, the
6 Department’s agencies are directed to implement the Preferred Alternative as described in the
7 FEIS/EIR and as provided below. This alternative best meets the statutory and trust obligations
8 of the Department to restore and maintain the Trinity River’s anadromous fishery resources,
9 based on the best available scientific information, while also continuing to provide water supplies
10 for beneficial uses and power generation as a function of Reclamation’s Central Valley Project
11 (CVP).” (ROD at p. 2.)

12 34. The ROD further explains: “As expressed above, the guiding principles for this
13 decision emanate from various Congressional mandates as well as the federal government’s trust
14 responsibility to the Hoopa Valley and Yurok Indian Tribes. . . . In light of these obligations, the
15 Service, with vital support from the Hoopa Valley Tribe, conducted an extensive scientific effort
16 to determine the appropriate flows and other measures necessary to restore and maintain the
17 Trinity River’s anadromous fishery. In section 3406(b)(23) of the CVPIA, Congress sought the
18 final resolution of these issues in order to meet the federal trust responsibility and to meet the
19 goals of prior legislation, calling for the completion of the scientific efforts initiated by Secretary
20 Andrus and for the implementation of recommendations, based on the best available scientific
21 information, regarding permanent instream fishery flow requirements and TRD operating criteria
22 and procedures necessary for the restoration and maintenance of the Trinity River anadromous
23 fishery. These statutory and trust responsibilities form the basis for the FEIS/EIR’s purpose and
24 need for this action—to restore and maintain the natural production of anadromous fish below the
25 TRD.” (ROD at p. 17.)

26 35. The ROD explained why the Secretary did not chose a flow regime requiring
27 even greater releases of water to the Trinity River: “Although the Maximum Flow Alternative
28 scored better than the Preferred Alternative in terms of estimated population increases, the

1 Maximum Flow Alternative would exclude or excessively limit the Department’s ability to
2 address the other recognized purposes of the TRD, including water diversions to the CVP and
3 power production in the Trinity Basin. The best available science presently indicates that the
4 Department’s statutory and trust obligations can be achieved while still meeting Congressional
5 intent to have the TRD integrated with the CVP to the extent that diversions to the CVP do not
6 impair in-basin needs.” (ROD at p. 25.)

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

14 **Reclamation’s Fishery Releases For 2013 Pursuant To The ROD**

15 37. Under the ROD, the maximum annual volume of releases for fishery purposes
16 depends upon the water-year type. Defendants have declared 2013 to be a “dry” year under the
17 ROD. Accordingly, the maximum volume of releases for fishery purposes for 2013 set by the
18 ROD is 453,000 acre-feet.

19 38. In early April 2013, Defendants established a schedule for releases of water
20 from Trinity Reservoir for fishery purposes in 2013. As has been typical under the ROD, and as
21 recommended by the Final Flow Report, the releases are intended to somewhat resemble a natural
22 hydrograph, with higher releases in the spring months, with releases declining steadily through
23 the early summer, until reaching a stable rate of 450 cubic feet per second (“cfs”) through late
24 summer and fall. A graphical representation and table showing the release schedule adopted for
25 2013 is attached as Exhibit 2.

26 39. Under the release schedule Defendants adopted for 2013, releases to the Trinity
27 River for fishery purposes were increased beginning on April 21, and peaked at a rate of
28 approximately 4,500 cfs on May 2 and 3. Releases declined thereafter until reaching a rate of 450

1 cfs on June 24. Under the adopted schedule in Exhibit 2, releases are to remain at 450 cfs until
2 October 15, when releases will decrease further to 300 cfs.

3 40. The release schedule for 2013 adopted by Defendants and implemented
4 beginning on April 21 uses the entire maximum volume of 453,000 acre-feet for fishery purposes
5 specified for a “dry” year by the ROD. The release schedule for 2013 does not make any
6 provision for the supplemental releases in August and September now being proposed.

7 41. The release schedule for 2013 specifies a rate of releases of 450 cfs throughout
8 August and September 2013. At a rate of releases of 450 cfs in August and September, the
9 volume of water released from Trinity Reservoir during August and September 2013 will exceed
10 the inflow into Trinity Reservoir during August and September. The TRD will be releasing
11 stored water that will augment natural flows in the Trinity River below the TRD during August
12 and September 2013. Hence, with releases at 450 cfs, the TRD will cause average flows in the
13 lower Klamath River during the months of August and September 2013 to be higher than such
14 flows would be absent the TRD.

15 **2013 Is A Year Of Critical Water Supply Shortage In The Central Valley, And 2014**
16 **Threatens To Be Even Worse**

17 42. CVP water supplies are scarce due to record dry conditions in Northern
18 California since January. On February 25, 2013, Reclamation announced that agricultural water
19 service contractors located south of the Delta would receive an allocation of 25% of their contract
20 supply. On March 22, 2013, however, Reclamation reduced this allocation to 20%. Allocations
21 for municipal and industrial water service contractors south of the Delta were reduced from 75%
22 to 70%. Reclamation’s announcement of these reductions stated “this decreased allocation for
23 South-of-Delta contractors is based on the critical water year classification, the projection of
24 reduced Delta inflows this spring, significant loss of reservoir storage to support pumping this
25 summer and water quality permit requirements.”

26 43. Shortages of overall CVP water supply are not evenly distributed across CVP
27 water users. Due to CVP contract priorities and other CVP obligations and regulations, the
28 members of the Authority that are agricultural water service contractors may suffer severe

1 shortages in a year when other CVP contractors face little or no shortages. For example, this year
2 agricultural water service contractors located south of the Delta have been allocated 20% of
3 contract supply, while San Joaquin River Exchange and Settlement Contractors and wildlife
4 refuges (level 2) located south of the Delta have been allocated 100% of contract and level 2
5 supplies respectively. North-of-Delta settlement and municipal and industrial users are likewise
6 allocated 100% of contract supply this year, and north-of-Delta agricultural water service
7 contractors have been allocated 75% of contract supply.

8 44. The dry conditions and severe water shortage in the Central Valley have been
9 recognized by state and federal officials. On May 20, 2013, Governor Brown issued Executive
10 Order B-21-13, to streamline approvals for water transfers to California's farms. As reasons for
11 taking this action, the Order recites that "much of California experienced record dry conditions in
12 January through March 2013, registering historic lows on the Northern Sierra and the San Joaquin
13 precipitation indices" and "record dry and warm conditions resulted in a snowpack substantially
14 below average, with estimated May water content in the statewide snowpack being only 17
15 percent of average and with the spring snowmelt season now being well underway." It states that
16 "reductions in surface water deliveries will likely force San Joaquin Valley agricultural water
17 users to extract additional groundwater from already overused basins, potentially resulting in
18 additional land subsidence," that "the supply reductions will jeopardize agricultural production in
19 parts of the San Joaquin Valley" and "the supply reductions will also impact millions of
20 municipal and industrial water users across California."

21 45. On May 24, 2013, Reclamation and the California Department of Water
22 Resources ("DWR") jointly asked that the CVP and SWP be relieved from meeting certain Bay-
23 Delta Water Quality Control Plan requirements that would require Reclamation to draw down
24 storage in Shasta Reservoir so far that it would deplete the cold water in Shasta Reservoir
25 necessary to maintain temperatures for winter-run Chinook salmon in the Sacramento River in the
26 late summer. A copy of the letter making that request is attached as Exhibit 3.

27 46. The May 24 letter explains the adverse impact of these conditions on project
28 storage and the cold water pools in storage that are necessary to maintain cool water temperatures

1 for salmon below Shasta Dam and other dams in the late summer and fall. Reclamation sought to
2 operate to Critical Dry rather than Dry year type requirements in the Delta, to save 100,000 to
3 200,00 acre-feet of storage: “There is a significant difference between the volume of Delta
4 inflow needed to achieve the Dry and Critical water quality objectives for Jersey Point and
5 Emmation through June 15. If Reclamation and DWR are able to begin operating to the Critical
6 year water quality objectives in May it may be possible to achieve 100,000 to 200,000 af, of cold
7 water benefits in the upstream reservoirs. This savings in cold water storage would improve the
8 chances of meeting the temperature objective at Airport Road. This cold water benefit will help
9 avoid temperature related fish losses in the Sacramento River.” (Ex. 3 at 4.)

10 47. On May 29, 2013, in response to this request to save 100,000 to 200,000 acre-
11 feet of CVP and SWP water in storage, the State Water Resources Control Board, through the
12 Delta Watermaster, indicated that it would not object or take any action if Reclamation and DWR
13 operated to meet Critically Dry year rather than Dry year objectives under the Water Quality
14 Control Plan, provided they submitted and operated to an approved temperature management plan
15 to maximize benefits to fisheries resources. In response, Reclamation submitted its plan for
16 managing the cold water pool in Shasta Reservoir in 2013 to the State Water Board.

17 48. The dry conditions and water supply shortages in 2013 portend further water
18 shortages for CVP contractors in 2014. The CVP and other water projects depend upon water
19 stored in wetter years to compensate for lower precipitation during dry years. Water in storage
20 allows projects to provide water users a more stable and reliable supply, and to meet the
21 requirements of environmental regulations each year. The quantity of water in storage is a key
22 determinant of CVP contract allocations. The greater the storage that can be carried over from
23 one year to the next, the greater the water supply protection against dry conditions the next year.
24 Conversely, the lower the carry over storage from one year to the next, the greater the risk to
25 water supply availability in the following year.

26 49. Going in to 2014, CVP reservoirs will be depleted. Even with the relief
27 provided by the State Water Resources Control Board, Reclamation has projected that end of
28 December storage in Shasta Reservoir will be 1.9 million acre-feet, well below average end of

1 December storage in Shasta Reservoir of 2.9 million acre-feet. End of December storage in
2 Trinity Reservoir, without the proposed additional August and September 2013 releases, is
3 projected to be about 1.3 million acre-feet, compared to an average of 1.6 million acre-feet. At a
4 level of projected end of December carryover storage in Trinity Reservoir of 1.3 million acre-feet,
5 it is highly unlikely that there will be enough precipitation to re-fill Trinity Reservoir in 2014.
6 Only an extraordinarily wet season in late 2013 and early 2014 will allow these reservoirs to refill
7 to capacity.

8 **Despite The Existing CVP Water Shortage, And The Terms Of The ROD, Defendants Have**
9 **Decided To Make Additional Releases Of Water Stored In The TRD During August And**
10 **September 2013 For Fishery Purposes**

11 50. Some four months after cutting contract allocations to south-of-Delta water
12 service contractors, and some two months after seeking relief from water quality standards to
13 preserve CVP water in storage, Defendants have announced their decision to release up to
14 109,000 acre-feet of water from storage in the TRD to the ocean. On August 7, 2013, Defendants
15 announced they have decided to make this release of stored water from the TRD in August and
16 September 2013, for the fishery purpose of reducing the risk of a possible salmon die-off from
17 disease in the lower Klamath River. Such a die-off in the lower Klamath River has occurred once
18 before, in 2002. However, a die-off did not occur in other years with numbers of returning
19 salmon and flows in the lower Klamath River similar to what is projected for this year.

20 51. Beginning on August 13, Defendants intend to increase releases from the TRD
21 to the Trinity River from the previously scheduled 450 cfs to achieve flow in the lower Klamath
22 River of 2,800 cfs. Defendants intend to continue excess releases until at least September 21.
23 The excess releases will continue until September 30 if water temperatures in the lower Klamath
24 River are above 23°C. These excess releases above the rate 450 cfs for this period through
25 September 30 will amount to approximately 70,000 acre-feet of water.

26 52. Defendants intend to further increase the rate of releases to double the flow in
27 the lower Klamath River to 5,600 cfs if they detect an outbreak of disease in the lower Klamath
28 River. These releases would continue for a 7-day period. If made, these additional releases will
amount to approximately 39,000 acre-feet of water.

1 53. The water released under this action will flow in the Klamath River and into the
2 Pacific Ocean. That water will be irretrievably lost for export to the Sacramento watershed and
3 other CVP uses, including water supply and generation of hydropower.

4 **The Proposed Additional Releases Will Cause Significant And Irreparable Harm**

5 54. Plaintiffs will be irreparably harmed by the lost water supply from the proposed
6 releases, up to approximately 109,000 acre-feet. Instead of releasing that water to the Trinity
7 River, Defendants could export it to the Sacramento watershed to support deliveries to members
8 of the Authority, including Westlands. By doing so, Reclamation could restore the 5% allocation
9 to south-of-Delta contractors that was cut on March 22, 2013. In addition, increasing exports
10 from the TRD to the Sacramento River watershed would increase hydropower generation in 2013.

11 55. Reclamation has a contractual obligation to optimize water deliveries to CVP
12 contractors. Given that Reclamation has concluded that it may release up to an additional
13 109,000 acre-feet of water from the TRD this year and still meet the various legal mandates
14 applicable to the CVP, then pursuant to its contractual obligation to optimize deliveries it should
15 use that water to restore the contract allocations to south-of-Delta CVP contractors that were cut
16 on March 22. By contrast, Reclamation is under no legal mandate to release additional water to
17 the Trinity River. Quite the contrary, as alleged herein, such releases are illegal.

18 56. If Defendants make the proposed releases to Trinity River instead of restoring
19 the allocation to south-of-Delta CVP agricultural water service contractors to 25%, Plaintiffs will
20 be irreparably harmed in at least two ways. First, their constituents will suffer the immediate loss
21 of the increased contract allocation and use of increased CVP water deliveries south of the Delta
22 in 2013. Additional CVP supply is desperately needed south of the Delta. The existing 20%
23 allocation has put the entire agricultural region on the west side of the San Joaquin Valley in
24 distress. Growers are scrambling to stretch the limited CVP supply to keep alive permanent crops
25 such as orchards and vineyards, and to supplement irrigation with lower quality groundwater that
26 damages trees, crops and the soil, and further depletes an already overdrafted groundwater basin.
27 Growers also face financial injury, as they must pay high rates to purchase water from other
28 sources, and lose income from fallowed fields and abandoned crops. That has rippling

1 socioeconomic effects in the region, from lost jobs and dislocation of communities. An
2 additional 5% allocation will help alleviate existing water shortages, and for any portions not used
3 in 2013, provide secure supply for 2014 stored in San Luis Reservoir south of the Delta, water
4 that growers can more readily rely upon than storage in upstream reservoirs.

5 57. Second, by further draining Trinity Reservoir in August and September this year
6 without meeting existing water supply needs, Defendants will likely set up even more dire
7 circumstances in 2014. It is very unlikely that Trinity Reservoir will refill in 2014. Hence, the
8 additional August and September releases will likely create a hole in storage in Trinity Reservoir
9 of up to 109,000 acre-feet going into 2014. This hole in storage in Trinity Reservoir will likely
10 reduce initial, February 2014 CVP contract allocations to members of the Authority below what
11 the allocations would have been without the releases. Lower initial allocations and delays in
12 increases to allocations cause harm to farmers trying to plan their planting for the coming
13 growing season and secure financing. With reduced CVP water allocations, they must scale back
14 their operations by fallowing land, reducing the number of employees, and taking other measures.
15 While increasing the allocation in 2013 will likewise likely result in reduced water in storage next
16 year, that will be offset by the benefits of meeting water supply needs this year and likely some
17 carry over of water allocated in 2013 to 2014.

18 58. The loss of CVP water supply has cascading, adverse environmental and
19 socioeconomic effects within the CVP service area south of the Delta. The west side of the San
20 Joaquin Valley cannot easily absorb losses of CVP water supply. Reclamation's ongoing
21 inability and failure to consistently deliver the full contractual amount of CVP water to the
22 Authority's members, such as Westlands, has resulted in extensive conservation efforts within
23 Westlands and other districts. As a result, the potential gains from conservation in these areas
24 have been exhausted. Farmers must instead turn to increased pumping of groundwater, purchase
25 of supplemental water supplies from other sources, and ultimately to fallowing land.

26 59. Very low CVP allocations in successive years push farmers beyond the level to
27 which they can adapt even for the short term. Water supply shortages worsened by the proposed
28 excess releases threaten numerous adverse environmental effects within the CVP service area

1 including, but not limited to, worsening of groundwater basin overdraft, land subsidence,
2 decreased groundwater recharge, threatened violation of state-adopted basin plan water quality
3 objectives, reductions in crop yields, reduced agricultural employment, endangerment of
4 permanent crops, and decreased air quality.

5 60. In addition, the proposed releases from Trinity Reservoir will increase the risk
6 that the TRD will not be able to maintain cold temperatures for salmon in the Trinity River in
7 2014. The releases will also diminish the ability of the TRD to assist in maintaining cold
8 temperatures for salmon in the Sacramento River. By diminishing the total volume of Trinity
9 water available for export to the Sacramento River, the releases will likely compress the time
10 period for which effective temperature control releases can be made from Whiskeytown
11 Reservoir to the Sacramento River. That in turn will force greater reliance on the cold water pool
12 in Shasta Reservoir to maintain cool temperatures for endangered winter-run Chinook salmon in
13 the Sacramento River through the late summer. The species affected, including the coho salmon
14 in the Trinity River, and Central Valley spring-run and winter-run Chinook salmon Central
15 Valley steelhead, and green sturgeon in the Sacramento River, are listed under the ESA as
16 threatened or endangered. In addition, the proposed releases may adversely affect the ESA-listed
17 threatened delta smelt by diminishing the water supply in Trinity Reservoir available to maintain
18 water quality in the Delta. According to the FWS, the delta smelt requires certain water quality
19 conditions in the Delta including outflow, and the proposed releases will reduce the amount of
20 water available for export to the Sacramento River to achieve those conditions in the Delta.

21 61. In addition, if Defendants make the proposed releases to the Trinity River in
22 2013, the releases will harm other biological resources within the Trinity River mainstem. The
23 releases will cause unseasonably high and cold flows in the mainstem of the Trinity River. Such
24 flows will harm special status species that inhabit the Trinity River, including the yellow-legged
25 frog, the western pond turtle, and the lamprey.

26 **Defendants Have Not Prepared An Environmental Impact Statement**

27 62. Defendants have not prepared an environmental impact statement to analyze the
28 effects of the proposed excess August and September 2013 releases to the Trinity River under

1 NEPA.

2 63. On July 17, 2013, Defendants released a draft environmental assessment and
3 finding of no significant impact (“draft EA/FONSI”) regarding the proposed excess releases.
4 Defendants requested comment by July 31, 2013. On July 31, 2013, Plaintiffs submitted
5 comments on the draft EA/FONSI. The comments explained that the proposed releases to the
6 Trinity River are a major federal action significantly affecting the quality of the human
7 environment, and that under NEPA Defendants must prepare an environmental impact statement.
8 These comments explained that the loss of stored TRD water to CVP uses will have particularly
9 harmful effects given the existing water shortage and the shortage looming for 2014.

10 64. Notwithstanding these comments and similar comments by others, on August 7,
11 2013, Defendants adopted a final EA/FONSI. The final EA/FONSI fails to adequately address
12 significant potential impacts of the proposed releases.

13 **Defendants Have Not Conducted ESA Section 7 Consultation Regarding The August And**
14 **September Releases**

15 65. Defendants did not conduct any ESA section 7 consultation regarding the
16 potential effects of the August and September 2013 releases on ESA-listed species or their
17 critical habitat.

18 66. The ROD specifies the amounts of CVP water to be released from the TRD in
19 different hydrologic year types for the restoration, propagation and maintenance of the Trinity
20 River fishery. The ROD was approved based, in part, on two biological opinions issued pursuant
21 to ESA section 7. These biological opinions do not evaluate the effects of unnaturally high and
22 cold flows in the Trinity River in August and September on ESA-listed species, such as the
23 Southern Oregon/Northern California Coast (“SONCC”) Coho salmon. Further, these biological
24 opinions do not evaluate the impacts that exceeding the ROD’s limit on the volume of annual
25 releases may have on ESA-listed species in the Trinity River and Sacramento River watersheds.

26 67. NMFS issued its “Biological Opinion for the Trinity River Mainstem Fishery
27 Restoration EIS and its Effects on Southern Oregon/Northern California Coast Coho Salmon,
28

1 Sacramento River Winter-run Chinook Salmon, Central Valley Spring-run Chinook Salmon, and
2 Central Valley Steelhead” (“NMFS BiOp”) on October 12, 2000. The NMFS BiOp concluded,
3 among other things, that increasing releases of CVP water from the TRD to carry out the ROD
4 would reduce the volume of water available for import to the Sacramento River watershed, and
5 therefore was likely to adversely affect Sacramento River winter-run Chinook salmon, which are
6 listed as endangered (59 Fed. Reg. 440 [January 4, 1994]). The NMFS BiOp did not analyze the
7 ROD’s effects on green sturgeon, which was listed as threatened in 2006 (71 Fed. Reg. 17757
8 [April 7, 2006]; *see* 74 Fed. Reg. 52300 [October 9, 2009][designating critical habitat]).

9 68. The NMFS BiOp did not analyze the effects of excess releases in August and
10 September on SONCC coho salmon in the Trinity River watershed. Reclamation’s excess releases
11 may adversely affect juvenile coho salmon in the Trinity River, and may adversely affect their
12 designated critical habitat. These releases will result in unusually high and cold flows in the
13 Trinity River in August and September, conditions that species in the Trinity River would not
14 experience under natural conditions, nor under the typical flow regime since operations of the
15 TRD began, or under the flow regimes analyzed for the ROD. The excess releases also reduce
16 the volume of cold water in storage in Trinity Reservoir. That may adversely affect coho salmon
17 in the Trinity River by diminishing Reclamation’s ability to maintain cooler water temperatures
18 beneficial to coho salmon.

19 69. The NMFS BiOp did not analyze the effects of the releases in excess of the
20 ROD’s annual volume limits on the listed species in the Sacramento River watershed. The
21 August and September releases may adversely affect listed species by diminishing the water
22 supply in Trinity Reservoir available to maintain water temperatures beneficial to listed species in
23 the Sacramento River.

24 70. In the environmental assessment for the supplemental 2013 releases,
25 Reclamation determined that implementing the proposed August and September releases prior to
26 receiving a pending biological opinion regarding operation of the entire CVP system would not
27 violate the ESA section 7 consultation requirement. Reclamation concluded that the “2013 late-
28 summer flow augmentation release will continue the status quo as to listed species in that

1 Reclamation still retains discretion to provide flow and water temperature conditions that are
2 consistent with currently anticipated conditions with respect to listed fish.” (Environmental
3 Assessment at p. 25.) Reclamation therefore concluded that it was not required to consult with
4 NMFS regarding the effects of the August and September releases, even though the prior NMFS
5 BiOp did not consider the effects of such releases or the effects of exceeding the ROD’s annual
6 limits for releases from the TRD for fishery purposes.

7 71. FWS issued its “Reinitiation of Formal Consultation Biological Opinion of the
8 Effects of Long-term Operation of the Central Valley Project and State Water Project as Modified
9 by Implementing the Preferred Alternative in the Draft Environmental Impact
10 Statement/Environmental Impact Report for the Trinity River Mainstem Fishery Restoration
11 Program and Request for Consultation on the Implementation of this Alternative on the
12 Threatened Northern Spotted Owl, Northern Spotted Owl Critical Habitat, and the Endangered
13 Bald Eagle within the Trinity River Basin, and Where Applicable, Central Valley Reservoirs”
14 (“FWS BiOp”) on October 12, 2000 as well. The FWS BiOp concluded, among other things, that
15 release of CVP water from the TRD to carry out the ROD’s fishery flow release schedule would
16 reduce the volume of water available for import to the Sacramento River watershed, and therefore
17 was likely to adversely affect the delta smelt, which are listed as threatened (58 Fed. Reg. 12854
18 [March 5, 1993]; *see* 75 Fed. Reg. 17667 [April 7, 2010] [finding reclassifying delta smelt from
19 threatened to endangered is warranted but precluded by higher priority listing actions]).

20 72. The FWS BiOp did not analyze the effects of the releases in excess of the
21 ROD’s annual volume limits on the delta smelt. The August and September releases may
22 adversely affect the delta smelt by diminishing the water supply in Trinity Reservoir available to
23 maintain water quality in the Delta.

24 73. In the environmental assessment for the supplemental 2013 releases,
25 Reclamation concluded that the supplemental releases would not affect any ESA-listed species
26 under the jurisdiction of the FWS, and therefore, there was no need to consult with FWS pursuant
27 to the ESA. This conclusion is inconsistent with the FWS BiOp’s determination that increased
28 releases from the TRD were likely to adversely affect the listed delta smelt, by reducing the

1 amount of water available for import to the Sacramento River watershed.

2 74. Reclamation has failed to fulfill its obligation under ESA section 7 to consult
3 regarding the excess releases. Plaintiffs have a concrete interest in ensuring that Defendants
4 satisfy their ESA consultation obligations with respect to ESA-listed species which may be
5 adversely affected by changes to TRD operations related to the excess releases. Each year
6 Plaintiffs' CVP water supply is significantly constrained pursuant to the requirements of existing
7 biological opinions developed as a result of ESA consultation regarding effects of CVP
8 operations on Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook
9 salmon, Central Valley steelhead, green sturgeon, and the delta smelt. In recent years, the
10 requirements of these biological opinions have significantly reduced the CVP water supply
11 available to Plaintiffs. Changes to TRD operations related to the excess releases may adversely
12 affect these same listed species by diminishing the quantity of water available from the TRD to
13 assist in maintaining appropriate water quality in the Sacramento River, Clear Creek, and the
14 Delta. Increased and colder flows in the Trinity River in late summer and early fall may
15 adversely affect Southern Oregon/Northern California Coast coho salmon rearing in the Trinity
16 River below Lewiston Dam. Plaintiffs have an interest in the conservation and recovery of these
17 ESA-listed species. If changes to TRD operations related to the excess releases adversely affect
18 the status of these ESA-listed species, that impaired status is likely to result in even more
19 stringent restrictions on CVP operations, and greater adverse effects on Plaintiffs' water supply.
20 By diminishing the quantity of TRD water available to export to the Sacramento River, the excess
21 releases likewise diminish the ability of the TRD to contribute to the recovery of listed species in
22 that watershed. Plaintiffs thus have an interest in ensuring that Defendants perform a lawful ESA
23 consultation regarding the late summer and early fall releases proposed for 2013 and for any
24 future years.

25 **The Court Should Preliminarily Enjoin The Proposed Releases, And After Resolving The**
26 **Merits Enter Judgment Setting Aside The Defendants' Actions And Providing Declaratory**
27 **And Permanent Injunctive Relief**

28 75. The excess August and September releases will begin and be completed before

1 the Court can finally resolve the merits of Plaintiffs' claims, and if allowed to occur, the releases
2 will likely cause irreparable harm to Plaintiffs and the environment. The balance of hardships
3 favors injunctive relief, and is in the public interest. Plaintiffs therefore request temporary and
4 preliminary injunctive relief against the releases.

5 76. Although the duration of the proposed 2013 releases is too short to allow the
6 claims alleged herein to be fully litigated before the releases end, and the 2012 releases have
7 already been completed, Plaintiffs request that the Court nonetheless finally resolve the claims
8 alleged herein and enter judgment for Plaintiffs. Based upon Defendants' actions over the past
9 decade, Plaintiffs reasonably expect to be subject to similar supplemental releases again. The
10 Defendants have already made supplemental releases for the purpose of reducing risk of disease for
11 returning salmon in the lower Klamath River in the years 2003, 2004, and 2012, and are attempting to
12 do so again in 2013. Defendants are likely to attempt to do so yet again in future years when they
13 believe conditions warrant. The period of such supplemental releases has typically been about 40
14 days, too short a time to allow Plaintiffs' claims against the releases to be fully litigated prior to the
15 cessation of the releases. The Court should therefore maintain jurisdiction even after the period of the
16 releases proposed for 2013 has expired, to resolve the claims presented in this complaint, to set aside
17 the 2012 and 2013 actions, and enter appropriate declaratory and permanent injunctive relief, relief
18 that will govern and prevent similar attempted actions in future years.

19 **V.**

20 **FIRST CLAIM FOR RELIEF**
21 **(THE 2013 RELEASES VIOLATE CVPIA SECTION 3406(B)(23))**

22 77. Plaintiffs reallege and incorporate herein by reference the allegations of
23 paragraphs 1 to 76, inclusive, of this Complaint and further allege:

24 78. The Defendants have a mandatory duty under CVPIA section 3406(b)(23) to
25 implement releases to the Trinity River for fishery purposes in accordance with the ROD. The
26 maximum fishery releases for each year is set forth in the ROD, based on year type. As the ROD
27 states at page 12: "the schedule for releasing water on a daily basis, according to that year's
28 hydrology, may be adjusted but the annual flow volumes established in Table 1 may not be

1 changed.”

2 79. The excess August and September releases are for fishery purposes.
3 Specifically they are intended to benefit migrating Chinook salmon in the lower Klamath River.
4 A significant portion of the Chinook salmon in the lower Klamath River are returning to the
5 Trinity River for spawning.

6 80. Under the ROD, Defendants are limited to releases for fishery purposes totaling
7 453,000 acre-feet for 2013. If Defendants make the additional August and September releases,
8 the total releases for fishery purposes in 2013 will exceed the 453,000 volume limit set by the
9 ROD, by the full amount of the additional releases. Defendants’ action is therefore in violation of
10 Defendants’ mandatory duty under CVPIA section 3406(b)(23) to implement the releases and
11 operating criteria set forth in the ROD.

12 81. Defendants’ decision to make the excess August and September 2013 fishery
13 releases is a final agency action for which there is no other adequate remedy in a court, within the
14 meaning of APA section 704.

15 82. The Defendants’ action is: (1) arbitrary, capricious, an abuse of discretion, and
16 otherwise not in accordance with law; (2) in excess of statutory jurisdiction, authority, or
17 limitation, or short of statutory right; and (3) without observance of procedure required by law,
18 within the meaning of 5 U.S.C. § 706(A), (C) and (D). Under APA section 706, the Court must
19 therefore hold unlawful and set aside Defendants’ action.

20 83. Plaintiffs have exhausted any and all administrative remedies required by law.
21 Plaintiffs have no plain, speedy or adequate remedy at law.

22 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

23 **VI.**

24 **SECOND CLAIM FOR RELIEF**
25 **(THE 2013 RELEASES ARE A USE OF WATER OUTSIDE THE STATE PERMITTED**
26 **PLACE OF USE IN VIOLATION OF CVPIA SECTION 3411(A) AND 43 U.S.C. § 383)**

27 84. Plaintiffs reallege and incorporate herein by reference the allegations of
28 paragraphs 1 to 83, inclusive, of this Complaint and further allege:

85. California law requires that an applicant for a water rights permit identify the

1 place where the applicant intends to use the water it seeks to appropriate. The applications that
2 Reclamation submitted for water rights permits for the TRD identified the place that water
3 diverted from Trinity River would be used as the CVP service area. The applications did not
4 include the lower Klamath River as an intended place of use.

5 86. The water permits issued to Reclamation by the State Water Resources Control
6 Board approved the diversion and use of water based upon and as described in Reclamation's
7 applications, and subject to additional terms and conditions identified by the Board. The existing
8 water rights permits applicable to the TRD do not approve use of water diverted by the TRD in
9 the lower Klamath River.

10 87. Section 3411(a) of the CVPIA directs that "the Secretary shall, prior to the
11 reallocation of water from any . . . place of use specified within applicable Central Valley Project
12 water rights and licenses to a . . . place of use not specified within said permits or licenses, obtain
13 a modification in those permits and licenses, in a manner consistent with the provisions of
14 applicable State law, to allow such change in . . . place of use."

15 88. Section 8 of the Reclamation Act requires Defendants "to proceed in
16 conformity with" State law "relating to the control, appropriation, use or distribution of water
17 used in irrigation." 43 U.S.C. § 483.

18 89. Chapter 10 of Division 2 of the California Water Code (commencing at Section
19 1700) provides a procedure and substantive requirements for an amendment to the approved place
20 of use under a water rights permit. The process includes notice to interested persons and a right
21 to protest.

22 90. Defendants have not obtained a modification of the approved place of use under
23 the TRD permits to add the lower Klamath River in accordance with the requirements of
24 California law.

25 91. The proposed allocation of stored TRD water for use in the lower Klamath River
26 in August and September 2013 without first obtaining a modification of the permitted place of use
27 under the State water rights permits applicable to the TRD is a violation of Defendants'
28 mandatory duties under CVPIA section 3411(a) and 43 U.S.C. section 483.

1 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

2 **VII.**

3 **THIRD CLAIM FOR RELIEF**
4 **(DEFENDANTS HAVE FAILED TO COMPLY WITH THE NATIONAL**
5 **ENVIRONMENTAL POLICY ACT REGARDING THE 2013 RELEASES)**

6 92. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every
7 allegation contained in paragraphs 1 through 91, inclusive, of this Complaint and further allege:

8 93. Reclamation is a federal agency subject to NEPA. NEPA requires that “to the
9 fullest extent possible,” all agencies of the federal government prepare an environmental impact
10 statement prior to implementing “major Federal actions significantly affecting the quality of the
11 human environment.” 42 U.S.C. § 4332(2)(C).

12 94. At a minimum, based on the available information, there are substantial
13 questions whether the August and September 2013 releases may have a significant effect on the
14 human environment. Under NEPA, Defendants are therefore required to prepare an
15 environmental impact statement before proceeding with the releases.

16 95. Defendants’ decision to proceed with the releases without preparing an
17 environmental impact statement is arbitrary and capricious. In the final EA/FONSI for the
18 August and September 2013 releases, Defendants have failed to take a hard look at the
19 consequences of the releases, failed to provide a convincing statement of reasons to explain why
20 the impact of the releases will be insignificant, and failed to base their decision on a consideration
21 of all the relevant factors.

22 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

23 **VIII.**

24 **FOURTH CLAIM FOR RELIEF**
25 **(DEFENDANTS HAVE FAILED TO COMPLY WITH THE ENDANGERED SPECIES**
26 **ACT REGARDING THE 2013 RELEASES)**

27 96. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every
28 allegation contained in paragraphs 1 through 95, inclusive, of this Complaint and further allege:

97. The ESA provides for the listing of, and affords certain protections to, species
determined to be threatened or endangered. Threatened species are defined as “any species which

1 is likely to become an endangered species within the foreseeable future throughout all or a
2 significant portion of its range.” 16 U.S.C. § 1532(20). Endangered species are those which are
3 “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).

4 98. The fish species affected by the proposed August and September releases—
5 SONCC coho salmon in the Trinity River, Central Valley spring-run chinook salmon, Sacramento
6 River winter-run chinook salmon, green sturgeon and delta smelt--are listed under the ESA as
7 threatened or endangered. 62 Fed. Reg. 24588 (May 6, 1997) [listing SONCC coho salmon as
8 threatened]; 64 Fed. Reg. 50394 (September 16, 1999) [listing Central Valley spring-run Chinook
9 salmon as threatened]; 59 Fed. Reg. 440 (January 4, 1994) [listing Sacramento River winter-run
10 Chinook salmon as endangered]; 71 Fed. Reg. 17757 (April 7, 2006) [listing green sturgeon as
11 threatened]; 58 Fed. Reg. 12,863 (March 5, 1993) [listing delta smelt as threatened].

12 99. Reclamation is a federal agency subject to the ESA. Section 7(a)(2) of the ESA
13 requires that each federal agency, in consultation with and with assistance of the Secretary, ensure
14 that any action which it authorizes, funds, or carries out is not likely to jeopardize the continued
15 existence of any threatened or endangered species or result in the destruction or adverse
16 modification of any listed species’ critical habitat. 16 U.S.C. § 1536(a)(2). In fulfilling its
17 obligations under ESA section 7(a)(2), Reclamation must “use the best scientific and commercial
18 data available.” *Id.*

19 100. Reclamation has a duty to “review its actions at the earliest possible time to
20 determine whether any action may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a).
21 If Reclamation determines that an action may affect any listed species or critical habitat, then it
22 must initiate consultation. *Id.* Reclamation is excused from initiating consultation only if it
23 obtains written concurrence from NMFS or FWS that an action is not likely to adversely affect a
24 listed species or critical habitat, or a preliminary biological opinion is confirmed as a final
25 biological opinion. 50 C.F.R. § 402.14(b)(1), b(2). Neither exception to the consultation
26 requirement set forth in 50 C.F.R. § 402.14(b) applies here.

27 101. Reclamation did not initiate consultation pursuant to ESA section 7 with NMFS
28 or FWS regarding the effects of the excess releases in August and September 2013 on ESA-listed

1 species or their critical habitat. If Reclamation made a determination without consultation that
2 the excess releases could not affect any listed species or critical habitat, that determination was
3 not based on the best scientific and commercial data available, and was arbitrary, capricious, and
4 an abuse of discretion.

5 102. Defendants have not satisfied their ESA section 7 obligations to consult with
6 NMFS and FWS regarding the excess releases in August and September. On July 11, 2013,
7 Plaintiffs provided Defendants with written notice of violations of ESA section 7 and ESA
8 section 9 related to the August and September excess releases, pursuant to ESA section 11(g), 16
9 U.S.C. § 1540(g). More than sixty days have passed since Plaintiffs provided that written notice
10 of violations to Defendants, and Defendants have not since cured the violations. Plaintiffs'
11 interests are adversely affected by Defendants' failure to consult under ESA section 7, because
12 the August and September excess releases may impair the status or recovery of listed fish species
13 that are the subject of biological opinions that restrict CVP operations, and may thereby lead to
14 additional or prolonged restrictions on CVP operations that adversely affect Plaintiffs' CVP water
15 supply.

16 103. ESA section 9, 16 U.S.C. § 1538, prohibits take of listed species. Federal
17 agencies causing take may be excused from section 9 through an incidental take statement in a
18 biological opinion issued pursuant to ESA section 7. 16 U.S.C. § 1536(o). Defendants,
19 however, have not completed ESA section 7 consultation regarding excess releases in August and
20 September, and therefore will violate ESA section 9 for any incidental take that occurs in
21 connection with the excess releases in August and September.

22 104. Defendants' decision to proceed with the August and September releases
23 without conducting ESA section 7 consultation is: (1) arbitrary, capricious, an abuse of
24 discretion, and otherwise not in accordance with law; (2) in excess of statutory jurisdiction,
25 authority, or limitation, or short of statutory right; and (3) without observance of procedure
26 required by law, within the meaning of 5 U.S.C. § 706(A), (C) and (D).

27 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.
28

IX.

FIFTH CLAIM FOR RELIEF
(THE 2012 RELEASES, AND RECLAMATION'S FAILURE TO KEEP ITS
COMMITMENTS RELATED TO THOSE RELEASES, ARE ARBITRARY,
CAPRICIOUS AND AN ABUSE OF DISCRETION)

105. Plaintiffs reallege and incorporate herein, as if set forth in full, each and every allegation contained in paragraphs 1 through 104, inclusive, of this Complaint and further allege:

106. The year type for 2012 under the ROD was "normal." Under the ROD, Defendants were limited to releases for fishery purposes totaling 647,000 acre-feet for 2012. In August and September of 2012, however, Defendants made additional releases of nearly 40,000 acre-feet for the purpose of reducing risk of disease outbreak among Chinook salmon in the lower Klamath River.

107. The additional August and September releases in 2012 were for fishery purposes. As a result of those additional releases, the total volume of releases for fishery purposes in 2012 was approximately 687,000 acre-feet, and hence the total volume of releases in 2012 exceeded the 647,000 acre-feet volume limit for 2012 set by the ROD. Defendants' 2012 action is a violation of Defendants' mandatory duty under CVPIA section 3406(b)(23) to implement the releases and operating criteria set forth in the ROD.

108. The release of stored TRD water for use in the lower Klamath River in August and September 2012 without first obtaining a modification of the permitted place of use under the State water rights permits applicable to the TRD is a violation of Defendants' mandatory duties under CVPIA section 3411(a) and 43 U.S.C. section 483.

109. At a minimum, based on the available information, there were substantial questions whether the August and September 2012 releases might have a significant effect on the human environment. Under NEPA, Defendants were therefore required to prepare an environmental impact statement before proceeding with the releases.

110. Defendants failed to prepare an environmental impact statement prior to making the August and September 2012 additional releases. Instead, Defendants prepared an environmental assessment, and issued a finding of no significant impact on August 10, 2012.

1 111. Defendants' decision to proceed with the 2012 additional releases without
2 preparing an environmental impact statement under NEPA is arbitrary and capricious.
3 Defendants failed to take a hard look at the consequences of the August and September additional
4 releases, failed to provide a convincing statement of reasons to explain why the impact of the
5 releases would be insignificant, and failed to base their decision on a consideration of all the
6 relevant factors.

7 112. Plaintiffs communicated their objections to the releases to Reclamation in early
8 July 2012. In response, Reclamation made three commitments to Plaintiffs documented in a July
9 27, 2012 letter from then Regional Director Don Glaser to Dan Nelson: (1) that if Plaintiffs did
10 not dispute the proposed action, Defendants would not assert that as a waiver of Plaintiffs' claims
11 the action was illegal; (2) Reclamation promised to mitigate any loss of water supply to its CVP
12 contractors in 2013-2014 resulting from the releases; and (3) Reclamation further promised to
13 develop a "long-term strategy for addressing fall fish needs on the Lower Klamath River."
14 Reclamation has not kept the second and third commitments, and whether it will keep the first
15 remains to be seen. A copy of the July 27, 2012 letter is attached as Exhibit 4.

16 113. In the summer of 2012, the CVP water supply situation was better than it is now
17 in 2013. But as a result of the dry hydrology since, Trinity Reservoir did not refill in 2013.
18 Plaintiffs have been and are still being harmed by those 2012 releases, because the releases
19 created a nearly 40,000 acre-foot hole in TRD storage. And now the CVP water supply and
20 projected carry over storage is much worse than in 2012.

21 114. Defendants have done nothing to mitigate the CVP's loss of the nearly 40,000
22 acre-feet of water above the ROD flows released from the TRD in August and September 2012.

23 115. Nor have Defendants developed a long term strategy for addressing the needs of
24 fish in the lower Klamath River in the late summer and early fall. For example, Defendants could
25 have, but did not, provide for such flows out of the block of water dedicated for fishery releases
26 under the ROD for 2013. Over the past year, Defendants could have, but have not, prepared an
27 environmental impact statement to address the impacts of making these late summer and early fall
28 releases.

1 116. Instead, in August of 2013, Defendants are attempting yet another last-minute,
2 ill-considered and illegal release of TRD stored water to the Trinity River that under the ROD is
3 designated for CVP uses.

4 117. Defendants' decisions to make the additional fishery releases in August and
5 September of 2012, and to not honor Reclamation's commitments in the July 27, 2012 letter, are
6 final agency actions for which there is no other adequate remedy in a court, within the meaning of
7 APA § 704.

8 118. Reclamation did not initiate consultation pursuant to ESA section 7 with NMFS
9 or FWS regarding the effects of the excess releases in August and September 2012 on ESA-listed
10 species or their critical habitat. If Reclamation made a determination without consultation that
11 the excess releases could not affect any listed species or critical habitat, that determination was
12 not based on the best scientific and commercial data available, and was arbitrary, capricious, and
13 an abuse of discretion.

14 119. The Defendants' decisions to make the 2012 releases and to disregard
15 Reclamation's commitments in the July 27, 2012 letter relating to those releases are: (1)
16 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; (2) in
17 excess of statutory jurisdiction, authority, or limitation, or short of statutory right; and (3) without
18 observance of procedure required by law, within the meaning of 5 U.S.C. § 706(A), (C) and (D).
19 Under APA section 706, the Court must therefore hold unlawful and set aside Defendants' action.

20 120. Plaintiffs have exhausted any and all administrative remedies required by law.
21 Plaintiffs have no plain, speedy or adequate remedy at law regarding the 2012 releases.

22 WHEREFORE, Plaintiffs pray for relief as more fully set forth below.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs pray for preliminary relief and judgment as follows:

- 25 1. For an order setting aside Defendants' decisions to make additional releases of
26 stored water from the TRD in August and September of 2012 and August and September 2013;
27 2. For an order declaring that the releases of stored water from the TRD in August
28 and September of 2012 and August and September 2013 in excess of the volume of releases set

1 by the ROD for each year are contrary to CVPIA section 3406(b)(23), and are unlawful, arbitrary,
2 capricious and in excess Defendants' authority and discretion;

3 3. For an order declaring that the lower Klamath River is not a permitted place of
4 use under the water rights permits issued by the State of California for the TRD, and that absent
5 modification of such permits releases of stored water from the TRD for use in the lower Klamath
6 River are prohibited by CVPIA section 3411(a) and 43 U.S.C. section 383, and are unlawful,
7 arbitrary, capricious, an abuse of discretion, and in excess Defendants' authority and discretion;

8 4. For an order declaring that the releases of stored water from the TRD in August
9 and September 2012 and August and September 2013 are major federal actions significantly
10 affecting the human environment, that Defendants have not complied with NEPA with regard to
11 such releases, and the releases are unlawful, arbitrary, capricious, an abuse of discretion, without
12 observance of procedure required by law, and in excess of Defendants' authority and discretion;

13 5. For an order declaring that the releases of stored water from the TRD in August
14 and September 2012 and August and September 2013 are subject to the ESA section 7
15 consultation requirements and the ESA section 9 take prohibition, that Defendants have not
16 complied with the ESA with regard to such releases, and the releases are unlawful, arbitrary,
17 capricious, an abuse of discretion, without observance of procedure required by law, and in
18 excess of Defendants' authority and discretion;

19 6. For a temporary restraining order and preliminary injunction prohibiting the
20 Defendants, and the individual officers thereof, and their successors, and any persons or entities
21 acting in concert with them, from making the releases of stored water from the TRD planned for
22 August and September 2013, and for further preliminary injunctive relief in the event that
23 Defendants propose other or additional unlawful releases prior to the resolution of the merits of
24 the claims alleged herein;

25 7. For a permanent injunction prohibiting Defendants from operating the TRD in
26 violation of CVPIA section 3406(b)(23) and the ROD, CVPIA section 3411(a), 43 U.S.C.
27 section 383, NEPA, and the ESA;

28 8. For costs of suit, including reasonable attorneys' fees; and

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9. For such other and further relief as the Court may deem just and proper.

Dated: October 4, 2013.

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: /s/ Daniel J. O'Hanlon

Daniel J. O'Hanlon
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Dated: October 4, 2013.

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